



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Great Plains Regional Office
115 Fourth Avenue SE, Suite 400
Aberdeen, South Dakota 57401

JUL 02 2020

IN REPLY REFER TO:
Real Estate Services
MC-306

CERTIFIED MAIL-RETURN RECEIPT REQUESTED- 7020 0640 0000 5331 9642

James R. Sanford, Director
Right of Way and Real Estate
Tesoro Companies, Inc.
19100 Ridgewood Parkway
Room 1-2D041
San Antonio, Texas 78259

Dear Mr. Sanford:

In accordance with 25 CFR Part 166 Subpart I, this letter shall serve as a formal **Notification of Trespass Determination** (Notice) for the unauthorized occupancy, use of, and action on the lands described herein, which are located within the exterior boundaries of the Fort Berthold Indian Reservation. The lands are held in trust by the United States for various individual Indian landowners.

The Bureau of Indian Affairs (BIA) has the authority to investigate and respond to trespass, and upon the determination of trespass, the BIA may assess penalties for trespass and ensure that the trespasser rehabilitates the damaged lands at his or her expense.¹ Pursuant to the regulations under 25 CFR Parts 166 and 169, this letter will address (a) the basis for the trespass determination; (b) corrective actions to be taken; and (c) the timeframe for taking action.

Basis and Determination for Notice

The BIA has determined that a pipeline owned and utilized by Andeavor/Tesoro (Pipeline) is encroaching on trust lands without an approved right-of-way, resulting in trespass.

The most recent recorded right-of-way expired on June 18, 2013, and Andeavor/Tesoro has failed to renew that right-of-way or obtain a new right-of-way. In accordance with 25 CFR § 169.410, any legal rights Andeavor/Tesoro had that were associated with possessing a right-of-way have lapsed, putting Andeavor/Tesoro in trespass. This gives the BIA cause to issue this

¹ See: 25 CFR § 166.801.

Notice.² Currently, Andeavor/Tesoro's pipeline will have been operating in trespass for seven years without the consent of the individual Indian landowners. Due to the length of time it is clear that negotiations are not in good faith and it is not in the best interest of the landowners to allow Tesoro to continue to benefit from this trespass. The following regulations set forth the determination of trespass, resulting in this Notice:

- (1) Trespass, 25 CFR Part 166 Subpart I, and 25 CFR § 169.410, set forth the basis for determination of trespass. Per 25 CFR § 169.2, trespass is any unauthorized occupancy, use of, or action on Tribal or individually owned Indian land or BIA land.
- (2) As set forth in 25 CFR § 166.801, it is the BIA's policy to assess trespass penalties for the cost of damage to Indian agricultural lands.

Lands Subject to This Notice³

In its entirety, the Pipeline occupies land in a total of 44 separate tracts, totaling 90.82 acres, more or less. It consists of both tribal, and individual Indian (or allotted) tracts. In addition to the tracts identified below, there are 10 tribally owned tracts⁴ and 11 other allotted tracts⁵ not subject to this Notice of Trespass Determination.

This Notice applies to the following 23 separate tracts of allotted trust land comprising of 49.80 acres of disturbance, more or less. Each is legally described below:

**Township 149 North, Range 95 West, Fifth Principal Meridian, McKenzie County,
North Dakota.**

1. Tract # 301-1793; Lot 7, Lot 8, SE $\frac{1}{4}$ of Section 25
Tract # 301-1793; N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 36
(4.5 acres of disturbance)
2. Tract# 301-1794; S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, Lot 6, Lot 7, Lot 8 of Section 36
(0.31 acres of disturbance)

² See No. 7, Page 72531, Vol. 80, No. 223, Federal Register, Nov. 19, 2015, "The proposed rule and final rule definition of trespass is consistent with the definition of trespass on Indian land...No Compelling reason exist to differentiate between intentional and unintentional trespass in the Right of Way context."

³ See: United States Department of Interior Bureau of Indian Affairs Title Status Report for verification of ownership.

⁴ The 10 Tribal tracts include 301-T-880A, 301-T-1108A-B, 301-T-1108A-A, 301-T-2098-D, 301-T-2098-B, 301-T-1012A-A, 301-T-1120A, 301-T-1827, 301-T-1950, and 301-T-5343.

⁵ The 11 additional allotted tracts included in a separate notice of trespass include 301-880A-D, 301-355A, 301-881A-B, 301-2098-C, 301-1127A-C, 301-1127A-D, 301-1127A-F, 301-1050A, 301-1744, 301-698A-B, and 301-1105A-B. A second Notice of Trespass Determination, with respect to these tracts, will be issued under a separate decision.

**Township 149 North, Range 94 West, Fifth Principal Meridian, McKenzie County,
North Dakota.**

3. Tract# 301-1791; E $\frac{1}{2}$ W $\frac{1}{2}$, Lot 1, Lot 2, Lot 3, Lot 4 of Section 31
(3.98 acres of disturbance)
4. Tract# 301-715A; NE $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 31
(2.62 acres of disturbance)

**Township 148 North, Range 95 West, Fifth Principal Meridian, Dunn County,
North Dakota.**

5. Tract #301-880A-B; SE $\frac{1}{4}$ of Section 2
(2.23 acres of disturbance)
6. Tract #301-717A; NE $\frac{1}{4}$ of Section 12
(3.82 acres of disturbance)
7. Tract #301-1001A; E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 12
(0.74 acres of disturbance)

**Township 148 North, Range 94 West, Fifth Principal Meridian, Dunn County,
North Dakota.**

8. Tract #301-2206-B; Lot 3, Lot 4 of Section 7
(1.95 acres of disturbance)
9. Tract #301-2206-A; E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7
(1.53 acres of disturbance)
10. Tract #301-940A; W $\frac{1}{2}$ of Section 17
(3.68 acres of disturbance)
11. Tract #301-1761; E $\frac{1}{2}$ of Section 17
(2.21 acres of disturbance)
12. Tract #301-1086A; SW $\frac{1}{4}$ of Section 21
(0.39 acres of disturbance)
13. Tract #301-1125A-D; W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 22
(0.7 acres of disturbance)

**Township 147 North, Range 94 West, Fifth Principal Meridian, Dunn County,
North Dakota.**

14. Tract #301-832A, N $\frac{1}{2}$ of Section 1
(4.3 acres of disturbance)
15. Tract #301-833A, S $\frac{1}{2}$ of Section 1
(2.08 acres of disturbance)

**Township 147 North, Range 93 West, Fifth Principal Meridian, Dunn County,
North Dakota.**

16. Tract #301-618A; Lot 3, Lot 4, E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 6
(2.28 acres of disturbance)
17. Tract #301-698A-A; E $\frac{1}{2}$ NW $\frac{1}{4}$, Lot 1, Lot 2 of Section 7
(1.48 acres of disturbance)
18. Tract #301-1105A-C; SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ of Section 8
(3.44 acres of disturbance)
19. Tract #301-1104A, S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 8
Tract #301-1104A, N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 17
(2.92 acres of disturbance)
20. Tract #301-2134, S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 17
(1.46 acres of disturbance)
21. Tract #301-2133, NW $\frac{1}{4}$ of Section 17
(0.11 acres of disturbance)
22. Tract #301-1734, SW $\frac{1}{4}$ of Section 17
(1.51 acres of disturbance)
23. Tract #301-1949, N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 20
(1.56 acres of disturbance)

Background

On September 18, 1953, the Superintendent, Fort Berthold Agency (Agency), BIA, executed a Grant of Easement for Right-of-Way to Service Pipeline Company⁶ for a period of 20 years commencing on June 18, 1953. Subsequently, two separate right-of-way renewals were approved for Amoco Pipeline Company, both for 20 year terms with the first commencing on June 18, 1973, and the second commencing on June 18, 1993⁷. Andeavor/Tesoro acquired the Pipeline from British Petroleum/Amoco in 2001. At the time of that acquisition, the second right-of-way renewal was effective. The second right-of-way renewal period expired on June 18, 2013.

On January 30, 2018, the Agency issued a 10-Day Show Cause Notice to Andeavor/Tesoro.

On February 7, 2018, the Agency received a response to the 10-Day Show Cause Notice from Andeavor/Tesoro notifying the BIA that they were currently engaged in good-faith negotiations with the landowners to obtain a new right-of-way. The letter further stated that Tesoro sent offers of \$66,000 per acre to all of the landowners.

On April 10, 2018, the Agency sent a copy of Andeavor/Tesoro's letter of February 7, 2018, to the landowners requesting that they notify the BIA in writing on whether they are engaged in

⁶ Andeavor/Tesoro is a successor in interest to Service Pipeline Company.

⁷ Legal counsel to the landowners assert that the 1993 easement renewal is void ab initio since it expired on June 18, 1993, then was retroactively approved on February 7, 1995, with tribal approval but without majority individual landowner consent.

good faith negotiations with Tesoro to settle the trespass and secure a new right-of-way.

On May 14, 2018, the Agency received a letter from Keith M. Harper, Esq., of Kilpatrick Townsend and Stockton LLC, notifying the BIA that they are engaged in good faith negotiations, on behalf of their clients (landowners of tracts: 301-880A-D, 301-355A, 301-881A-B, 301-2098-C, 301-1127A-C, 301-1127A-D, 301-1127A-F, 301-1050A, 301-1744, 301-698A-B, and 301-1105A-B), with Andeavor /Tesoro to resolve both the ongoing trespass and to renew or obtain a new right-of-way for its Pipeline. The letter further stated, “[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.”

On May 18, 2018, the Agency received from the Three Affiliated Tribes (Tribe) a copy of the Tribe’s negotiated compensation for settlement of both the trespass and right-of-way for tribal tracts affected by the Pipeline. The Tribe requested that the Agency share the information with the affected landowners.

On May 21, 2018, the Agency sent the Tribe’s negotiated compensation amount to each of the allotted landowners.

On June 8, 2018, Andeavor/Tesoro submitted a request to the Agency for approval of a right-of-way that included only part of the Pipeline. This included fourteen (14) tracts, ten (10) of which are 100 percent tribally owned.⁸

In a letter dated June 19, 2018, the Agency notified Andeavor/Tesoro that the application was considered incomplete due to an issue with the appraisal.

On July 30, 2018, the Agency sent another letter to all of the affected landowners informing them that the Appraisal and Valuation Services Office (AVSO) was in the process of performing appraisal reviews and, should the appraisal reports be certified, they would be sent to the individual landowners.

On October 5, 2018, the Agency became aware that Keith M. Harper, Esq., of Kilpatrick Townsend & Stockton, LLP, filed a class action lawsuit on behalf of their clients and all landowners similarly situated. The Class Action Complaint was filed in the U.S. District Court, Western District of Texas, San Antonio, Texas, and is captioned Joann Chase, et. al. v. Andeavor Logistics, L.P., Andeavor, f/k/a Tesoro Corporation, Tesoro Logistics, GP, LLC, Tesoro Companies, Inc., and Tesoro High Plains Pipeline Company, LLC.

On October 26, 2018, another complaint was filed in the U.S. District Court, District of North Dakota, Western Division, by another group of affected landowners Tex Hall, et.al., v. Tesoro

⁸ See 25 CFR § 169.110(a)(1-3) A right-of-way over or across tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it: (1) Has agreed upon compensation satisfactory to the tribe; (2) Waives valuation; and (3) Has determined that accepting such agreed-upon compensation and waiving valuation is in its best interest.

High Plains Company, LLC, Tesoro Corporation, Tesoro Logistics GP, LLC, Tesoro Companies, Inc., (Tesoro) aka Andeavor or Andeavor Logistics, LLC. The complaint asserts 11 Counts (with the first count as Trespass) and a demand for jury trial.

On November 19th and 20th, 2019, a compliance check was conducted by Agency employees. The staff concluded that the Pipeline was still in trespass and two sites were identified where the pipe was exposed.

On April 21, 2020, the Agency received written notification from Reed A. Soderstrom, Esq., that good faith negotiations have ceased. Mr. Soderstrom represents the landowners of tracts 301-618A, 301-698A-A, 301-715A, 301-717A, 301-832A, 301-833A, 301-880A-B, 301-940A, 301-1001A, 301-1086A, 301-1104A, 301-1105A-C, 301-1125A-D, 301-1734, 301-1761, 301-1791, 301-1793, 301-1794, 301-1949, 301-2133, 301-2134, 301-2206-A, and 301-2206-B.

On April 27, 2020, a second compliance check was performed by Agency staff. Again the Agency staff determined that the Pipeline is in trespass. The compliance check revealed that there were three exposed portions of the pipeline, being on tracts 301-2098A-D, 301-1050A, and 301-618A. Each exposed section is approximately 25-36 feet in length.

On May 6, 2020, a follow up compliance was completed by Agency staff. This compliance notes that nothing has changed since the last compliance was conducted.

On May 14, 2020, the Agency Superintendent signed and delivered a 10-Day Show Cause letter to Colby Branch of Crowley Fleck, counsel for Andeavor/Tesoro.

On May 22, 2020, the Agency received a response to the 10-Day Show Cause Notice from Andeavor/Tesoro stating they are prepared to submit new offers to the allottees and requesting a conference call with BIA staff.

Corrective Actions

Andeavor/Tesoro must immediately cease and desist the use of the Pipeline.⁹ Additionally, the enclosed invoice must be paid in full within thirty (30) days from the receipt of this letter. The unauthorized Pipeline may not be removed or disposed of unless authorized by the Bureau of Indian Affairs.

Damages and Valuation

The method of valuation utilized by the BIA consists of the cost of a right-of-way, divided by the acreage encumbered and multiplied by the acreage damaged.¹⁰ Damages also consider the value of the pipeline,¹¹ throughput, penalties, cost associated with enforcement of the regulations,

⁹ Discontinued use must comply with industry abandonment/capping standards.

¹⁰ This penalty assessment does not preclude any damages that could be assessed under 25 CFR §169.413 or other applicable regulation and law.

¹¹ The existing right-of-way expired; therefore, ownership of any fixtures remaining reverts to the landowner(s).

including field examinations and survey, damage appraisal, investigation assistance and reports, witness expenses, demand letters, court cost and attorney fees.¹²

The damages associated with this trespass are assessed for the twenty-three (23) tracts identified above. The damages assessed for these tracts include, but are not limited to, the Land Analysis, Pipeline Estimate, Annual Rent (omitted)¹³ and Throughput, which total \$62,386,212.00.¹⁴ The allotted landowners submitted an appraisal in accordance with the requirements under 43 CFR Part 100. The total damages assessed for these tracts is **\$187,158,636.00**.¹⁵ This amount is due within 30 days of the receipt of this letter.

Failure to Take Corrective Actions¹⁶

In the absence of an approved right-of-way, lease or permit, this office is compelled to issue this Notice of Trespass determination. Failure to comply with the corrective actions outlined herein will result in the BIA taking any and all actions necessary to protect the Indian land, including remedies available to us under the grant of easement, collecting any available bond, and assisting the landowners in pursuing any remedies available to them under applicable tribal law. Further, the BIA may refer this case, and the outstanding debt, to the United States Attorney.

Notice to Interested Parties

A copy of this decision is being provided to each known interested party (or their attorney) by certified mail, in accordance with 25 CFR § 2.19(b). Copies of this decision are being provided to ensure that each interested party is made aware of the decision being issued. Interested parties are not required to take any further action; however, any interested party that wishes to appeal this decision may do so in accordance with the appeal instructions provided herein.

Appeal Rights

Any party who wishes to seek judicial review of this decision must first exhaust administrative remedies. This decision may be appealed to the Interior Board of Indian Appeals (IBIA) in accordance with the regulations in 43 CFR §§ 4.310-4.340.

¹² See 25 CFR §§ 166.812; 166.814; and 169.413.

¹³ Annual Rent is not factored into this total because at the time the tribe was collecting \$2000 per acre per year with the intent to substitute this for a tax.

¹⁴ Fair Market Value of the right-of-way was calculated by considering the value of the land encumbered, throughput fee, avoidance value, loss of revenue, loss of profits, loss of market value, and other factors pursuant to 25 CFR §§ 169.112, 169.118, 166.815, and 166.816.

¹⁵ Application of 25 CFR § 166.812(a) collection of the value of the products illegally used or removed plus a penalty of double their values. This total consists of a value of the Trespass Damages (2,339 rods x \$167.00 per rod x 84 months = \$32,811,492), + Throughput Damages (40,000 barrels x \$0.60 per barrel tariff x 30 days x 84 months = \$60,480,000.00) x 48.9% (% of Pringle & Herigstad's Clients) = \$29,574,720. Total = \$32,811,492 (damages) + \$29,574,720 (throughput fee) = \$62,386,212 x 3 equals \$187,158,636.00.

¹⁶ Pursuant to 25 CFR § 166.801, the BIA has a nondiscretionary obligation to assess "penalties" as provided for in § 166.812 for the unauthorized use of the land, and per § 166.806, if the trespasser fails to take corrective action, the BIA has the discretion to apply damages and costs for damage to the agricultural land and enforcement costs incurred as a result of the trespass.

Should you choose to appeal this decision, your notice of appeal to the IBIA must be signed by you, or your attorney, and must be either postmarked and mailed (if you use mail) or delivered (if you use another means of physical delivery, such as FedEx or UPS) to the IBIA within 30 days from the date you received this decision. The regulations do not authorize filings by facsimile/fax or by electronic means. Your notice of appeal should clearly identify the decision being appealed. You must send your original notice of appeal to the IBIA at the following address:

U.S. Department of the Interior
Interior Board of Indian Appeals
Office of Hearings and Appeals
801 N. Quincy Street, Suite 300
Arlington, Virginia 22203

You must also send copies of your notice of appeal to: 1) the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, MS-4141-MIB, 1849 C Street N.W., Washington, D.C. 20240; (2) each interested party known to you; and, (3) this office. Your notice of appeal sent to the IBIA must include a statement certifying that you have sent copies to these officials and interested parties and should identify them by names or titles and addresses.

Should you file a notice of appeal, the IBIA will notify you of further procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing notice of appeal.

If you have any questions or need additional information please do not hesitate to contact Rick Clifford, Regional Realty Officer at (605) 226-7618, or Gregg Bourland, Deputy Regional Director-Trust Services at (605) 226-7343.

Sincerely,



Regional Director

Enclosure

cc: Superintendent, Fort Berthold Agency (with enclosure)
See distribution list

Distribution list: (without enclosure)

7020 0640 0000 5331 9659

Reed Soderstrom, Esq.
Pringle & Herigstad, P.C
2525 Elk Drive
Post Office Box 1000
Minot, North Dakota 58701

Counsel to Indian landowners of tracts 301-618A, 301-698A-A, 301-715A, 301-717A, 301-832A, 301-833A, 301-880A-B, 301-940A, 301-1001A, 301-1086A, 301-1104A, 301-1105A-C, 301-1125A-D, 301-1734, 301-1761, 301-1791, 301-1793, 301-1794, 301-1949, 301-2133, 301-2134, 301-2206-A, and 301-2206-B.

7020 0640 0000 5331 9666

Keith M. Harper, Esq.
Kilpatrick Townsend & Stockton LLP
607 14th Street NW, Suite 900
Washington, D.C. 20005-2018

Counsel to Indian landowners of tracts 301-880A-D, 301-355A, 301-881A-B, 301-2098-C, 301-1127A-C, 301-1127A-D, 301-1127A-F, 301-1050A, 301-1744, 301-698A-B, and 301-1105A-B.

7020 0640 0000 5331 9673

Three Affiliated Tribes
Attn: Chairman's Office
404 Frontage Road
New Town, North Dakota 58763

Owner of tracts 301-T880A, 301-T1108A-B, 301-T1108A-A, 301-T2098-D, 301-T2098-B, 301-T1012A-A, 301-T1120A, 301-T1827, 301-T1950, and 301-T5343.

7020 0640 0000 5331 9680

Three Affiliated Tribes
Attn: MHA Energy Office
404 Frontage Road
New Town, North Dakota 58763

BILL FOR COLLECTION

Make Remittance Payable To: Bureau of Indian Affairs- Fort Berthold Agency Date 6-23-2020

Mail Payment To: Dept. C127, P.O. Box 979121, St. Louis, MO 63197-9000

Tesoro High Plains
Cristopher J. Castillo, Senior Counsel
Marathon Petroleum Corporation L P
1515 Arapahoe St
Tower 1, Suite 1600
Denver, Colorado 80202

Amount of Payment
\$187,158,636.00

Description	Amount
<p>Damage Assessment for trespass for the 23 tracts listed below:</p> <p>301-618A, 301-698A-A, 301-715A, 301-717A, 301-832A, 301-833A, 301-880A-B, 301-940A, 301-1001A, 301-1086A, 301-1104A, 301-1105A-C, 301-1125A-D, 301-1734, 301-1761, 301-1791, 301-1793, 301-1794, 301-1949, 301-2133, 301-2134, 301-2206-A, and 301-2206-B.</p> <p>Tesoro High Plains</p>	<p>\$187,158,636.00</p>
<u>Amount Due This Bill</u>	<u>\$187,158,636.00</u>

Amount received \$ _____

ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown; other classification optional)