UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA (WESTERN)

JOANN CHASE, et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ANDEAVOR LOGISTICS, L.P., ANDEAVOR, F/K/A TESORO CORPORATION, TESORO LOGISTICS, GP, LLC, TESORO COMPANIES, INC., and TESORO HIGH PLAINS PIPELINE COMPANY, LLC.	§	**Civil Action No. 1:19-cv-00143-DLH-CRH**
	§	
Defendants.	§	

DEFENDANTS' AMENDED MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND LACK OF PRIMARY JURISDICTION

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Defendants, named as Andeavor Logistics L.P., Andeavor, f/k/a Tesoro Corporation, Tesoro Logistics, GP, LLC, Tesoro Companies, Inc., and Tesoro High Plains Pipeline Company, LLC (collectively referred to herein as "**Defendants**"), refile this Amended Memorandum in Support of Their Motion to Dismiss for Failure to Exhaust Administrative Remedies and Lack of Primary Jurisdiction ("**Motion**") (*see* Doc. 73)[1] on the additional and alternative grounds that (i) Plaintiffs have failed to exhaust their administrative remedies in an ongoing administrative proceeding before the United States Department of the Interior's Bureau of Indian Affairs ("**BIA**"), and (ii) the BIA has primary jurisdiction over this matter.

Because Plaintiffs have already amended their Complaint, and their amendments and additional relief sought serve only to underscore the need to dismiss this lawsuit for failure to exhaust administrative remedies and lack of primary jurisdiction, Plaintiffs should not be granted leave to further amend as it would be futile.

PROCEDURAL BACKGROUND

On January 4, 2019, Defendants filed a Motion to Dismiss, including for failure to exhaust administrative remedies and lack of primary jurisdiction. *See* Docs. 17 and 21. Recognizing the impending demise of their original Complaint due to the case-dispositive grounds raised in Defendants' Motion to Dismiss, Plaintiffs filed a First Amended Class Action Complaint (Doc. 28) (the "**FAC**" or "**Amended Complaint**") on January 25, 2019. The amendments, however, serve only to provide additional reasons why this case must be dismissed for failure to exhaust

[1] This Motion is being filed subject to Defendants' Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 74), Amended Rule 12(b)(6) Motion to Dismiss (Doc. 75), and Amended Motion to Dismiss for Failure to Join Required Party (Doc. 76). *See* Amended Motion to Dismiss (Doc. 73). In the unlikely event that jurisdiction is found to exist and Plaintiffs' lawsuit survives the other dismissal grounds, this Motion provides additional and alternative grounds to dismiss Plaintiffs' lawsuit.

administrative remedies and lack of primary jurisdiction. For example, Plaintiffs—a small, self-appointed group of Indian allottees who claim to be beneficiaries of just fractions of the overall beneficial interests in the tracts at issue[2]—now seek injunctive relief, specifically removal of the pipeline. But the issue of how to proceed and what remedies, if any, to seek is presently before the BIA in an ongoing administrative proceeding. The pendency of that proceeding renders court action premature at best.

Following the filing of Plaintiffs' Amended Complaint, and while this case was still pending in the Western District of Texas, Defendants filed an Amended Motion to Dismiss directed to the new complaint. *See* Docs. 43-47. The Texas court never reached the Amended Motion to Dismiss, as it elected to consider transfer first, and, upon deciding that transfer was appropriate, further concluded that the remaining motions pending before it were "best addressed by the receiving court after the transfer." Doc. 67 at 5-6, 21-22. Consistent with this, the Texas court in its transfer order denied Defendants' Amended Motion to Dismiss without prejudice to refiling here. *Id.* at 21-22.

Now that the case has been transferred, and in accordance with the schedule adopted by this Court (Doc. 70), Defendants file this Motion directed to Plaintiffs' Amended Complaint.[3]

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[2] According to their declarations, none of the five Plaintiffs who seek to be appointed class representatives claims to own a beneficial interest in more than one of the 35-plus tracts allegedly at issue. *See* Doc. 40, at Ex. G, and Doc. 40-1, at Exs. H-J (declarations). In fact, one of these Plaintiffs, Margo Bean, only claims a beneficial interest of ***0.00833% in one of the tracts***, and another, Eunice White Owl, only claims a beneficial interest of ***2.0408% in another***. Doc. 40-1, at Exs. J (Bean Declaration) and I (Owl Declaration). According to Bean's Declaration, ***at least 60 other beneficiaries*** own the remaining 99.167% of just the one tract that she claims an interest in. Plaintiffs allege there are more than 35 affected tracts. FAC ¶ 104.

[3] In the interest of efficiency and because nothing in the Amended Complaint requires any further proof from Defendants, Defendants are not re-filing the affidavit and exhibits that were filed with their original Motion to Dismiss and Memorandum in Support. Instead, this Motion simply hereby incorporates and cites to the affidavit and exhibits originally filed and already in the Court's record. *See* Doc. 21-1.

FACTUAL AND LEGAL BACKGROUND

I. Plaintiffs' Allegations.

Plaintiffs are 48 individuals who allege they are enrolled members of the Three Affiliated Tribes and owners[4] of beneficial interests in allotments within the Fort Berthold Reservation in North Dakota. FAC ¶¶ 1-3, 6-54. Plaintiffs allege that the pipeline at issue has been in trespass on their allotted tracts since a BIA-issued right-of-way easement allegedly expired. FAC ¶¶ 2, 71, 96, 98-99. On behalf of themselves and a putative class of all other owners of beneficial interests in allotted tracts the pipeline crosses, Plaintiffs purport to assert "Counts" for trespass (Count I), breach of the prior easement agreement for failure to remove the pipeline and restore the land (Count II),[5] unjust enrichment during the trespass period—imposition of constructive trust (Count III), and punitive damages (Count IV). FAC ¶¶ 55, 121-49. For these purported claims, Plaintiffs seek damages and other relief, including an injunction requiring Defendants to remove the pipeline from the allotted tracts. FAC ¶¶ 126-29, 135-36, 139, 145-49.

At the present time, the issue of whether the pipeline is in trespass, and if so, what remedies to seek, is squarely before the BIA as part of an ongoing administrative action undertaken in accordance with BIA regulations. As set forth in Defendants' Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 74), Plaintiffs have not alleged a claim over which this

[4] For ease of reference, this Motion sometimes refers to Plaintiffs as "owners," "landowners," "beneficial owners," and the like. However, ownership is actually vested in the United States, in trust for the individual Indian allottees. *See e.g.*, *Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981); *see also* FAC ¶ 2-3 (recognizing that the tracts at issue are held in trust by the United States for Plaintiffs' benefit).

[5] This count is predicated upon the easement between Defendant's predecessor and the United States that granted a right-of-way for the pipeline over and across Plaintiffs' allotted tracts effective June 18, 1993, for a term of 20 years (the "**1993 Easement**"). *See* Doc. 23-2, at Exs. D and E. Plaintiffs separately attack the validity of the 1993 Easement, claiming it was wrongfully issued by the BIA and "void *ab initio*." FAC ¶¶ 79, 122. Accordingly, the breach of easement "Count" is asserted in the alternative, "if the 1993 Easement is determined to be valid." FAC ¶ 134.

Court has subject matter jurisdiction.[6] But even if Plaintiffs had asserted a viable basis for subject matter jurisdiction (and they have not), dismissal of this action would still be required because of the pendency of the BIA administrative action.

II. The BIA's Statutory and Regulatory Framework.

The Constitution grants Congress broad general authority over the administration of Indian affairs—powers the Supreme Court has consistently described as "plenary and exclusive." *United States v. Lara* 541 U.S. 193, 200 (2004) (internal citations omitted). The term "plenary" indicates the breadth of congressional power to legislate in the area of Indian affairs, and the term "exclusive" refers to the supremacy of federal over state law in this area. *Cohen's Handbook of Federal Indian Law*, § 5.02[1], at p. 391 (Nell Jessup Newton ed., 2012). Through a series of statutes, Congress has delegated authority for the day-to-day administration of Indian affairs to the President or the Secretary of the Interior ("**Secretary**"). *See* 25 U.S.C. §§ 2, 9.[7] In turn, much of this authority has been delegated to the BIA. *See* 25 U.S.C. §§ 1, 1a, 2; 43 U.S.C. § 1457.

Fee title to Indian trust lands, including the allotments at issue in this case, remains vested in the United States. *See e.g.*, *Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981); *see also* FAC ¶ 2-3 (recognizing that the tracts at issue are held in trust by the United States for Plaintiffs' benefit). Allotted lands are owned by the United States in trust for individual beneficial Indian landowners. *Id*. Rights-of-way over Indian trust lands are authorized under the Act of February 5,

[6] In addition, Plaintiffs have failed to assert a cause of action upon which relief can be granted, and have failed to join a party required under Rule 19. Each of these failings, in addition to lack of subject matter jurisdiction, independently requires dismissal of this lawsuit.

[7] 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."); *id.* at § 9 ("The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs ….").

1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-328 (the "**1948 Act**"). The 1948 Act empowers the Secretary of the Interior to grant "rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes …." 25 U.S.C. § 323. The 1948 Act prescribes the Secretary's authority to grant a right-of-way over and across lands of individual Indians. *See* 25 U.S.C. § 324. The 1948 Act contains a broad delegation of authority to the Secretary of the Interior to promulgate implementing regulations as to issues therein. 25 U.S.C. § 328 (the Secretary is authorized "to prescribe any necessary regulations for the purpose of administering [the 1948 Act].").

The BIA's right-of-way regulations appear at 25 C.F.R. Part 169. These regulations are comprehensive and exhaustive in nature. Subpart F of Part 169 pertains to "Compliance and Enforcement." Subpart F, which includes 25 C.F.R. § 169.410 (discussed below), describes its purpose and scope as follows:

> This subpart describes the procedures we use to address compliance and enforcement related to rights-of-way on Indian land. Any abandonment, non-use, or violation of the right-of-way grant or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant.

25 C.F.R. § 169.401. Responsibility for investigating compliance with rights-of-way is expressly delegated by Congress to the BIA, not individual beneficial Indian landowners. 25 C.F.R. § 169.402 (prescribing investigative authority only to the BIA and the tribe). If an individual beneficial Indian landowner suspects a right-of-way has been violated, he or she is to notify the BIA, which will "initiate an appropriate investigation." 25 C.F.R. § 169.402(a)(1). The regulations permit the Indian landowners to ***negotiate*** remedies with respect to right-of-way violations, 25 C.F.R. § 169.403(b), but ultimately it is up to the BIA to decide what to do about a violation of a right-of-way, *see* 25 C.F.R. § 169.404.

In the case of the situation being alleged by Plaintiffs—a company remaining in possession of Indian trust land after expiration of a right-of-way[8]—no authority is provided to individual beneficial Indian landowners to pursue actions or remedies. To the contrary, the BIA's regulations place authority in ***the BIA*** to decide how to treat holdover possessors and what, if any, actions or remedies to pursue:

> **§ 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?**
>
> If a grantee remains in possession after the expiration, termination, or cancellation of a right-of-way, and is not accessing the land to perform reclamation or other remaining grant obligations, we may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified us in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action. The holdover time will be charged against the new term.

25 C.F.R. § 169.410.

The holdover regulation implicated by the present allegations stands in contrast to another regulation, 25 C.F.R. § 169.413, which concerns situations in which an individual or entity takes possession without a right-of-way. In the situations addressed by 25 C.F.R. § 169.413, the possession is automatically treated by the regulation as a trespass, without any sort of "determination" by the BIA. In that situation, that regulation allows, but does not require, the BIA

[8] Plaintiffs admit that the pipeline was originally installed on the allotted tracts pursuant to a valid easement issued by the BIA in 1953. FAC ¶ 72. Plaintiffs also recognize that this easement was renewed in 1973 for a 20-year term ending in 1993. *See* FAC ¶ 77. Plaintiffs allege, however, that the "1973 Easement" expired in 1993 and was not renewed (at least not validly). FAC ¶¶ 71, 78-79, 122-23. Alternatively, Plaintiffs claim that if the 1993 Easement was a valid renewal, it expired in 2013. FAC ¶ 84. Thus, Plaintiffs' claim is that Defendants have wrongfully remained in possession after a right-of-way expired.

to recover possession and pursue any additional remedies, and it further indicates that Indian landowners are free to "pursue any available remedies under applicable law"[9]:

> **§ 169.413 What if an individual or entity takes possession of or uses Indian land or BIA land without a right-of-way or other proper authorization?**
>
> If an individual or entity takes possession of, or uses, Indian land or BIA land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass. An unauthorized use within an existing right-of-way is also a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law, including applicable tribal law.

25 C.F.R. § 169.413. There is no similar mention of Indian landowners pursuing remedies in the BIA's regulation pertaining to holdover situations. *See* 25 C.F.R. § 169.410. And for good reason.

In the case of a right-of-way holdover, as alleged here, 25 C.F.R. § 169.410 mandates a different process. The BIA is first required to communicate with the Indian landowners for the purpose of gathering their input on whether the BIA should treat the matter as a trespass under applicable law. 25 C.F.R. § 169.410. After such consultation, ***the BIA*** will then determine whether to treat the "unauthorized possession" as a trespass under applicable law. *Id*. Unless the parties notify the BIA in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, the ***BIA*** "may" take action to recover possession of the land on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, including judicial action. *Id*. Unlike in the case of trespass where there was no right-of-way in the first instance under 25 C.F.R. § 169.413, in promulgating the holdover process set out in 25 C.F.R. § 169.410, the BIA chose to not authorize beneficial Indian landowners to independently pursue remedies. 25 C.F.R. § 169.410. The regulation grants the BIA the exclusive authority to determine

[9] For the reasons set forth in Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, the "applicable law" for a trespass action would be state common law.

both (i) whether an "unauthorized possession" of Indian land by a right-of-way holdover is to be treated as a trespass, (ii) and if so, whether to "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law …." *Id.*

There are sound reasons for the prescribed BIA holdover procedures. Obtaining and renewing a BIA right-of-way is a long and involved process. *See, e.g.*, 25 C.F.R. §§ 169.101 - 169.130. For any project of significant scope, the applicant must first establish a working relationship with the governing tribe and the BIA. Safety, environmental, and infrastructure concerns must be addressed. Appraisals must be completed, and reviewed and approved by the Department of the Interior Appraisal and Valuation Services Office and the BIA. *See id.* § 169.114. Finally, negotiating an agreement with perhaps hundreds or even thousands of individual Indian beneficial owners may be required. *Id.* at §§ 169.106 - 169.109. It is not uncommon for this long and involved process to continue past expiration of the original right-of-way term, thus creating a holdover situation.

More significantly from the BIA and landowner perspective, the BIA's holdover policy recognizes that a negotiated solution may very well be in all parties' best interests. The BIA's holdover process is designed to allow the BIA to stay its hand so as to allow good faith negotiations to continue. This process allows the BIA to gather and assess information and affords the BIA discretion to tailor its course of action (if any) and remedy (if any) to the best interests of all interested parties. While some beneficial Indian landowners may want to immediately sue and remove the pipeline as Plaintiffs seek to do,[10] such decision may not be in the best interests of

[10] Indeed, even as to those landowners who want to sue, they too may have different desires and plans as to how to carry out such actions. *See* Sanford Aff. (Doc. 21-1) ¶ 31, Ex. V (another class action lawsuit filed in this Court by a different segment of the same individual Indian beneficiary landowners who are in the putative class here).

other beneficial Indian landowners who would like to see the (income-producing) project continue to operate.[11]

Indeed, as the Department of the Interior has stated, and as Plaintiffs themselves readily admit, because of the highly-fractionated ownership of Indian trust lands, it is "difficult, if not impossible, to use the land for any beneficial purpose." FAC ¶ 105 (citing the Department of the Interior). As such, it is easy to see why the BIA and other putative class members would continue to negotiate to keep the underground income-producing asset operating. In fact, it is hard to fathom why any Indian landowners would seek to have such underground income-producing asset removed, when it is otherwise "difficult, if not impossible, to use the land for any beneficial purpose." If each landowner were permitted to undertake independent legal action during the pendency of the BIA's determination, the resulting litigation and potentially-inconsistent orders could condemn the right-of-way project for all—to the undesired detriment of many.

III. Present Status of the BIA's Holdover Proceeding.

The Superintendent of the BIA Fort Berthold Agency, Kayla Danks, initiated the current holdover proceeding under 25 C.F.R. § 169.410 by issuing a 10-Day Show-Cause letter to Tesoro High Plains. Sanford Aff. (Doc. 21-1) ¶ 21, Ex. N. The letter stated that "[t]he Fort Berthold Agency (FBA) is responsible for investigating and responding to allegations of trespass, assessing penalties, and ensuring that the trespasser rehabilitates the damaged land at his expense." *Id.* The letter further noted that ***if*** the Fort Berthold Agency made a determination of trespass, it "would proceed with Notice of Trespass, which will include: (a) corrective actions that must be taken, (b) timeframes for taking corrective actions, and (c) potential consequences and penalties for failure

[11] For example, the majority beneficial interest owners of at least five tracts at issue in this lawsuit desire to continue negotiating, as opposed to litigating. *See* Sanford Aff. (Doc. 21-1) ¶ 28, Ex. U.

to take corrective actions." *Id*. Finally, the letter noted that there would be an opportunity to appeal the BIA Fort Berthold Agency's final determination as to whether to treat the matter as a trespass. *Id*.

On April 10, 2018, Superintendent Danks sent individual allottees correspondence indicating that the BIA "may" treat Tesoro High Plains' possession as a trespass, and

> [u]nless the parties (landowners) have notified us in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, **we <u>may</u> take action to recover possession <u>on behalf of the Indian landowners</u>, and pursue any additional remedies available under applicable law**, such as forcible entry and detainer action. *See* 25 C.F.R. § 169.410.

Sanford Aff. (Doc. 21-1) ¶ 23, Ex. P. (boldface original; underline supplied). Superintendent Danks asked the landowners to notify the BIA in writing within 45 days if they were engaged in good faith negotiations with Tesoro High Plains so that the BIA "can proceed with [its] determination." *Id*. Superintendent Danks directed any questions from the individual allottees to herself. *Id*.

In response to the Superintendent's letter, various parties have notified the BIA in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way. Indeed, counsel for the Plaintiffs in this lawsuit provided Superintendent Danks notice of good faith negotiations via letter dated May 14, 2018. *Id*. at ¶ 24, Ex. Q. Plaintiffs' counsel's letter, on behalf of 37 of the 48 named Plaintiffs in this lawsuit, expressly acknowledged and ***invoked 25 C.F.R. § 169.410***; informed the Superintendent of the BIA Fort Berthold Agency that the 37 allottees were in negotiations with Tesoro High Plains; and stated, in accordance with 25 C.F.R. § 169.410, that ***"[b]ecause the landowners are in negotiations, the BIA should not take action to recover possession on behalf of or seek remedies affecting these landowners in relation to the trespassing pipeline.***" Sanford Aff. (Doc. 21-1) ¶ 24, Ex. Q (emphasis added). Now, through this lawsuit and in direct contradiction of the very process that Plaintiffs have invoked, Plaintiffs

improperly seek to remove the pipeline and recover damages, even though other individual allottees are still in negotiations and the BIA's administrative process continues. *See, e.g.*, FAC ¶¶ 125, 129.

Other individual allottees who are not parties to this lawsuit have also notified the BIA in writing that they are in good faith negotiations with Tesoro High Plains. For example, via a letter dated July 31, 2018, a Bismarck lawyer advised Superintendent Danks and Supervisory Realty Specialist Berndt that his five clients who beneficially own a 75% interest in five allotted tracts were engaging in discussions with Tesoro High Plains' attorneys. Sanford Aff. (Doc. 21-1) ¶ 28, Ex. U.

On May 18, 2018, the BIA Fort Berthold Agency received notification from the Tribal Business Council that the BIA could release to the individual allottees a copy of the Three Affiliated Tribes' negotiated total compensation for renewal of the right-of-way for the pipeline, and a copy was provided to the individual allottees via a letter from Superintendent Danks on or about May 21, 2018. *Id.* at ¶ 25, Ex. R. Superintendent Danks extended the recommended response date for good faith negotiations to July 31, 2018. *Id.* Superintendent Danks directed any questions from the individual allottees to herself and the BIA Supervisory Realty Specialist. *Id.*

Furthermore, appraisals were commissioned with respect to the allotted tracts over which the easement runs, so that the allottees could be informed of the fair market value of the right-of-way in connection with their negotiations. Sanford Aff. (Doc. 21-1) ¶ 29. An independent, highly experienced, reputable, certified appraiser, Norman H. Lee, was commissioned to conduct the appraisals. *Id.* Mr. Lee conducted the appraisals of the tracts. *Id.* The appraisals were provided to the BIA in 2014, and voluntarily updated and submitted again in 2016 and 2018, in order to ensure that the BIA and allottees had current and accurate appraisal information. *Id.* The

appraisals are pending further work and review by the Department of the Interior's Appraisal and Evaluation Services Office ("**AVSO**").[12] *Id*. Upon completion of that work and review, the AVSO is expected to render an opinion as to appraisals of the allotted tracts. *Id.*; *see also* 25 C.F.R. 169.12 (2015) ("The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.").

On July 30, 2018, Superintendent Danks sent another letter to individual allottees. Sanford Aff. (Doc. 21-1) ¶ 27, Ex. T. Therein, Superintendent Danks noted that the BIA would use appraisals to determine the fair market value in connection with granting approval of the right-of-way. *Id*. She further indicated that, in order for any penalties, damages, and costs to be assessed, an appraisal determination from the AVSO is required. *Id*. She also acknowledged that the AVSO was still in the process of performing appraisal reviews of the 34 submitted appraisals. *Id*. She further noted that if the appraisal reports are approved, they will be sent by the BIA to the individual allottees in connection with their negotiations and consents. *Id*. Superintendent Danks concluded that, until the BIA Fort Berthold Agency had the required appraisal, "[the BIA] cannot grant right-of-way approval or assess trespass damages." *Id*.

As a result of the ongoing good faith negotiations and the pending appraisals, the BIA is holding in abeyance any further action under 25 C.F.R. § 169.410. Sanford Aff. (Doc. 21-1) ¶ 30. Accordingly, the BIA has made no administrative determination as to whether to treat the matter

[12] Indeed, Plaintiffs have also recently tried to interfere with these ongoing appraisals being conducted in connection with the BIA right-of-way negotiation and renewal process, which demonstrates not only the ongoing nature of the process and those negotiations with other Indian landowners, but also the Plaintiffs' improper attempts through this lawsuit to usurp the BIA's role and decide for all other Indian landowners (and the United States itself) what action to take and remedies to seek. *See* Ex. A hereto.

as trespass, and the parties are continuing to resolve right-of-way issues pursuant to the administratively required process.

ARGUMENT AND AUTHORITIES

As described in the sections above, the BIA is in the middle of administrative proceedings related to the alleged right-of-way holdover, as mandated by its own regulations. The process involves ongoing communication with the beneficial Indian landowners, investigation, fact finding, appraisals, and ultimately, a determination by the BIA as to (i) whether to treat the matter as a trespass under applicable law, and (ii) if so, what actions and remedies, if any, to seek on behalf of the Indian landowners. With their lawsuit, Plaintiffs seek to substitute themselves and this Court as decision-makers in place of the agency, in direct conflict with the express mandates of the statute. That is not permitted under the well-established doctrines of exhaustion of administrative remedies, preemption, and primary jurisdiction. To allow the required agency administrative process to continue unimpeded, the Court should dismiss this action.

I. Plaintiffs Have Failed to Exhaust Their Administrative Remedies.

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. *McKart v. United States*, 395 U.S. 185, 193 (1969). The doctrine requires the parties to exhaust any prescribed administrative remedies before seeking relief in federal court. *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). "Where 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." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993).

The exhaustion of administrative remedies doctrine serves four primary purposes: (1) it respects agency authority by discouraging the "deliberate flouting" of agency processes; (2) it protects agency autonomy by allowing the agency to apply its expertise and correct its own errors;

(3) it furthers effective judicial review by developing key facts in an administrative proceeding; and (4) it promotes judicial economy by avoiding needless repetition. *Peters v. Union Pac. Ry. Co.*, 80 F.3d 257, 263 n. 3 (8th Cir. 1996) (internal citations omitted).

Plaintiffs' claims in this action are premised upon the alleged unauthorized possession of land after expiration of a right-of-way—the same issue presently under consideration by the BIA in its ongoing administrative proceedings. These proceedings are being conducted in accordance with regulatory procedures adopted through formal rule-making by the very agency charged by Congress with responsibility for administering Indian trust lands. Additionally, 25 C.F.R. § 169.410 provides the BIA with exclusive authority to administratively determine whether a holdover event should be treated as a trespass, and if so, the regulation also provides the BIA with the exclusive authority to determine whether to take action and what remedies, if any, to pursue on behalf of the Indian landowners. Here, the BIA has not yet made an administrative determination as to whether to treat the alleged holdover as a trespass, nor has it decided to take action to recover possession or pursue another remedy on behalf of the Indian landowners, including Plaintiffs.

Instead, the agency is currently in the process of gathering information (including appraisals), allowing continuation of ongoing negotiations by individual beneficial Indian landowners, and deciding how to proceed. To allow this lawsuit to move forward would nullify the BIA's proper, Congressionally-delegated role in gathering information, weighing that information in light of its special expertise and authority in Indian affairs, and applying its delegated discretion in formulating a remedy in the best interests of all affected beneficial Indian landowners. That Plaintiffs are now, through their pleading amendment, seeking an injunction ordering Defendants to remove the pipeline from the allotted tracts further illustrates the conflict

between this lawsuit and the BIA's legally-mandated role as trustee. Given the BIA's actions to date, the BIA apparently prefers to allow a negotiated resolution that will include the underground pipeline remaining in operation. Certainly, that is what other Indian landowners who are presently engaged in good faith negotiations with Tesoro High Plains prefer—which again, is not surprising since, according to the Department of the Interior and Plaintiffs themselves, it is "difficult, if not impossible, to use the land for any beneficial purpose." FAC ¶ 105 (citing the Department of the Interior).

But if this lawsuit is allowed to proceed and Plaintiffs are successful, this option will be foreclosed—for everyone. Thus, this lawsuit not only circumvents the BIA; it is also a direct threat to the BIA's ability, as trustee, to decide on a course of action that is in best interests of all beneficial owners—stripping the BIA of the authority solely delegated to it (as opposed to respecting such authority and allowing the BIA to apply its expertise). By this lawsuit, Plaintiffs—a small self-appointed group of landowners[13]—and their counsel seek to decide for all other Indian landowners (and the BIA itself) what action to take and what remedies to seek. But under the law, it is the BIA, not Plaintiffs, that must fulfill this role. Plaintiffs simply cannot take these actions, much less seek to impose them on all other Indian landowners.

The doctrine of administrative exhaustion applies "with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *Reiter*, 507 U.S. at 269 (internal citations omitted). This is just such a case. The present matter directly implicates agency expertise and discretion[14] in an ongoing administrative procedure as to Indian affairs—the very

[13] *See supra* note 2.

[14] As discussed above, the regulation grants the BIA the exclusive authority and discretion to administratively determine both (i) whether an "unauthorized possession" of Indian land by a right-

power and authority delegated by Congress to the BIA (the Bureau of Indian Affairs). Because the issues as to the alleged holdover situation and trespass are currently before the BIA, and for all the reasons laid out by the Eighth Circuit in *Peters*, this Court should dismiss the present action for failure to exhaust administrative remedies.

Plaintiffs' recourse is with and through the BIA. As mentioned, the BIA is obliged to "communicate with the Indian landowners in making the determination whether to treat [an] unauthorized possession as a trespass." 25 C.F.R. § 169.410. But under the law, the BIA is the decision-maker, not individual beneficial owners like Plaintiffs, including on issues as to how to proceed (if at all) and what remedies (if any) to pursue on behalf of all affected Indian landowners. If Plaintiffs are not satisfied with the BIA's ultimate determination, then they will have the opportunity to appeal that decision within the agency. 25 C.F.R. §§ 2.2; 2.7(c); *see also* Sanford Aff. (Doc. 21-1) ¶ 21, Ex. N (letter from the Superintendent of the BIA Fort Berthold Agency noting that there will be an opportunity to appeal the BIA Fort Berthold Agency's final determination as to whether to treat the matter as a trespass).

Once those administrative appeals are exhausted, Plaintiffs could seek judicial review; until then, however, the matter remains pending in the agency and is not considered a final agency action subject to judicial review. 25 C.F.R. § 2.6(a).

Because the BIA has not made a final determination and Plaintiffs have not exhausted their administrative remedies, any court action, including the present lawsuit, is, at best, premature and should be dismissed.

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of-way holdover is to be treated as a trespass, and (ii) if so, whether to "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law …." 25 C.F.R. § 169.410.

As noted above, Plaintiffs, as part of their trespass claim, attack the validity of the prior easement issued by the BIA (the 1993 Easement), claiming that the BIA wrongfully issued it without the requisite consent of the allottees and that it was therefore "void *ab initio*."[15] These allegations provide further reason to dismiss Plaintiffs' claims for lack of exhaustion. The BIA's right-of-way regulations provide that administrative appeals may be taken from "BIA decisions under this part," including decisions to grant a right-of-way. 25 C.F.R. § 169.13; *see also* 25 C.F.R. § 169.2(b) (2015) (same). Plaintiffs, however, have not appealed the 1993 Easement administratively. Thus, Plaintiffs have not exhausted administrative remedies with respect to the 1993 Easement, and they therefore cannot seek to have this Court set it aside as "void."

II. Alternatively, the BIA Has Primary Jurisdiction Over This Matter.

For the reasons set forth in Defendants' concurrently-filed Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 74), the federal courts do not have subject matter jurisdiction over this lawsuit. Moreover, even if a viable basis for subject matter jurisdiction were alleged (and it has not been), the doctrine of primary jurisdiction would still necessitate dismissal of this lawsuit.

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, promotes orderly relationships between the courts and administrative agencies charged with particular regulatory duties. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 63 (1956). It is distinguishable in that exhaustion of administrative remedies applies where (generally by statute) a claim is cognizable in the first instance solely by an administrative agency. *Id*. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts as well as the administrative agency, but adjudication of the claim requires the resolution of issues which

[15] FAC ¶¶ 79, 84, 122; *supra* note 5.

have been placed within the special competence of an administrative agency pursuant to a regulatory scheme. *Id*. at 64. As argued in a separate motion filed concurrently herewith, Plaintiffs have not alleged a claim over which this Court has subject matter jurisdiction. Even if a viable basis for subject matter jurisdiction was alleged (and it has not been), and even if administrative exhaustion was not required (and it is), it would still be appropriate to dismiss this action because of the BIA's primary jurisdiction over the claims raised.

Application of the doctrine of primary jurisdiction is discretionary with the court, and no fixed formula exists. *Id*. Assertion of primary jurisdiction is particularly appropriate in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. *Far East Conf. v. United States*, 342 U.S. 570, 574 (1952). In addition to preserving the proper relative roles between administrative agencies and the courts, the doctrine of primary jurisdiction serves to promote uniformity and consistency in the regulation of business entrusted to a particular agency. *Id*.

The need to apply primary jurisdiction is at its greatest when the precise issue brought before the court is already in the process of adjudication by an administrative agency. *Federal Power Comm'n v. Louisiana Power & Light Co*., 406 U.S. 621, 647 (1972). Restraint on the part of the court not only preserves the proper role of agencies and courts, but helps maintain uniformity of regulation. *Burlington N., Inc. v. Chicago and N. W. Transp. Co*., 649 F.2d 556, 558 (8th Cir. 1981). As a general rule, court actions should not be used to circumvent administrative procedures. *Id*. at 559 (internal citations omitted). Further, if the court did not stay its hand during the pendency of an administrative procedure and the court and the agency were to reach different results, affected parties could be placed in an untenable position. *Kocolene Oil Corp. v. Ashland Oil, Inc*., 509 F. Supp. 741, 743 (S.D. Ohio, 1981).

The BIA is charged exclusively with administrating Indian trust lands and ensuring the best interests of the Indian landowners. The BIA has the ability to gather relevant information a court may not have access to, as well as the first-hand and historical knowledge and expertise to make decisions in the best interests of all affected Indian landowners. Indeed, Plaintiffs have already asserted in this lawsuit that the Court will likely not have access to the records, information, and personnel of the BIA or the Three Affiliated Tribes. *See* Plaintiffs' Response to Defendants' Motion to Transfer Venue (Doc. 40), at pp. 13-16. According to Plaintiffs, the Department of the Interior (and thus BIA) is not subject to compulsory process, and the Department of the "Interior's decision on whether to produce documents is governed by its own regulations" and "[t]hose regulations make clear that 'it is the Department's general policy not to allow its employees to testify or to produce Department records upon request or by subpoena.'" *Id.* Similarly, Plaintiffs have also asserted that the Three Affiliated Tribes' records are not subject to subpoena. *Id.* In addition, Plaintiffs have also asserted that the BIA's and Three Affiliated Tribes' personnel are likely not subject to subpoena power, and therefore, the Court cannot compel them to testify. *Id.* at p. 18. In short, according to Plaintiffs' own assertions, the BIA will likely have much greater access to relevant information as compared to Plaintiffs and the Court. *See also* Order, Doc. 67, at 13 n.8 (discussing the Department of the Interior's general policy of not allowing its employees to testify or to produce documents).

In discharging its duties, the BIA has created a regulatory procedure, subject to public notice and comment, specifically for guiding the agency in cases involving right-of-way holdovers. *See, e.g.*, 25 C.F.R. § 169.410. The process was designed to: (i) inform the agency of the relevant on-the-ground facts; and (ii) grant the agency flexibility—and discretion—to formulate an

appropriate action and remedy based on the information gathered, the facts of each case, and the best interest of all parties involved.

As set forth in Section III above, the BIA has initiated holdover proceedings in a manner consistent with 25 C.F.R. § 169.410.[16] The agency is presently gathering information, including updating and reviewing appraisals, in preparation for making its determination as to how to proceed, including a determination as to whether to treat the present situation as a trespass. Recognition of the agency's primary jurisdiction is particularly appropriate when the agency is in the process of gathering information and reaching a decision. *See Federal Power Comm'n*, 406 U.S. at 647. The ability of the agency to apply its specialized expertise and discretion is thereby maintained, preserving the proper roles of the BIA and the Court, and preventing the use of the Court to circumvent an ongoing agency action. Allowing the mandated BIA proceedings to continue unimpeded would maintain uniformity in BIA procedures and decisions and prevent the possibility of inconsistent decisions as between the BIA and the Court. In contrast, as discussed more fully above, if this lawsuit is allowed to proceed it will strip the BIA of its delegated authority, discretion, and ability to decide on the proper course of action that is in best interests of all beneficial owners.

For all of these additional and independent reasons, this Court should dismiss the present action based on the BIA's primary jurisdiction over the matter.

[16] Indeed, Plaintiffs themselves have invoked these very administrative proceedings. Sanford Aff. (Doc. 21-1) ¶ 24, Ex. Q (Plaintiffs' counsel's letter, on behalf of 37 of the 48 named Plaintiffs in this lawsuit, expressly acknowledging and invoking 25 C.F.R. § 169.410).

CONCLUSION

For these reasons, in the unlikely event this Court were to deny Defendants' concurrently-filed Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction, this Court should nevertheless dismiss this action for failure to exhaust administrative remedies or, alternatively, due to lack of primary jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 7, 2019, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Western District of Texas, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

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