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

JOANN CHASE, et al., Plaintiffs, v. ANDEAVOR LOGISTICS, L.P., et al., Defendants.	Case No.: 1:19-CV-00143-DLH-CRH

PLAINTIFFS' ADDITIONAL RESPONSE IN OPPOSITION TO MOTION TO DISMISS

On June 8, 2023, the Court ordered additional briefing on Defendants' amended motion to dismiss (Doc. 73), filed on September 7, 2019. In doing so, the Court limited such briefing to the issue of whether Plaintiffs, or individual Indian allottees, possess a trespass right of action under federal law. Defendants argue that no such right of action exists, and thus the Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and Plaintiffs fail to state a claim under Fed. R. Civ. P. 12(b)(6).

Plaintiffs' initial response sufficiently demonstrates that Defendants are entirely mistaken and, as discussed below, recent federal authorities with nearly identical facts have held that Defendants are liable for trespass and unjust enrichment over Indian lands. Accordingly, the Court should deny Defendants' motion and allow Plaintiffs' claims, which were originally filed on October 5, 2018, to proceed without further delay.

I. Relevant Background

On October 3, 2019, the parties completed briefing on the Defendants' amended motion to dismiss. On April 6, 2020, the Court granted Defendants' motion on one ground, finding that Plaintiffs had failed to exhaust their administrative remedies under applicable Bureau of Indian

Affairs (BIA) regulations, but did not reach any of Defendants' remaining arguments. (Doc. 100.) Plaintiffs immediately appealed and, on September 13, 2021, the Eighth Circuit reversed and remanded the case, finding that there was no mandatory requirement for Plaintiffs to exhaust administrative remedies in this case because there is "nothing in the Indian Right-of-Way Act, 25 U.S.C. §§ 323-28, or its implementing regulations, 25 C.F.R. pt. 169, authorizing the BIA to award the Allottees damages or injunctive relief for Andeavor's alleged ongoing trespass." *Chase v. Andeavor Logistics, LLP*, 12 F.4th 864, 870 (8th Cir. 2021). However, the Eighth Circuit invoked the discretionary judicial doctrine of primary jurisdiction, directing this Court to enter a stay for a "*reasonable* period of time to see . . . what action, *if any*, the agency takes." *Id.* at 877 (emphasis added). The Department of Interior has now made a decisive determination that there does indeed exist a right of action for a trespass claim against Defendants. Specifically, the United States has filed the precise claim as Plaintiffs here as a counterclaim for trespass in a related action: *Tesoro High Plains Pipeline Co. v. United States*, No. 1:21-CV-00090 (D.N.D. Apr. 23, 2021) (hereinafter, "*Tesoro* Action").

On September 22, 2021, this Court ordered the parties to brief whether joinder of this lawsuit with the *Tesoro* Action was appropriate. (Doc. 105.) The parties completed briefing on March 3, 2022 (Doc. 118), but the issue of joinder remains pending. On June 1, 2022, the parties requested a stay of litigation for a period of 90 days as the parties continued to pursue settlement. (Doc. 119.) On August 30, 2022, the Parties filed a Joint Status Report, informing the Court that settlement was "unachievable" and any "remaining disputes between the Parties w[ould] need to be resolved through litigation." (Doc. 121.) The Court held status conferences on September 22, 2022, and June 8, 2023, but no other substantive action has taken place in this matter since then. (Docs. 123, 127.)

On June 8, 2023, the Court ordered additional briefing on Defendants' amended motion to dismiss. (Doc. 130.)

II. Plaintiffs Possess a Common Law Trespass Claim under Federal Law.

When it comes to Indian trust lands, there is no legal difference between the status of a tribe and an individual Indian allottee. Like a tribe, an individual Indian allottee is the beneficial owner of lands held in trust by the United States. *See Inter Tribal Council of Arizona v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995); *Cobell v. Norton*, 240 F.3d 1081 (D.D.C. 2001). As the court recognized in *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corporation*, 418 F. Supp. 798 (D.R.I. 1976), when Indian land is at issue, "the interests sought to be protected by Congress are the same, no matter who the plaintiff may be." *Id*. at 806 (quoting *Capitan Grande Band of Mission Indians v. Helix Irr. Dist.*, 514 F.2d 465, 471 (9th Cir 1975)). Thus, claims for trespass to both types of land ownership are protected by federal law and subject to this Court's jurisdiction.

A. The United States Agrees that a Trespass Cause of Action Exists, Thereby Permitting Plaintiffs to File Suit on Their Own Behalf Under *Poafpybitty*.

Defendants concede that the United States could bring an action for trespass to the trust allotments at issue in this case.[1] That is true, but Defendants' accuracy ends there. Plaintiffs, as beneficial owners of trust lands, may assert the same rights on their own behalf. In *Poafpybitty v. Skelly Oil Company*, the Supreme Court confirmed that individual Indian landowners *or* the federal government may bring an action to protect allottees' interests in lands that are held in trust by the federal government for their benefit. 390 U.S. 365, 368-70 (1968). The Supreme Court held that

[1] *See* Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies (Doc. 77) (arguing that only the United States can bring the trespass claims asserted in this case).

individual allottees' right to bring suit is subject only to the federal government's right to intervene in such an action. *Id.* at 371. Notably, the Court recognized that, if an allottee were required to rely on the United States to bring an action or to be part of the action, it would likely eliminate the allottee's ability to protect his or her interest in the land. *Id.* at 370-74. Thus, if a trespass cause of action exists, as the United States makes clear in its filings one does, Plaintiffs may bring it on their own behalf.

Here, the Eighth Circuit invoked the discretionary judicial doctrine of primary jurisdiction and ordered this Court to "stay the action for a reasonable period of time to see what action the agency may take." *Chase*, 12 F.4th at 877-78. The intent of the Eighth Circuit's holding was to solicit the BIA's position on Plaintiffs' federal common law trespass rights, prior to the Court resuming its normal course of judicial proceedings. When the United States, on behalf of the BIA, filed its counterclaims against Defendants in the *Tesoro* Action, it "weighed in" and confirmed that Defendants are committing willful trespass on Plaintiffs' lands under the same theories of federal common law asserted by Plaintiffs, among other bases. By taking such action, the United States made clear that a trespass cause of action exists, thereby responding to the Eighth Circuit's primary jurisdiction question. Consequently, under *Poafpybitty*, Plaintiffs have the right to bring their own action as beneficiaries of the trust land they seek to protect.

B. Federal Authority Recognizes This Court's Jurisdiction Over Beneficial Owners' Federal Common Law Trespass Claims.

Cases that have squarely addressed whether there is Section 1331 jurisdiction over federal common law trespass claims similar to Plaintiffs'—where the land at issue is held in trust by the United States—have uniformly held that there is federal question jurisdiction over such claims. For example, in *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010), the plaintiffs were individual members of the Comanche Tribe and held beneficial title to allotted trust land in Fort Sill,

Oklahoma. *Id*. at 1280. The plaintiffs entered into a five-year lease for their allotments with the Business Committee of the Comanche Tribe. *Id*. The plaintiffs later claimed that the Secretary of the Interior never approved the lease, as required by 25 U.S.C. § 348 and BIA's regulations. The plaintiffs ultimately brought suit, asserting several claims against the individual members of the Business Committee. *Id*. at 1280-81. Two counts survived the initial motion to dismiss: a claim for violation of 25 U.S.C. § 345 and a claim for common law trespass. *Id*. The trial court granted summary judgment in defendants' favor on those claims, and plaintiffs appealed.

On appeal, the Tenth Circuit specifically considered whether subject matter jurisdiction existed over the plaintiffs' claims. *Id*. at 1281-83. It held that while § 345 itself did not create a cause of action, it did provide a basis for federal court jurisdiction over the plaintiffs' trespass claim. *Id*. The court further determined that then held that "[p]laintiffs' two claims, however, can be fairly construed to articulate a viable claim over which we have jurisdiction." That is because plaintiffs "contend that § 345 was 'violated' in the sense that [d]efendants' presence on their property constituted trespass and was thus 'unlawful' within the meaning of § 345" and "[t]hey combine this with a claim for common-law trespass." Accordingly, the Tenth Circuit concluded: "We construe the complaint as stating a *federal* common-law trespass claim, for which § 345 provides jurisdiction." *Id*. (emphasis in original) (citing, *inter alia*, *Oneida Cnty., N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 235-36 ("*Oneida II*") (1985)). The court additionally determined that "[t]he district court also had subject-matter jurisdiction under 28 U.S.C. § 1331, as a federal common-law suit provides federal question jurisdiction."[2] *Id*. at 1282 n.1 (citing *Nat'l Farmers*

[2] Trying to diminish the Tenth Circuit's holding in *Nahno-Lopez*, Defendants state that "the case came before the court on appeal of a motion for summary judgment, not jurisdiction, and the defendants simply conceded jurisdiction on appeal." (Doc. 74 at 19 n.23.) Defendants are plainly wrong. "Not only may a party never waive the court's jurisdictional authority to hear a case, but [federal courts] 'have an independent obligation to determine whether subject-matter jurisdiction

Union Ins. v. Crow Tribe of Indians, 471 U.S. 840, 850 (1985)); *see also Gilmore v. Weatherford*, 694 F.3d 1160, 1176 (10th Cir. 2012) (holding that federal question jurisdiction existed for individual Indians' common law claim for conversion of mine tailings ("chat") from Indian trust land).

Plaintiffs' claims in this case are indistinguishable from those asserted in *Nahno-Lopez*, except that, here, Plaintiffs have expressly pled that their trespass claims arise under § 345 and federal common law. (FAC ¶¶ 1, 64, 124, 127.) Thus, this Court has subject matter jurisdiction over Plaintiffs' trespass claims under both § 345 and § 1331 because Plaintiffs' claims arise under federal common law.

Other courts have, as a rule, agreed that federal courts maintain jurisdiction over claims by individual Indians arising from trust land. The Ninth Circuit, for example, has expressly held that "[f]ederal common law governs an action for trespass on Indian lands." *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). And decades prior to *Nahno-Lopez*, the Ninth Circuit directly addressed subject matter jurisdiction over such claims in *Loring v. United States*, 610 F.2d 649 (9th Cir. 1979), reaching the same conclusion as the Tenth Circuit. The plaintiffs in *Loring* were individual members of the Salt River Pima-Maricopa Indian Community who owned trust land along the western edge of the Salt River Indian Reservation, which had been illegally taken by the

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exists, even in the absence of a challenge from any party.'" *Nyffeler Const., Inc. v. Sec'y of Labor*, 760 F.3d 837, 841 (8th Cir. 2014) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). Considering that the Tenth Circuit thoroughly examined the question of subject matter jurisdiction and concluded that two separate jurisdictional bases existed, Defendants' suggestion that the Court did not truly consider this issue is simply wrong. Further, in *Davilla v. Enable Midstream Partners, L.P.*, ("*Davilla III*"), the Tenth Circuit affirmed the district court's grant of partial summary judgment on liability against a trespassing pipeline operator on individual Indians' federal common law trespass claims. 913 F.3d 959, 970-71 (10th Cir. 2019). The Tenth Circuit could not have affirmed a liability ruling in favor of the Indian landowners in *Davilla III* if the district court did not have subject matter jurisdiction over the common law trespass claims.

United States and the City of Scottsdale. *Id*. at 649. Although written consents for the taking of the land had been purportedly obtained, plaintiffs contended that the consents were fraudulent and were not approved by the Secretary of the Interior. *Id*. The district court dismissed the claims against both defendants for lack of subject matter jurisdiction. *Id*. at 650.

On appeal, the Ninth Circuit reversed as to the plaintiffs' claims against the City.[3] Rejecting the City's argument that plaintiffs "had wholly failed to indicate why this action can belong in federal rather than state court," the Ninth Circuit held that "[p]laintiffs' claims here arise under 25 U.S.C. §§ 323-325, which serve to protect Indian lands against improvident grants of rights-of-way." *Id*. at 650. Specifically, the Ninth Circuit held that the plaintiffs' allegations implicated 25 U.S.C. § 325, which requires the Secretary to approve rights of way, and the regulations promulgated thereunder. *Id*. In conclusion, the Ninth Circuit held that "***[t]hese provisions, protecting the Indian allotment against improvident grants of rights-of-way, give rise to rights appurtenant to the allotted lands. Federal jurisdiction under 25 U.S.C. § 345 and 28 U.S.C. § 1353 exists to entertain an action brought to preserve these rights.***" *Id*. at 651 (emphasis added).

This Court has also recognized individual Indian allottees' federal common law trespass claims and the jurisdiction it possesses over them, acknowledging that "[j]urisdiction under § 345 may exist for the trespass and related claims for declaratory relief" brought by individual allottees. *Houle v. Cent. Power Elec. Co-op, Inc.*, No. 4:09-CV-021, 2011 WL 1464918, at *3 n.1 (D.N.D. Mar. 24, 2011) (citing *Nahno-Lopez*, 625 F.3d at 1282).[4] Most recently, in *Danks v. Slawson*

[3] The Ninth Circuit affirmed dismissal of the plaintiffs' claim against the United States because it was barred by the statute of limitations contained in 28 U.S.C. § 2401(a). *Loring*, 610 F.2d at 650.
[4] Even the attorney who represented Defendants before the BIA with respect to the initial easement negotiations acknowledges that subject matter jurisdiction exists over individual Indians' claims for trespass to trust land. *See Colby Branch*, ACCESSING INDIAN LAND FOR MINERAL

Exploration Company, Inc., a group of Native American allottees sought damages for alleged pollution of their allotted trust land, resulting from the release of oil from a defendants' well. No. 18-CV-186, 2021 WL 4783258, at *1 (D.N.D. Oct. 13, 2021). The defendants contended that the court lacked jurisdiction, but the "court concluded it ha[d] at least federal question jurisdiction based upon plaintiff allottees having federal common law claims for the torts of trespass and nuisance and that plaintiffs can pursue these claims without the United States, as owner and trustee for plaintiffs' allotments, being a party." *Id.* at *4 n.2.[5]

Other federal courts have consistently affirmed the same. In *Public Service Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley Cty., New Mexico*, No. 15-CV-501, 2016 WL 10538199, at *5 (D.N.M. Apr. 4, 2016), the court held that individual Indian "[p]laintiffs may bring their trespass claim under § 345, and the Court has federal subject-matter jurisdiction." The individual Indian landowners in *Public Service Co*. were indistinguishable from Plaintiffs in this case—they were pursuing claims for trespass to two trust allotments. *See id*. at *2. Similarly, in *Davilla v. Enable Midstream Partners, L.P.* ("*Davilla I*"), the court held that "federal common law govern[ed the individual Indian plaintiffs'] claim for continuing trespass" to their trust

DEVELOPMENT, 2005 No. 5 RMMLF-Inst. Paper No. 3, at 22 (Rocky Mountain Mineral Law Foundation 2005) ("An action for trespass on trust lands may be brought by the United States, as trustee for the Indian owner, or by the Indian himself. Jurisdiction for either action is proper in federal district court."); *see also* Doc. 38 at 61-62 (Letter from *Colby Branch* to the BIA regarding Defendants' negotiations with landowners).

[5] *See also Danks v. Slawson Expl. Co.*, No. 1:18-CV-186, slip op. at 12 (D.N.D. Aug. 9, 2021) ("[P]laintiffs for the first time ma[k]e 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.") (citing *Davilla III*, 913 F.3d at 965, and collecting other cases); *id.* at 14 n.2 (observing that "Indian allottees can sue for damages 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") (citing *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968)).

allotment. No. CIV-15-1262-M, 2016 WL 6952356, at *2 (W.D. Okla. Nov. 28, 2016). Later in the same case, the court granted summary judgment in the plaintiffs' favor on liability for the federal common law trespass claim, and that grant of summary judgment was affirmed on appeal. *Davilla v. Enable Midstream Partners, L.P.*, 247 F. Supp. 3d 1233, 1238 ("*Davilla II*") (W.D. Okla. 2017), *aff'd in part, rev'd in part on other grounds* by *Davilla III*, 913 F.3d 959 (10th Cir. 2019).

Recent decisions in various federal courts reaffirm this clear rule of decision. For example, in facts extraordinarily similar to the ones here, the court in *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co.* held that, *inter alia*, a beneficial owner of Indian allotments is entitled to damages for trespass and unjust enrichment. 626 F. Supp.3d 1030 (W.D. Wis. 2022). There, the plaintiff filed an action against Enbridge, an energy delivery company, for continuing to operate an oil and natural gas pipeline across 12 parcels of allotted lands, owned in whole or in part by the plaintiff, after Enbridge's rights-of-way had long expired. *Id.* at 1037. At the summary judgment stage, the court determined that Enbridge was liable for both trespass and unjust enrichment and awarded the plaintiff a profits-based remedy, partly because doing "otherwise would be a strong incentive for Enbridge to act in the future exactly as it did here." *Id.* at 1054. Indeed, the court contemplated that "[i]f Enbridge was required to pay only what it would have paid the Band for an easement, the court would essentially be granting Enbridge a de facto condemnation power, and excusing it from complying with the bargaining and easement process for Indian lands established by federal law." *Id.*

The *Bad River Band* court and parties rightly assumed federal law applied. On June 16, 2023, the court awarded the plaintiff $5,151,668 in profits-based damages for Enbridge's past trespass and, "[g]oing forward . . . to continue paying the [plaintiff], according to the formula set

forth [therein], for each quarter that Line 5 operates in trespass on the 12 allotment parcels." *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Resrv. v. Enbridge Energy Co.*, No. 19-CV-602, 2023 WL 4043961, at *2 (W.D. Wis. June 16, 2023). The court further "enjoin[ed] Enbridge to remove its pipeline within three years from any parcel within the [plaintiff's] tribal territory on which it lacks a valid right of way and to provide reasonable remediation at those sites." *Id.*

Similarly, in *Swimonish Indian Tribal Community v. BNSF Railway Company*, a railroad carrier exceeded the terms of its easement by unilaterally increasing its use of a railroad that traversed Indian lands. No. C15-0543RSL, 2023 WL 2656470 (W.D. Was. Mar. 27, 2023). At the outset, the court acknowledged that "Federal common law governs an action for trespass on Indian lands, and that law generally comports with the Restatement of Torts." *Id.* at *5 (cleaned up and quoting *Milner*, 583 F.3d at 1182). Indeed, according to the court, "[a] trespass occurs if permission to enter the property is conditioned or restricted and the defendant violates those conditions or restrictions." *Swinomish*, 2023 WL 2656470, at *5 (citing Restatement (Second) of Torts § 168 (1965)). Applying these principles, the court found that BNSF's intentional crossings of the plaintiff's lands exceeded the terms of its easement, resulting in trespass under federal common law. *Id.* at *5. The plaintiff was thus "entitled to equitable remedies, including the recovery from BNSF of profits made by the unlawful entry." *Id.* at *6.

Indian trust lands arise under federal law. The United States, after all, is the trustee who owes fiduciary duties to the Indian landowner. *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983); *see also Cobell*, 240 F.3d at 1088. The trust relationship is created by federal law. The leases, easements, and rights of way—including the one in this case—were approved by the Secretary of the Interior. It would be curious indeed if, given this federal extraordinary and deep

federal nexus, there was not a right of action for trespass on these federally controlled lands. So, it is not a surprise that every court which has actually looked at this precise issue has agreed that there is a right of action for trespass against those who act like Defendants did here. Plaintiffs' rights in their trust allotments "arise under" federal statutes, are protected on an ongoing basis by federal statutes and regulations, and that federal common law provides the means by which Plaintiffs can assert and protect those rights. A cause of action for trespass thus exists and is available for Plaintiffs to assert.

III. Assuming *Arguendo* Plaintiffs Do Not Have a Federal Common Law Trespass Claim, Plaintiffs Would Have No Remedy in Any Court.

The final, and equally problematic, issue with Defendants' assertion that no cause of action for trespass exists is that Plaintiffs would be left without a remedy for Defendants' past and ongoing illegal and willful use of their land (i.e., willful trespass). Defendants contend that Plaintiffs' claims arise solely from state law and cannot be pursued in federal court. However, Congress has expressly legislated regarding the scope of state court jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country." 28 U.S.C. § 1360(a). Under § 1360(a), Congress granted civil jurisdiction over claims involving Indians arising in specified areas of Indian country to six states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id*. But, even as to those states' jurisdiction, Congress stated that:

> Nothing in this section shall authorize the . . . encumbrance . . . of any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States . . . or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate . . . the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b).

The Supreme Court analyzed § 1360(b), which is the codification of Pub. L. 240 § 4(b), in *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976). In that case, the Supreme Court held that "the express prohibition of any 'alienation, encumbrance, or taxation' of any trust property can be read as prohibiting state courts, acquiring jurisdiction over civil controversies involving reservation Indians pursuant to [§ 1360(b)] from applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property" and any other reading "would simply make no sense." *Id*. at 391 (quoting Pub. L. 240 § 4(b)). Other courts have similarly held that § 1360(b) prevents state courts from assuming jurisdiction over suits that involve trust allotments. For example, in *Alaska Department of Public Works v. Agli*, the court agreed that "state courts do not have jurisdiction to adjudicate the right to the possession or ownership of interest of property held in trust for Alaskan Natives." 472 F. Supp. 70, 72 (D. Alaska 1979). "Where a dispute involves trust or restricted property, the state may not adjudicate the dispute nor may its laws apply," including actions for "ejectment." *Id*. at 73 (citing *In re Humbolt Fir, Inc*., 426 F. Supp. 292, 296 (N.D. Cal. 1977)). The court in *Alaska Dep't. of Public Works* also noted that "the statutes that do grant jurisdiction over 'any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty' place that jurisdiction in the federal courts." *Id*. (citing 28 U.S.C. § 1353, 25 U.S.C. § 345); s*ee also All Mission Indian Hous. Auth. v. Silvas*, 680 F. Supp. 330, 332 (C.D. Cal. 1987) (holding § 1360 prevented application of state law to action to evict Indian residents from trust land, and that federal common law governed the ejectment claim); *Heffle v. State*, 633 P.2d 264, 268 (Alaska 1981) ("courts have strictly interpreted section 1360 against a broad grant of state jurisdiction over allotment lands" and holding that the state court did not have jurisdiction over claims for a restraining order related to a right-of-way over an allotment).

Although § 1360 may not function as a grant of jurisdiction to the federal courts, the fact that § 1360 expressly carves out from state court jurisdiction claims relating to the "encumbrance . . . ownership or right of possession" of Indian trust land shows that Congress understands—consistent with *Oneida II*, *Bryan*, and multiple other precedents—that such claims are already the province of the federal courts.

IV. Conclusion

This is a case about Indian trust land—long held to be the province of federal law. A plethora of federal authority demonstrates that Plaintiffs, as individual Indian allottees possessing beneficiary ownership of such lands, may bring claims for trespass in this Court. The most recent case law since this issue was originally briefed uniformly reaffirms that Plaintiffs have a right of action. Thus, for the reasons articulated in Plaintiffs' response (Doc. 85) and herein, Defendants' motion should be denied in its entirety.

Date: June 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served on all counsel of record via electronic transmission on June 20, 2023.

/s/ Keith M. Harper
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