THE OGLALA SIOUX TRIBAL COURT OGLALA SIOUX TRIBE PINE RIDGE INDIAN RESERVATION	) SS.	IN CIVIL COURT
CURTIS TEMPLE Plaintiff, vs. OST Allocation Committee, et al., Defendants.		CASE NO. CIV-13-0533 ORDER
CURTIS TEMPLE Plaintiff, vs. BIA Area Superintendent, et al., Defendants.		CASE NO. CIV-15-0333 ORDER
CURTIS TEMPLE Plaintiff, vs. OST Land Committee Members, et al., Defendants.		CASE NO. CIV-18-0038 **ORDER**

These three cases have been consolidated into one action now entitled CIV-18-0038, and are before the Court on the Tribal Defendants' motion to dismiss based upon sovereign immunity and jurisdictional grounds. The Court heard oral argument of the parties on the motions to dismiss on September 24, 2018. Thereafter, the Court received numerous post-hearing briefs and proposed orders from the parties. After reviewing the briefs in this matter, and considering all of the pleadings, the arguments of counsel, and good cause appearing therefor, the Court issues its opinion and orders as follows:

Exhibit H

STANDARD OF REVIEW

When analyzing a complaint following a Fed.R.Civ.P. 12 (b) motion to dismiss, the court assumes that all facts asserted in the complaints are true and construes all reasonable inferences from those facts in a light most favorable to the complainant, in this case Mr. Temple. OST.R.Civ.P. 12 (b); *Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1056–57 (D.S.D. 2016); citing *Rochling v. Dep't of Veterans Affairs*, 725 F.3d 927, 930 (8th Cir. 2013). Further, the Court may consider the complaint, exhibits attached to the complaint, and matters that are part of the public record in determining if the complaint is plausible. *Id.*, at 1056–57.

SUMMARY OF FACTS

In these actions, Plaintiff Curtis Temple challenges various actions taken by the Oglala Sioux Tribe ("Tribe") and its officials (referred to collectively hereafter as the "Tribal Defendants) and by the United States and its officials in respect to various Range Units on the Pine Ridge Indian Reservation ("Reservation"). Some of the actions that Plaintiff challenges were taken in 2012 and 2015, under the Grazing Code in effect at those times, namely O.S.T. Ordinance No. 11-05 (Mar. 31, 2011), while some of the actions Plaintiff challenges were taken in 2017 and forward under the Grazing Code now in effect, namely O.S.T. Ordinance No. 17-15 (Apr. 26, 2017).

In CIV-13-0533 and CIV-15-0333, these cases relate to actions taken by the Tribe and the United States in 2012 and 2015. Specifically, Plaintiff challenges the denial by the Oglala Sioux Tribe Allocation Committee of Plaintiff's applications and bids for certain

Range Units, namely Range Units 169, P501, and P514, and the issuance by the United States of Grazing Permits for those Range Units to other members of the Tribe in 2012. Further, Plaintiff challenges the issuance of a lease by the Oglala Sioux Tribe to Range Unit 505 to another member of the Tribe in 2015. That lease was subject to approval by the United States under 25 U.S.C. § 177. In these cases, Plaintiff seeks an order directing Tribal Defendants and, presumably, the United States to "cancel the leases" and Grazing Permits of other members of the Tribe, namely Donald 'Duke' Buffington (Range Units 169 and P501), Wesley Chuck Jacobs (P514), and Rollie Wilson (505), and to grant gazing privileges to those Range Units to Plaintiff. Pl. Proposed Order at 6 (Apr. 4, 2019). *See also* Pl. 2d Proposed Order at 6-7 (Jul. 26, 2019).

In CIV-18-0038, Plaintiff seeks an injunction to prevent the Tribe and the United States from leasing any Tribal lands on the Reservation to nonmembers of the Tribe. The complaint lacks any specific factual allegations and does not appear to challenge any particular allocation of grazing privileges by the Tribe or the United States. However, Plaintiff has informed the Court that: he has applied for grazing privileges since 2017; his applications were denied based on his delinquency on an outstanding debt to the Bureau of Indian Affairs; and he seeks an order directing the Tribe and, presumably, the United States to grant him the grazing privileges for which he applied. For example, in January 2018, Plaintiff submitted a bid for Range Unit 509. His bid was not accepted and a Grazing Permit for Range Unit 509 was issued (by the United States) to Mitch O'Connell, a tribal member. Plaintiff seeks an order directing the Tribe and the United States to cancel the Grazing

Permit of Mitch O'Connell and to grant Plaintiff a Grazing Permit for Range Unit 509. Pl. Proposed Order at 6 (Apr. 4, 2019). *See also* Pl. 2d Proposed Order at 6-7 (Jul. 26, 2019).[1]

The Court is barred from considering the allegations against the United States by Mr. Temple, and the allocation and leasing decisions of the Tribe are presented here within the context of consideration of the sovereign immunity of the Oglala Sioux Tribe, and their officials. While Plaintiff's factual allegations are taken as true for purposes of review by this Court, Plaintiff bears the burden of identifying an express waiver of sovereign immunity. Absent such a waiver, the Court lacks subject matter jurisdiction over Plaintiff's cases, and the cases are dismissed pursuant to Rule 12(b)(1) of the Oglala Sioux Tribe Rules of Civil Procedure.

To grant the relief Plaintiff seeks, this Court would have to cancel Grazing Permits issued by the United States and at least one lease issued by the Tribe (and approved by the United States). The Court would also have to order the Tribe and the United States to issue and approve Grazing Permits and leases to Plaintiff.

As set forth more fully below, the Court does not have jurisdiction to grant such relief. Neither the United States nor any of its agencies or officers is a party to these cases. All federal defendants have been dismissed from the cases because they have sovereign immunity from unconsented suit in the Oglala Sioux Tribal Court.

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[1] The Court notes that Case No. CIV-18-0038 is against members of the Land and Natural Resources Committee of the Oglala Sioux Tribal Council. However, that committee and its members are not responsible for the conduct Plaintiff challenges. The committee and its members do not make decisions allocating grazing privileges on the Reservation. Nor do they enter into leases for tribal trust lands on the Reservation. Plaintiff has no apparent cause of action against the Land and Natural Resources Committee or its members.

The United States of America is a necessary and indispensable party and it cannot be joined as a defendant because it is immune from suit in Tribal Court. Each of the Range Units involved in this action contains land held in trust by the United States for the benefit of the Tribe or its members. The United States manages the grazing of livestock on this land by issuing Grazing Permits and approving leases. These cases cannot proceed without the participation of the United States. Therefore, as the Court indicates below, these three cases cannot survive OST R.Civ.P. 12(b)(7), even taking the facts in a light most favorable to the Plaintiff in the three joined cases.

PROCEDURAL AND ADDITIONAL FACTUAL BACKGROUND

Grazing land is one of the most valuable assets of the Tribe and its members, and is often a point of contention between tribal ranchers, who can be described fairly as competitive with each other with regard to leases, because of the value of such leases to tribal members who ranch. Pursuant to a scheme initiated by the United States of America, grazing land is divided into Range Units, which are numbered tracts of range land designated as management units for the administration of grazing privileges by the Tribe and the United States Bureau of Indian Affairs (hereinafter "BIA"). Range Units may consist of tribal trust (or restricted) land, individual trust (or restricted) land, government land, or any combination thereof, consolidated for grazing purposes.

Under existing tribal and federal law, the awarding of grazing privileges for Range Units on the Reservation is carried out jointly by the Tribe and the BIA. In most cases, grazing privileges are awarded pursuant to the Tribal Grazing Code, O.S.T. Ord. No. 17-15, and the federal regulations at 25 C.F.R. Part 166. Under the Tribal Grazing Code,

allocation applications and competitive bids are submitted to the Oglala Sioux Tribe's Allocation Committee. The Allocation Committee reviews the applications and bids, makes eligibility determinations, and approves or denies applications and bids. The decisions of the Allocation Committee are forwarded to the Superintendent of the Pine Ridge Agency of the BIA as recommendations. The Superintendent makes the final decisions to award Grazing Permits, pursuant to the regulations at 25 C.F.R. Part 166.

Under the Tribal Grazing Code, grazing privileges for Range Units are awarded through an allocation process. Range Units that remain available after the allocation process are subject to competitive bidding. Tribal member livestock operators, those with no more than 300 head of livestock, are permitted to use the allocation process without competitive bidding, while other operators must compete for Range Units in the competitive bidding process. O.S.T. Ord. No. 17-15, at 5-12, §§ 3-4. Preference is given in the competitive bidding process to tribal members with more than 300 head of cattle. *Id.* at p. 4, defn. (w). Fraud and false statements in connection with allocation applications and competitive bids are not permitted.

The Grazing Code provides a comprehensive administrative remedy for an individual aggrieved by a decision of the Allocation Committee. Under Ordinance No. 11-05, the administrative remedy consisted of an appeal to the Oglala Sioux Tribe Executive Committee. *See* O.S.T. Ord. No. 11-05, § 3(g). Under Ordinance No. 17-15, the administrative remedy consists of an appeal to an Administrative Law Judge ("ALJ"). *See* O.S.T. Ord. No. 17-15, pp. 9-10, § 3(g).

An exception to the process set forth above exists for Range Units consisting *entirely* of tribal trust land. Such Range Units are not included in the Range Management Program and Grazing Leases to those Range Units are not governed by the Tribal Grazing Code. Instead, the Grazing Leases are awarded through the Land Office of the Tribe, not the Allocation Committee, and the leases are subject to approval by the United States pursuant to 25 U.S.C. § 177.

A. CIV-13-0533 and CIV-15-0333.

CIV-13-0533 and CIV-15-0333 concern actions taken by the Tribe and the United States in 2012 and 2015 in connection with Range Units 169, P501, 505, and P514. These are discussed more fully below.

1. Range Units 169 and P501.

In 2012, grazing privileges for Range Units 169 and P501 were awarded through the allocation process. The Grazing Code in effect at the time was Ordinance No. 11-05. Then, as now, allocation privileges were not competitively bid and could only be awarded to tribal members. O.S.T. Ord. No. 11-05, at 1. The Grazing Code provided that for an allocation: "[a]pplicant ownership of livestock shall not exceed three hundred animal units." *Id.* at 7, § 3(d). The Code further provided: "If the Allocation Committee makes a motion for a livestock count on a permittee for ownership purposes, the Bureau of Indian Affairs must comply." *Id.*

Plaintiff had Grazing Permits for Range Units 169 and P501, but notably those Grazing Permits expired on October 31, 2012. Plaintiff filed an application for an allocation of Range Units 169 and P501 in 2012. Donald "Duke" Buffington, another tribal rancher,

also filed an application for an allocation of Range Units 169 and P501 in 2012. On September 25, 2012, the Allocation Committee made a motion for livestock counts of both ranchers. Thereafter, the BIA conducted livestock counts of both ranchers and determined that Plaintiff had approximately 1,622 cattle on the Reservation, whereas Mr. Buffington had approximately 92 cattle on the Reservation.

On October 10, 2012, the Allocation Committee determined, based on the BIA livestock counts, that Plaintiff was *ineligible*, and that Mr. Buffington was *eligible* for an allocation of grazing privileges to Range Units 169 and P501. The Allocation Committee awarded the grazing privileges to Range Units 169 and P501 to Mr. Buffington.

On October 17, 2012, the BIA Agency notified Plaintiff that Range Units 169 and P501 were not allocated to him, but were allocated to Mr. Buffington. The letter informed Plaintiff that his application was denied *since he exceeded the limitation of 300 head of livestock for allocation purposes*. The letter also notified Plaintiff of his right to appeal the Allocation Committee's decision to the Executive Committee.

Plaintiff appealed the decision of the Allocation Committee to the Executive Committee. The Executive Committee held a hearing on March 18, 2013, to consider the appeal. Plaintiff attended the hearing. The Executive Committee denied the appeal and upheld the Allocation Committee's ruling based on Plaintiff's ineligibility for the allocation of Range Units 169 and P501. That constituted a final decision.

The United States, acting by and through the Superintendent of the Pine Ridge Agency of the BIA, then issued Grazing Permits for Range Units 169 and P501 to Mr. Buffington. On April 18, 2013, Plaintiff filed an appeal with the Great Plains Regional

Office of the BIA. On August 18, 2013, the Regional Director denied the appeal and upheld the decision of the Superintendent to issue Grazing Permits to Mr. Buffington. The Regional Director stated: "[t]he Superintendent . . . acted properly in issuing grazing permits to Donald 'Duke' Buffington for Range Unit 169 and P501 following the Oglala Sioux Tribe allocation process." Tr. Defs. Appx., Exh. 25 (Apr. 22, 2016).

The Regional Director responded to Plaintiff's claim that he was entitled to continue leasing those units, as the prior permittee of Range Units 169 and P501:

> Mr. Temple is, as any tribal member, eligible to apply for an allocation of any range unit on the Pine Ridge Reservation. An allocation is not an automatic renewal of the permit at the Pine Ridge Agency. *It is the responsibility of the Oglala Sioux Tribe Allocation Committee to decide who will receive an allocation of grazing privileges for range units on the Pine Ridge Reservation.* The Allocation Committee met on October 10, 2012, and determined Mr. Temple was ineligible for an allocation of Range Units 169 and P501. . . . Livestock counts were conducted Range Units 169 and P501 on September 26, 2012. Livestock counts were conducted on Range Units 514 and 506 on September 28, 2012. One-thousand-six-hundred-twenty-two head of livestock were counted on these Range Units belonging to Curtis Temple ....

Tr. Defs. Appx., Exh. 25 (Apr. 22, 2016), emphasis added.

Plaintiff then appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA") on September 3, 2013. However, Plaintiff withdrew his appeal on May 4, 2015, and the IBIA dismissed the appeal on May 11, 2015. *See Temple v. Great Plains Regional Director, BIA*, 60 IBIA 296 (May 11, 2015).

The Grazing Permits issued by the United States to Mr. Buffington were for a period of five (5) years, beginning November 1, 2012, and ending October 31, 2017. Those Grazing Permits have expired. The United States has since issued additional Grazing Permits to Mr. Buffington for Range Units 169 and P501 for the period beginning

November 1, 2017, and ending October 31, 2022. Those Grazing Permits are in full force and effect.

2. Range Unit P514.

In 2012, Oglala Sioux Tribal member Chuck Jacobs applied for an allocation of grazing privileges to one-half of Range Unit 514 for the purpose of grazing buffalo. His application was denied by the Allocation Committee, and he appealed to the Executive Committee. The Executive Committee reversed the decision of the Allocation Committee and awarded one-half of Range Unit 514 to Mr. Jacobs based upon a preference for buffalo. This half of Range Unit 514 is now referred to as P514. Plaintiff attended the Executive Committee hearing and argued against the allocation to Mr. Jacobs.

The United States issued a Grazing Permit to Mr. Jacobs for Range Unit P514 for the period beginning November 1, 2012, and ending October 31, 2017. The United States issued a second Grazing Permit to Mr. Jacobs for Range Unit P514 the period beginning November 1, 2017, and ending October 31, 2022. That Grazing Permit is in full force and effect.

The Court notes that, in 2014, Plaintiff filed an action in Tribal Court over the allocation of Range Unit P514 to Mr. Jacobs. The action was captioned *Temple v. Jacobs*, 14-CIV-0288. This Court dismissed that action *with prejudice* on February 19, 2015, meaning that Plaintiff may not relitigate his dispute over Range Unit P514 in these joined cases.

3. Range Unit 505.

Range Unit 505 is not allocated under the Grazing Code because the land and grazing rights in this unit are wholly owned by the Tribe. Range Unit 505 is put out for bid annually by the Tribe's Land Department. In 2015, Tribal member Rollie Wilson bid $58,100 for Range Unit 505. Plaintiff bid $50,000. Plaintiff added that, if he was not the high bidder, he would add an additional $500 over the high bidder, but this type of escalation clause is not valid under the laws of the Tribe. Mr. Wilson's bid was the high bid and Range Unit 505 was leased to him. Plaintiff lost the auction to a higher bidder.

The term of the Grazing Lease issued to Mr. Wilson in 2015 has expired. Range Unit 505 has since been put out for bid and re-let on a number of occasions. Mr. Wilson holds the current Grazing Lease for Range Unit 505. That lease is in full force and effect.

B. Case No. 18-CIV-0038.

Plaintiff's complaint in Case No. 18-CIV-0038 lacks specific factual allegations. However, the Court is aware that Plaintiff submitted competitive bids and allocation applications for various Range Units for the grazing period beginning in 2017 and that he seeks an order of this Court awarding him grazing privileges to some or all of those units. *See* Pl. Proposed Order at 6 (Apr. 4, 2019). *See also* Pl. 2d Proposed Order at 6-7 (Jul. 26, 2019).

On January 11, 2018, Plaintiff submitted competitive bids for grazing privileges to Range Units P506, 509, 512, 514, and P514 for the period beginning November 1, 2017, and ending October 31, 2022. On January 29, 2018, the Allocation Committee met and

disapproved Plaintiff's bids based on his delinquency on an outstanding debt to the BIA related to land operations. The Grazing Code provides that:

> It will be the responsibility of the bidder to check with the Oglala Sioux Tribe and/or Bureau of Indian Affairs on any outstanding debt prior to the bid opening. Payment in full shall be made not less than twenty-four hours prior to the hour set for opening of sealed bids.

O.S.T. Ord. No. 17-15, § 4(b).

According to documents Plaintiff filed with this Court on October 19, 2018, Plaintiff owed $355,531.40 to the BIA as of July 25, 2017. *See* Pl. Aff., Exh. B (Oct. 18, 2018). Some or all of this debt is attributable to trespass fees, penalties, damages, and costs assessed against Plaintiff by the BIA in relation to trespassing livestock on Range Units 169 and P501. A portion of this debt is owed to the Tribe as an owner of land in Range Units 169 and P501. *Id.* at Exh. D, p. 3.

On February 5, 2018, the BIA notified Plaintiff that his bids were disapproved by the Allocation Committee. The BIA informed Plaintiff of his appeal rights. Thereafter, Plaintiff appealed the decision of the Allocation Committee to an ALJ. In a decision dated March 2, 2018, ALJ Pat Donovan upheld the decision of the Allocation Committee. The ALJ held that the above-quoted language from Section 4(b) of the Grazing Code is "mandatory" and bids may not be accepted from individuals with delinquent debts to the Tribe or the BIA.

On March 22, 2018, Plaintiff applied for an allocation of grazing privileges for Range Units 509, 512, and 733. On March 26, 2018, the Allocation Committee disapproved Plaintiff's application based on his outstanding debt to the BIA. On March 28, 2018, the

BIA notified Plaintiff of the Allocation Committee's decision and of Plaintiff's appeal rights.

Thereafter, Plaintiff appealed the decision of the Allocation Committee to an Administrative Law Judge, and Judge Tracey Zephier heard the appeal and, on October 18, 2018, issued a decision affirming the decision of the Allocation Committee. The ALJ noted that the Grazing Code provides that, "[t]he Allocation Committee shall disqualify allocation applications for any outstanding bill owed either to the Oglala Sioux Tribe and/or Bureau of Indian Affairs connected to land issues." O.S.T. Ord. No. 17-15, § 3(a). This language in Section 3(a), like the language in Section 4(c), is mandatory.

The decisions of Administrative Law Judges Donovan and Zephier are final. There are no further Tribal administrative or judicial remedies in respect to these matters.

In all, Plaintiff sought – and was denied – Grazing Permits for six Range Units (P506, 509, 512, 514, P514, and 733). The Allocation Committee has approved grazing privileges for three of these units (509, P514, and 733), and the United States has issued Grazing Permits for all three units (509, P514, and 733) for the period beginning November 1, 2017, and ending October 31, 2022. These Grazing Permits are in full force and effect. As of this date, Range Units P506, 512, and 514 are still in the permitting process.

ANALYSIS

I. Lack of Jurisdiction Based on Tribal Sovereign Immunity.

It must be said, first, that the attorney for the Petitioner Temple has done an excellent job of raising constitutional and equitable arguments before the Court, in oral argument and in written documents, and he has fought for his client to the end. However, in the end,

it is both the laws of the Oglala Sioux Tribe and federal Indian law principles which must prevail. Very simply, the Tribal Defendants have sovereign immunity from suit, and it has not been expressly waived by the Tribe, nor has the Petitioner pleaded such waiver in his three petitions.

Tribal law affirms the sovereign immunity of the Tribe and its governmental bodies and officials. *See* O.S.T. Ord. No. 15-16 (Sept. 28, 2015); O.S.T. Ord. No. 01-22 (Jul. 30, 2001). Plaintiff has not identified a waiver of this immunity. Without such a waiver, the Court lacks subject matter jurisdiction and these actions must be dismissed.

A. The Doctrine of Tribal Sovereign Immunity in Federal Indian Law.

The Oglala Sioux Tribe is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Indian tribes are "domestic dependent nations," with inherent sovereign authority over their members and their territory, and in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), the Supreme Court held that suits against Indian tribes are barred by tribal sovereign immunity.

The Supreme Court has "time and again treated the 'doctrine of tribal immunity as settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030-2031 (2014) (quoting *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 756 (1998)).[2]

[2] The doctrine of tribal sovereign immunity has been upheld and affirmed repeatedly by the Supreme Court and the lower Federal courts. *See*, *Bay Mills Indian Cmty.*, 134 S.Ct. at 2030-2031;

A "close and necessary" connection exists between sovereignty and sovereign immunity, which is "central to sovereign dignity." *Alden v. Maine*, 527 U.S. 706, 715 (1999). Tribal sovereign immunity is an essential aspect of Indian sovereignty because it protects Indian tribes from interference with tribal government functions, seizure of tribal assets, and the harassment occasioned by multiple lawsuits. Sovereign immunity is necessary to protect the sovereign's financial integrity. Claims for "compensatory damages, attorney's fees, and even punitive damages could create staggering burdens," which would pose "a severe and notorious danger" to tribal governments and tribal resources. *Alden v. Maine*, 572 U.S. at 750 (discussing state sovereign immunity).

Sovereign immunity is also necessary to protect government public policy decision-making from "unanticipated intervention in the process of government." *Great Northern Life Ins.*, 322 U. S. 47, 53 (1944). If government sovereign immunity is disregarded, "the course of public policy and the administration of public affairs," instead of being decided by government officials, may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." *Alden*, 527 U.S. at 750.

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 416-417 (2001); *Kiowa Tribe*, 523 U.S. at 754; *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) ("Tribes possess immunity because they are sovereigns predating the Constitution").

Tribal sovereign immunity extends to tribal officers acting in their official capacities. "A suit against a governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent." *McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (cleaned up). "There is no reason to depart from these general rules in the context of tribal sovereign immunity." *Lewis v. Clarke*, 137 S.Ct. 1285, 1292 (2017).

Plaintiff argues that he is suing the tribal officers in their individual capacities, yet he fails to identify any action taken by the tribal officials outside their official capacities and the relief he seeks is re-allocation to himself of grazing privileges for various Range Units. The relief sought makes clear that the action is against the tribal officials in their official capacities because these individuals have no authority to allocate Range Units in their individual capacities. As discussed above, it is the United States, acting by and through the BIA, that issues Grazing Permits, based on the recommendations of the Tribal Allocation Committee. Further, the Supreme Court's decision in *Idaho v. Couer D'Alene Tribe*, 521 U.S. 261 (1997), stands for the principle that sovereign immunity bars actions seeking prospective injunctive relief against government officials when the actions seek to control the use and disposition of government land. 521 U.S. at 281-288. Sister Sioux tribal courts have come to the same conclusion regarding challenges to tribal government allocation of Grazing Units. *See, e.g., Anderson v. Brings Plenty*, Nos. A-004-08 and A-005-08 (Chey. R. Sx. Tr. Ct. App. 2010).

B. No Abrogation of Sovereign Immunity.

Congress has not abrogated the Tribe's sovereign immunity. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc.*, 532 U.S. at 416-417 (quoting *Santa Clara Pueblo,* 436 U.S. at 58, and citing *United States v. Testan*, 424 U.S. 392, 399 (1976)).

Plaintiff cites *Santa Clara Pueblo v. Martinez*, 439 U.S. 49 (1978), for the proposition that Tribal forums, including Tribal courts and "[n]onjudicial tribal institutions," are available to vindicate rights created by the Indian Civil Rights Act. 439 U.S. at 65-66. However, in *Santa Clara Pueblo*, the Supreme Court expressly held that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit." *Id.* at 59. The ICRA does not abrogate tribal sovereign immunity or authorize suits against Indian tribes:

> It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Nothing on the face of [the Indian Civil Rights Act] purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, the provisions of [25 U.S.C.] § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

436 U.S. at 58-59.

Nothing in *Santa Clara Pueblo* suggests that an action may be maintained in Tribal Court against an Indian Tribe or a Tribal official to undo a disposition of Tribal land or to require a disposition of Tribal land, let alone a disposition of land that is held in trust by

the United States for the benefit of the Tribe or Tribal members and that is subject to leases or Grazing Permits made and approved by the Tribe and the United States.

An action affecting the use and disposition of government land is barred by sovereign immunity. In *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261 (1997), the Supreme Court made it clear that sovereign immunity bars actions against government officials, even actions seeking prospective injunctive relief, as opposed to monetary damages, when the actions seek to control the use and disposition of government land. 521 U.S. at 281-288.

C. No Waiver of Sovereign Immunity.

The Supreme Court has held that, a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal citation omitted), and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (internal citation omitted). Further, as a matter of statutory construction, waivers of sovereign immunity are not to be liberally construed, but "must be construed strictly in favor of the sovereign." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33–34 (1992) (internal citations omitted). *Accord, Miller v. Alamo*, 992 F.2d 766, 767 (8th Cir. 1993) ("[a] purported waiver [of sovereign immunity] is to be strictly construed against waiver of the immunity"); *Campbell v. United States*, 835 F.2d 193, 195 (9th Cir. 1987) ("[w]aivers of sovereign immunity are strictly construed in favor of the government, and courts should not enlarge such waivers beyond what a fair reading of the statute requires").

The laws of the Tribe provide that any waiver of tribal sovereign immunity must be "unequivocally expressed" and accompanied by a "consent to suit," O.S.T. Ord. No. 01-22 at 1, 2, and "it must make specific reference to a waiver of tribal sovereign immunity," O.S.T. Ord. No. 15-16, § 1(b). There is no such waiver in this case.

The Tribe has preserved its sovereign immunity, including the immunity of its officers from suit in any civil action arising from the performance of their official duties. Oglala Sioux Tribal Ordinance No. 01-22 provides that:

> [T]he Oglala Sioux Tribal Council, acting in the exercise of their Constitutional and Reserved Powers does hereby declare the Oglala Sioux Tribe, Oglala Sioux Tribal Officials, and Oglala Sioux Tribal Employees, acting in their official capacity, immune from suit, based on the Doctrine of Sovereign Immunity ....

O.S.T. Ord. No. 01-22 (Jul. 30, 2001). Similarly, Oglala Sioux Tribal Ordinance No. 15-16 provides that:

> The Oglala Sioux Tribe and its governing body, the Oglala Sioux Tribal Council, and its departments, programs, and agencies shall be immune from suit in any civil action and its officers, employees, and agents shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

O.S.T. Ord. No. 15-16, § 1(a) (Sept. 28, 2015).

Plaintiff points to a Grazing Code provision that requires grazing permittees to submit to Tribal Court jurisdiction and argues that it waives the Tribe's sovereign immunity. Section 18 of Ordinance No. 11-05 provided:

> Jurisdiction: All bidders of a range unit grazing permit, by acceptance of such grazing permit consent to the jurisdiction of the Oglala Sioux Tribe, and further agree to the submission of any dispute arising herein to the Courts of the Oglala Sioux Tribe.

O.S.T. Ord. No. 11-05, p. 15, § 18. This section provides that grazing permittees consent to Tribal Court jurisdiction and agree to submit disputes arising out of the use of grazing lands to the Tribal Courts.

This is a jurisdictional provision, and it has since been amended to clarify that it is intended to require non-members of the Tribe to consent to the jurisdiction of the Tribe and its courts. Ordinance No. 17-15 provides:

> Jurisdiction: All *non-member* bidders of a range unit grazing permit, by acceptance of such grazing permit consent to the jurisdiction of the Oglala Sioux Tribe, and further agree to the submission of any dispute arising herein to the Courts of the Oglala Sioux Tribe.

O.S.T. Ord. No. 17-15, p. 15, § 18 (emphasis added).

The purpose of this provision is to subject grazing permittees to the jurisdiction of the Tribe and the Tribal Courts. Another purpose is to require permittees to bring actions against other permittees in Tribal Court. Such disputes may concern fencing, trespass, motor vehicle and livestock accidents, and other subjects.

The jurisdictional provision in the Tribal Grazing Code (§ 18), by its express terms, applies to successful "bidders" for range unit grazing permits. The Tribe and its agencies and officers are not bidders for such permits. There is no reference to the Tribe, its agencies, or officers in this provision, let alone an unequivocally expressed waiver of sovereign immunity, a specific reference to a waiver of tribal sovereign immunity, or a specific consent to suit by the Tribe, its agencies, or officers.

This provision affirms the jurisdiction of the Tribe and it courts, but it does not waive the sovereign immunity of the Tribe. In *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264

(1821), the first Supreme Court case to address sovereign immunity, the Court made clear that a statute that confers jurisdiction upon a court does not, in itself, authorize suits against the sovereign in that court. An express waiver of sovereign immunity is required: "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." *Id.* at 411-12. *Accord*, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (federal statute granting civil jurisdiction to State courts over Indian country causes of action only extended to suits between private litigants and did not authorize state regulation of tribal government functions); 16 MOORE'S FEDERAL PRACTICE § 105.21 (3rd ed.1998) ("Statutes that create … jurisdiction do not, in and of themselves, waive … sovereign immunity").

The Oglala Sioux Tribal Court has previously held that the Tribal Grazing Code does not contain a waiver of tribal sovereign immunity. In *Nelson v. Oglala Sioux Tribe Allocation Committee Members*, Case No. CIV-15-0037 (May 6, 2015), the Tribal Court noted that plaintiff could not identify "any express legislative waiver of sovereign immunity" in the Tribal Grazing Code and, therefore, dismissed plaintiff's suit based on the doctrine of tribal sovereign immunity. *Id.* at 2-3.

Further, in *Nelson*, the Tribal Court noted that the allocation of grazing permits "touches on Indian trust land with title in the United States." *Id.* Since the United States formally approves and issues grazing permits, the Tribal Court noted that it is the "wrong forum" to complain about matters concerning grazing permits issued by the United States. *Id.* at 3. The Tribal Court stated: "Rather, as directed by the BIA, plaintiff must address her concerns to the BIA through its administrative process." *Id.*

Plaintiff's claims, like the claims in *Nelson*, are properly addressed to the BIA through the federal administrative process. The United States holds title to Range Unit lands in trust for the benefit of the Tribe and individual Indians. The United States is responsible for issuing grazing permits and approving leases for these units, based on the recommendations of the Tribal Allocation Committee. The Tribal Grazing Code governs the manner in which the Tribal Allocation Committee makes those recommendations. The Tribal Grazing Code contains an administrative remedy for individuals aggrieved by decisions of the Allocation Committee. Plaintiff exercised his tribal administrative remedies under the Tribal Grazing Code. His appeals were heard and decided, and the administrative decisions are final.

Plaintiff also exercised his federal administrative remedies. In April 2013, Plaintiff filed an administrative appeal to challenge the decision of the Agency Superintendent to issue grazing permits to another tribal member. In August 2013, the Great Plains Regional Director affirmed the decision of the Superintendent, concluding that the Superintendent acted properly in issuing the grazing permits. Plaintiff filed an appeal with the IBIA, but later voluntarily withdrew that appeal. The IBIA entered an order dismissing the appeal in May 2015. *See Temple v. Great Plains Regional Director, BIA*, 60 IBIA 296, 2015 WL 2432185 (May 11, 2015). Thus, the decision of the Great Plains Regional Director is final and binding.

Plaintiff's grievances have been heard and decided in the available administrative forums. Plaintiff waived his right to federal judicial review of the BIA's final approval and issuance of the grazing permits when he withdrew his IBIA appeal. Having failed to

exhaust his administrative remedies and having failed to preserve these matters in the federal administrative process, Plaintiff will not be permitted to litigate them in this action.

Plaintiff may not maintain an action in Tribal Court against the Tribe or tribal officials to undo or require a disposition of tribal land that is held in trust by the United States for the benefit of the Tribe or tribal members and that is subject to leases and Grazing Permits made and approved by the Tribe and the United States. Civil actions seeking to control the use and disposition of government land are barred by sovereign immunity. *Couer d'Alene Tribe*, 521 U.S. at 281-288.

If sovereign immunity is applied, and there is no express waiver and none pleaded, as Tribal ordinance requires, and as federal Indian law requires, then sovereign immunity is a bar to the three joined cases. As the Oglala Sioux Nation Supreme Court has held, a holding followed previously by this Court, "[s]overeign immunity is a jurisdictional bar to suit and thus precludes a Court from hearing a case." *Pahin Sinte Owayawa et al. v. Phelps* (OST SCT 2014-2063); citing *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000). Further that "the immunity defense is not only a defense to liability, but is an entitlement not to stand trial." *Pahin Sinte Owayawa*, citing *Mitchell v. Forsyth*. 472 U.S. 511 (1985).

Accordingly, these three joined cases are dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Oglala Sioux Tribe's Rules of Civil Procedure, because the Tribe, its departments, programs, agencies, and officers, employees, and agents acting in their official capacities enjoy sovereign immunity from suit in tribal court.

II. Failure to Join the United States as a Necessary and Indispensable Party.

Plaintiff also seeks an order, in the nature of *mandamus* or injunctive relief, directing Tribal Defendants to cancel the Grazing Permits and Grazing Leases of various tribal members and to grant those Grazing Permits and Grazing Leases to Plaintiff. The Tribal Court has no jurisdiction to enter such relief, least of all without the participation of the United States as a party in these cases. The United States holds title to Range Units on the Reservation for the benefit of the Tribe and individual tribal members. The United States is responsible for issuing Grazing Permits for these units, based on the recommendations of the Tribal Allocation Committee. The United States is also responsible for approving Grazing Leases approved by the Land Office of the Tribe.

The United States is a necessary and indispensable party in cases affecting the disposition of Indian trust lands, including actions seeking to cancel, reinstate, or restore Grazing Permits and Grazing Leases concerning Indian trust lands. So fundamental is the interest of the United States that in *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970), the Eighth Circuit held that "a proceeding against Indian lands in which the United States has an interest *is* a proceeding against the United States." *Id.* at 145, *emphasis added.*

The United States holds the title to Indian trust lands for tribes and individual Indians, with a restriction on alienation. The purpose is to protect Indian lands from alienation and interference by third parties. *United States v. Hellard,* 322 U.S. 363, 366 (1944). Federal law provides that:

No purchase, grant, lease, or other conveyance of lands, or of any title or

> claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution …

25 U.S.C. § 177. As has long been held in the Supreme Court, without the consent of the United States, an Indian tribe or Indian allottee may not alienate its interest in trust land by deed, right-of-way, lease, etc. *United States v. Noble*, 237 U.S. 74 (1915) (holding that an Indian allottee may not alienate his or her interest in Indian trust land without the permission of the United States). *Accord, Bennett Cty. v. United States*, 394 F.2d 8, 11 (8th Cir. 1968) ("All questions with respect to rights of occupancy in land, the manner, time and conditions of extinguishment of Indian title are solely for consideration of the federal government").

When Congress enacted the Quiet Title Act, and waived the United States' sovereign immunity from suits to quiet title to federal land, Indian lands were excepted. The Quiet Title Act provides: "This section does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). *See also Block v. North Dakota,* 461 U.S. 273 (1983).

Plaintiff sued the United States and federal officials in these actions, and the Tribal Court dismissed the United States and federal officials based on the sovereign immunity of the United States. The United States is an indispensable party and, without it, these cases must be dismissed. This Court cannot provide complete relief without the participation of the United States, and the ability of the United States to protect its interests would be significantly impaired in its absence. O.S.T. R. Civ. P. Rule 19(a).

In similar circumstances, the Supreme Court has held that the United States is a necessary and indispensable party in cases disposing of Indian lands. In *United States v.*

Hellard, 322 U.S. 363 (1944), the Supreme Court ruled that the United States could sue to set aside an action in state court partitioning the Indian trust lands of individual tribal members. The Court explained:

> Restricted Indian land is property in which the United States has an interest. This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. Under § 2 of the Act of June 14, 1918 lands partitioned in kind to full-bloods remain restricted. Only if the land is sold at partition sale are the restrictions removed. The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States.

Id. at 365 (internal citations omitted).

In *Minnesota v. United States*, 305 U.S. 382 (1939), the Supreme Court held that the United States was an indispensable party in a proceeding by the State of Minnesota to condemn a right-of-way across Indian trust lands, explaining:

> The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. . . . As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In its capacity as trustee for the Indians, it is necessarily interested in the outcome of the suit -- in the amount to be paid. That it is interested also in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions.... There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments -- a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.

Id. at 386-390 (internal citations omitted).

In *Carlson v. Tulalip Tribes*, 510 F.2d 1337, 1339 (1975), the Ninth Circuit held that "the United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation." *Jackson v. Sims*, 201 F.2d 259, 262 (10th Cir. 1953). When the government invokes sovereign immunity and the claim cannot continue "in equity and good conscience" without it, then the government is indispensable and the case must be dismissed. *Save the Valley, LLC v. Santa Ynez Band of Chumash,* Civ. No. 15-02463-RGK (C.D. Calif. July 2, 2015).

In a case on the Cheyenne River Indian Reservation, the Cheyenne River Sioux Tribal Court of Appeals affirmed the dismissal of a judicial challenge to the allocation of a Grazing Permit, in part, because the United States was a necessary party to the action and it could not be joined based on the doctrine of sovereign immunity. *See Anderson v. Brings Plenty*, Nos. A-004-08 and A-005-08 (Chey. R. Sx. Tr. Ct. App. 2010) (copy attached). As in the present case, the affected Range Unit and Grazing Permit in *Anderson* concerned land held in trust by the United States for the Tribe and individual Indian allottees. The court held:

> In this case, the Plaintiffs failed to join several seemingly necessary parties under Rule 19, including the owners of the individual Indian allotments which comprise portions of the affected grazing units, the successful applicants for grazing permits on the affected range units whose interests are critically affected by the relief sought, *the United States as trust holder of the land involved in the grazing units,* and the Cheyenne River Sioux Tribe as beneficial holder of much of the land comprising the affected grazing units. While the failure to name the owners of individual Indian allotments and the successful applicants for the grazing permits might be cured, *sovereign immunity bars Plaintiffs/Appellants from naming the United States and the Tribe whose interests are critically involved in any allocation of revenue generating activity, such as allocation of grazing permits, on its land.*

Anderson, *supra*, at p. 4.

The logic and reasoning of the *Anderson* court are applicable here. The United States and all named federal official defendants have been dismissed from these actions, based on the doctrine of federal sovereign immunity, and without their participation these actions cannot proceed. The lands at issue are Indian trust lands, which cannot be leased or permitted without the consent of the Tribe and the United States.

Accordingly, these actions are dismissed for failure to join the United States as a necessary and indispensable party, pursuant to Rule 12(b)(7) of the Oglala Sioux Tribe Rules of Civil Procedure. Therefore, it is hereby

ORDERED that the three above-captioned joined actions are DISMISSED with prejudice.

Dated this 22 day of August, 2019.

Charles Abourezk, Chief Judge

ATTEST:

Clerk of Court