

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

Edward “Solly” Danks, Sr., and)	Case No. 1:18-cv-186
Georgianna Danks, as Land Owners,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
Slawson Exploration Company, Inc., and)	
White Butte Oil Operations, LLC,)	
)	
Defendants.)	

**PLAINTIFFS’ RESPONSE TO ORDER TO
SHOW CAUSE WHY CASE SHOULD NOT BE
SHOW DISMISSED FOR FAILURE TO PROSECUTE**

FACTS

Defendants’ Answer to the Second Amended Complaint, Facts, paragraph # 7, where Defendants state, “Defendants admit that a release of approximately three (3) barrels of fluids occurred on September 20, 2016, during completion operations at the Panzer 2-20MLH well.” There is uncontroverted evidence that Defendants caused a spill of “petroleum hydrocarbons and water,” according to the LTE report, on Plaintiffs’ land surface. But according to two witnesses the spill contained oil, fracking water, and flowback water. The United States holds the fee to Plaintiffs’ land and holds the land in trust for Plaintiffs.

Pursuant to the Order, Doc. # 42, in this action, Defendants’ actions are a trespass and Plaintiffs make a tort claim for damage to property or nuisance. Defendants’ trespass is an actual interference with the right of Plaintiffs’ exclusive possession, and Plaintiffs had to moved cattle

away from spill area. There is a presumption that trespass causes damages to the land owner. Damages are allowable under 25 CFR § 163.29 - Trespass.

This brings us to Defendants' request for admissions that Plaintiffs must admit they suffered no damages as a result of the spill. Judge Miller's characterization that Defendants' amended motion is "too cute by half" is completely correct.

Defendants first caused the spill to occur through neglect. Then Defendants' actions were willful in violating the laws governing oil spills on Indian trust land. Defendants willfully destroyed all of the evidence under the guise of a clean up, or as Bryan Koehler, expert letter, states, "environmental services." Now with all of the evidence willfully destroyed, causing an absence, void, or hole so that Plaintiffs are unable to present evidence to support their claim for damages.

Now, Defendants themselves are "too cute by half" wanting to be rewarded by demanding the Court dismiss this action arguing Plaintiffs cannot prove damages after Defendants willfully destroyed all of the evidence. As far as experts, Plaintiffs contacted, Andrea Lucio Vigen, Integrity Environmental, LLC, prior to filing in tribal court. Plaintiffs were informed that with all of the evidence destroyed, Integrity wouldn't be able to provide any assistance. Integrity indicated that it was doubtful if any organizations would be interested in assisting.

After Defendants willfully destroyed all of the evidence, they made up all sorts of stories to support their illegal actions, such as "only three barrels, or so, of oil were released." A little bit of foliage and some soil was removed as part of the "clean-up." However, affidavits from Edward Tyke Danks, Jr. and from Marty Danks say otherwise. At any rate, after cover up, how

are Plaintiffs suppose to prove otherwise, with no experts, and no evidence. Footnote 1, on page 10 of this Order, Document 42, is evidence of Defendants' illegal coverup.

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 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: 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"). 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.

In response to Defendants request that Plaintiffs suffered no damages, Plaintiffs will not admit they suffered no damages. In fact **Plaintiffs categorically state that they did suffer damages**, but thanks to Defendants' illegal coverup, Plaintiffs are unable to determine what the exact damages are and Plaintiffs therefore claim upwards of \$75,000.00. But Plaintiffs will leave it to the jury to award damages.

Defendant Slawson has been involved with another recent oil spill.

The North Dakota Oil and Gas Division was notified of an oil spill occurring Sunday, Aug. 8, at the Gunslinger Federal 1-12-1H well, about 13 miles northwest of Keene, North Dakota.

Slawson Exploration Company, Inc. reported that 260 barrels of crude oil and 390 barrels of produced water were released due to an equipment failure/malfunction. The product

was contained on-site and cleanup is underway.¹

In another spill by Stanley,

The North Dakota Oil and Gas Division was notified of a release occurring Thursday, Aug. 19 at the Brown 41-28XH well, about 11 miles south of Stanley.

Whiting Oil and Gas Corporation reported Thursday that 1,400 barrels of produced water were released due to an equipment failure/malfunction. Product was contained on-site. At the time of reporting 1,304 barrels of produced water had been recovered. and cleanup is underway.

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In these two recent oil spills, more than just “three (3) barrels of fluids” were “released.” Its hard to the spill on Plaintiffs’ trust land was only “three (3) barrels of fluids.”

LEGAL ARGUMENT

Was Defendants’ conduct “willful”? N.D.C.C. § 12.1-02-02(1) provides that a person engages in conduct “Willfully” if he engages in the conduct *intentionally, knowingly, or recklessly*. N.D.C.C. § 12.1-02-02(2)(e) defines intentionally, knowingly, and recklessly as:

- a. “Intentionally” if, when he engages in the conduct, it is his purpose to do so.
- b. “Knowingly” if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.
- c. “Recklessly” if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided

¹*Williston Herald*, Renée Jean, 8 Aug. 2021.

²*Williston Herald*, Renée Jean, 23 Aug 2021

in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.

In addition, Bryan Koehler, expert letter, states, “Soil sampling was completed to identify the presence or absence of residual soil impact following **removal** of affected vegetation and soil.” This an admission of a second trespass to Plaintiffs’ land by LTE at the request of Defendants. The trust landowner must approval to any cleanup after an oil spill. “Fluid Mineral Estate,” Procedural Handbook, July 2012 Department of the Interior, Bureau of Indian Affairs, Division of Real Estate Services, 849 C. Street, N.W. Washington, DC 20240. (Hereinafter Handbook). This document will be discussed more in depth later in this Response.

JURISDICTION

Plaintiffs argue the Court has jurisdiction as described in Doc. 42 of this action, which states in part:

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).

Plaintiffs can sue in their own right without the United States as an indispensable party.

Houle, citing *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) (“Poafpybitty”).

This is not the only place the Court can look in assuming jurisdiction. Cited earlier, the

Handbook, submitted in part as an Exhibit, provides direction dealing with oil spills on Indian trust land. Some of the provisions covered in the Handbook **Introduction** are:

This handbook is intended as a “hands-on” user manual that details step-by-step procedures for each action necessary to accomplish management of the Fluid Mineral estate.

The Fluid Mineral estate consists of the subsurface resources of Hydrocarbons (Oil ...)

The Handbook identifies the roles of the tribe, Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Office of the Special Trustee for American Indians (OST), and Office of Natural Resources Revenue (ONRR). Procedural distinctions are provided for the differences in operations between Tribal lands, and allotted or restricted lands.

A. Bureau of Indian Affairs (BIA) performs the following leasing and permitting functions:

- Advertises and conducts lease sales.
- Receives bonus monies and first year rentals
- Approves leases as the duly authorized representative of the Secretary of the Interior.
- Collects rental income until the leases are in production or terminate.
- Maintains current mineral ownership records.
- Determines whether the issuance of a lease, a permit, or a mineral agreement is in the best interest of the Indian mineral owner.
- Determines whether the drilling constitutes a significant environmental impact. The actual environmental documentation is created by Agency or Regional Offices or may be provided by a prospective lessee. In many lease situations, a categorical exclusion may be appropriate because detailed NEPA documentation is determined by the site specific environmental requirements within an APD application.
- Disseminates copies of approved leases, permits and mineral agreements to BLM and Lessees.
- The ONRR does not receive copies of approved leases, permits and mineral agreements until they become productive.
- Approves assignments, communitization and unitization agreements, rights-of-way and farmouts but only if the farmout is a contractual agreement with an owner who holds an interest in an oil and gas lease which states the farmout will assign all or part of that interest to another party in exchange for fulfilling contractually specified conditions (drill a well, to a specific depth, for a defined period of time, producing a certain volume of oil and/or gas, etc.).
- Approves any subsequent agreement changes, such as successor operators, sub-operators, amendments, contraction and termination of agreements.
- Cancels leases, permits and minerals agreements for due cause, i.e., violation of

lease terms.

- Approves and maintains files on required bonds and corporate information.
- Provide instruction to OST to distribute monies from producing leases received through ONRR to Tribal accounts and Individual Indian Money (IIM) accounts.
- Approves downhole abandonment procedures in consultation with BLM, and the Environmental Protection Agency (EPA).
- Assists in assumption of marginal wells by tribes.

B. Bureau of Land Management (BLM) performs the following functions:

- Provides pre-sale and post-sale valuation of tracts, including leases derived from direct negotiations.
- Requires compliance with 43 CFR operational regulations, onshore orders, Notice to Lessee (NTL) and other instructions of the authorized officer.
- Issues drilling permit and prescribe types and frequency of form submittals required by operator.
- Monitors all production activities and may require temporary shutdown of operations for violation of regulatory requirements.
- Prepares environmental assessment for drilling wells and other surface disturbing activities, with input from other surface managing agencies.
- Enforces compliance of environmental requirements including producing operations, plugging of wells and restoration of disturbed areas.
- Provides engineering and technical assistance as needed.
- Determines and advises on the adequacy of bonding.
- Identifies drainage and other pertinent issues, and notifies BIA and makes recommendations for remedy.
- Conducts production verification; i.e., Detailed Production Accounting Inspection (DPAI)

C. Office of Natural Resources Revenue (ONRR), formerly Minerals Management Service, performs the following functions:

- Collects, accounts for, and pays out monies owed on producing leases that will be distributed to Indian mineral owners. Reconciles production volumes with revenue received in compliance with 30 CFR 203, Relief or Reduction in Royalty Rates.
- Collects Monthly Report of Operations, forms ONRR-4054 (Oil and Gas Operations Report) and ONRR 2014 (Report of Sales and Royalty Remittance) from operators.
- Conducts audits and compliance reviews.
- Publishes quarterly bankruptcy list.
- Negotiates settlements for disputed royalties with the approval of the Assistant Secretary - Indian Affairs.

D. Office of the Special Trustee for American Indians (OST) performs the following

functions:

- Disburses monies received from ONRR according to BIA ownership and distribution instruction.
- Disburses monies received in the BIA lockbox on non-producing leases according to BIA distribution instruction.
- Records receipts and disbursements in the Trust Fund Accounting System (TFAS).
- Reports receipts to beneficiaries via an Explanation of Payments (EOP). (See OST Collections and Disbursements Handbook).

1.7 Undesirable Events

The following events constitute an undesirable event resulting from oil and gas activities:

- Well blow out
- Flow-line break
- **Oil and gas spills**
- **Property damage**
- **Salt water spills**
- Personal injury or death
- **Contamination**
- Theft

(Emphasis added).

All on-lease occurrences of any undesirable events resulting from mining activities are the responsibility of the lessee/operator. **The local BIA or BLM office serves as the lead agency to ensure clean-up activities are properly conducted by the lessee/operator.** (Emphasis added)(This includes reporting spills).

The Tripartite MOU specifies that the BLM will coordinate all accident investigations but either the BLM or BIA may order shutdown of operations in situations involving imminent danger. It should be emphasized that assuming control of an event via orders to shutdown may transfer liability for the results of the event to the government and therefore it may be wiser to leave serious events under the control of the lessee/operator with direct consultation by the federal agency(s). **The BLM has authority to levy fines and penalties for undesirable events and should be a major participant in any consultation concerning an event.** When necessary, the participation of other governmental agencies and offices (EPA, OSM, ONRR, etc) may be requested, and their level of participation will vary from incident to incident, based on jurisdiction and severity of event. **Lessees/operators must comply with all applicable rules and regulations of any state or any other Federal agency regarding notification and reporting of undesirable events.** (Emphasis added).

Category II:

This category is classified as more routine in nature and should not require all

offices to be involved. Generally, BIA handles such event (s) within their jurisdiction but it may be necessary to involve the BLM and their authority to levy fines and penalties.

The event may include incidents described in Category I, sub-paragraphs 2 & 3, but involve smaller quantities or events that are not life threatening or do not have major impact on the public health or safety. Category II events also include:

(1) Property damage, when an individual files a complaint about personal property in any amount, including injury or death of animals/livestock.

(a) For Tribal lands, upon the tribe's request the BIA will assist the Tribe in resolving the issue with the operator/company.

(b) For allotted lands, the BIA works directly with the operator/company and landowner to resolve the issue.

(c) For non-trust lands that have been contaminated by operations on trust lands, the BIA works directly with the operator/company and other interested parties to resolve the issue.

B. Responsibilities

BIA/BLM:

BIA/BLM is notified immediately of the incident and both will determine the extent of impact of the incident. BIA/BLM ensures that the incident is responded to in a timely, efficient and safe manner; and assures that follow-up is conducted as appropriate.

NOTE: At no time should anyone venture into a dangerous situation without proper equipment and training.

BLM:

- Notify BIA when advised by other parties of any undesirable event. If known, advise of category level of event.
- Determine if the event was avoidable or unavoidable and notify BIA and ONRR.
- Notify by telephone the BIA staff (preferably discuss with Superintendent) concerning oil or gas thefts.
- Handle well operation or theft problems.
- Provide technical assistance upon request concerning well operation problems.
- Participate in field visits to determine impact from major undesirable event. Advise lessee of remedial action needed to correct operational problems.
- Provide copies of incident reports to BIA.
- Enforce 43 CFR 3162.5-1, NTL 3-A, and appropriate On-Shore Orders. Issues notice of violation to lessee/operator when necessary.

Lessee/Operator:

- Must have a contingency plan. This is a Superfund Amendments and Reauthorization Act (SARA Title III) requirement.
- Must have Spill Prevention Control and Countermeasures (SPCC) plan.
- **Must notify by telephone:**
 - a. **BIA agency office, the same day of discovery of undesirable event**
 - b. **BLM, as required per NTL-3A**
 - c. **Tribe, as required**
 - d. **National Response Center, operated by the U.S. Coast Guard, as required (800-424-8802)**
 - e. **CHEMTREC (Chemical Manufacturers Association), as required (800-424-9300)**
- **With BIA, the Tribe** (when required) and other federal agencies consultation, determine necessary remedial action. Take prompt action to clean-up site and submit required reports within required time periods. Emphasis added.

And finally,

2.3 State Authority on Indian Lands

State commissions dealing with minerals development have no authority over Indian lands that are held in trust or subject to a restriction against alienation pursuant to 25 CFR § 1. Lessees or Operators following instructions, orders or regulations of state officials or local governing groups may face penalties and cancellation of their lease(s), when those instructions violate the lease terms and/or regulations, unless they receive approval for following said instructions, orders, or regulations from BIA or other appropriate federal agency and/or Indian minerals owners. State oil, gas and minerals divisions and commissions may manage the rules for orderly spacing to assure maximum recovery, and provide the forum for dispute resolution if BIA and the Tribe adopts their recommendations. If the state does not provide the service, it is the responsibility of BLM, unless the Tribe and/or BIA have taken the primacy and responsibility. (Emphasis added).

Bryan Koehler’s statement, “LTE recommends that White Butte request a ‘No Further Action’ determination from the NDDH” is of no significance in light of the above 2.3 State Authority on Indian Land regulation. Defendants have provided no evidence that they have complied with these regulations in the Handbook. Again Defendants’ conduct was willful to

cover up the spill by intentionally failing to report the spill according to the Handbook.

Defendants cannot plead ignorance, because the Handbook was provided as part of the Right-of-Way for the well sites.

DAMAGES

As stated *supra*, Defendants admit there was an oil spill, which is a trespass and a nuisance. But the oil spill is more than a simple trespass and nuisance; the oil spill damage Plaintiffs' land. As can be seen from the except below,

For individuals who are not familiar with tribal cultures and histories, it is easy to assume that the ability to make money off of land by leasing it to extractive industries or selling it off is a natural path to personal success and therefore prosperity for the community at large. Make no mistake: For Native people, a link exists between landownership and success, but it is much more complex and intimate than the personal ability to exploit or sell land for financial gain. Not all communities are facing the same kind of crises, but almost all recognize the importance of land to cultural preservation. Whether in our ancestral homelands, such as those where the Lakota have stopped the construction of the pipeline, or in areas of Oklahoma, where more than two dozen tribes were forcefully placed during the 19th century, protecting our tribal land bases is an intrinsic part of the formula that will lead to greater prosperity and success for individuals and tribes in Indian country.³

Defendants submitted a request for an admission that Plaintiffs had not suffered any damages from the oil spill. Plaintiffs have suffered damages; in the non-Indian sense of money damages, Plaintiffs have had to move their cattle to a different grazing area, running the risk of over grazing because of the oil spill. Plaintiffs lost the use of the land, the entire pasture, not just the area of the spill. Cattle wonder around when grazing. Plaintiffs cattle would have eventually wondered over to spill and to eat some grass, contaminated with the remains of the spill, over the bank to the creek. And in the Indian sense, their mother, the Earth, has been violated. It is hard

³The Atlantic. "*For Native Americans, Land Is More Than Just the Ground Beneath Their Feet.*" Kelli Mosteller. 17 September 2016. <https://notevenpast.org/>

to put a value on this second damage, but Plaintiffs are willing to leave it to a jury to decide.

Pursuant to the Handbook, if Defendants had properly reported the oil spill, the BLM would have assessed penalties and damages. As it stands, Plaintiffs have had to do the BLM work because of Defendants' illegal conduct of covering up the spill and not reporting the spill, which has added additional stress on Plaintiffs.

Finally, the Court cites *Kramper Family Farm Partnership v. IBP, Inc.*, 393 F.23d 828 (8th Cir. 2005), to make the determination Plaintiffs failed to make a claim for damages. This case before the Court is distinguished from *Kramper* by the fact that no evidence was willfully destroyed in *Kramper* as it was in this action.

CONCLUSION

Defendants Slawson and White Butte have broken federal laws and federal agency regulations and committed wrongful acts by willfully covering up the oil spill, and by willfully not reporting the oil spill to the BLM and the BIA allowing the Court to award, in addition to all loss, damages, or injury caused thereby or resulting therefrom, but also to award damages for the sake of example and by way of punishment. Defendants Slawson and White Butte have cause pollution to Plaintiffs' trust land surface, and possibly to a creek which is used to water Plaintiffs' cattle. Such punishment being appropriate for Defendants Slawson and White Butte since "260 barrels of crude oil and 390 barrels of produced water were [again] released due to an equipment failure/malfunction."

Submitted to the Court on the 24th day of August, 2021.

/S/ Don Bruce
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