

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>CURTIS TEMPLE,</p> <p>Plaintiff,</p> <p>v.</p> <p>LAWRENCE ROBERTS, Assistant Secretary of Indian Affairs, Department of Interior, Bureau of Indian Affairs; TIM LAPOINTE, Northern Plains Regional Director, Department of Interior, Bureau of Indian Affairs; JOHN LONG, Acting Superintendent, Pine Ridge Agency, Bureau of Indian Affairs; LIONEL WESTON, Branch of Realty, Pine Ridge Agency, Bureau of Indian Affairs, Department of Interior,</p> <p>Defendants.</p>	<p>5:15-CV-05062-CBK</p> <p>DEFENDANTS' PRE-TRIAL BRIEF</p>
--	--

This matter is scheduled for trial on August 21, 2023. The Defendants, acting in their official capacities, by and through counsel, Assistant United States Attorneys Stephanie C. Bengford and Yvette K. Lafrentz, respectfully submit this pre-trial brief.

The facts of this case have been provided multiple times. Defendants incorporate their prior factual recitations found at Docket 13 at 2-7; Docket 24; Docket 33; Docket 81 at 2-5; as well as Judge Viken's Findings of Fact in Docket 55 at 2-10.

Judge Viken's most recent Order dismissed claims one¹, seven, ten, and eleven. Docket 183. The remainder of the claims were stayed pending resolution of the IBIA appeals process. *Id.* Specifically, Judge Viken dismissed any claims as to the public sale of the cattle, failure to

¹ The Plaintiff's first claim is only dismissed as to his allegations of being the proper owner and user of the grazing land. Claim one survives as to impoundment and trespass issues.

conduct a survey to identify the Plaintiff's allotted land, and any pre-impoundment claims. *Id.* As the Court has now lifted the stay, the Defendants plan to proceed as to the remaining claims relating only to impoundment conduct, trespass findings, and monetary assessments.

I. Substitution of Defendants – All Claims

In the original complaint, Plaintiff identified Cleve Her Many Horses, Superintendent, Pine Ridge Agency, as the sole Defendant. Docket 1. Subsequent amended complaints identified other individuals, as the current caption indicates. *See* Dockets 89, 152. Plaintiff's claims, however, attempt to challenge agency conduct. In particular, Plaintiff challenges BIA regulations and claims that certain conduct is arbitrary and capricious. Judge Viken's most recent Order found that the filings do not support any claims against the defendants in their individual capacity². Docket 183 at 23-24. Although Judge Viken stated that the Plaintiff would be allowed the opportunity to "file a properly supported motion to amend his complaint." *Id.* Plaintiff has not done so. As such, the Defendants are proceeding under the premise that they are only sued in their official capacities and, therefore, the only proper defendant is the agency or its *de facto* head.

II. Failure to Exhaust Administrative Remedies – All Claims

Plaintiff raises claims that did not exist at the time of the original filing. This matter was originally filed on August 20, 2015. In Plaintiff's Second Amended Complaint, although he was provided leave to amend his complaint to raise claims that have accrued since the initial

² The Eighth Circuit Court of Appeals has expressed that a plaintiff who seeks to sue a public official in both their individual and official capacities must clearly state as much in the complaint. *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1233 (N.D. Iowa 1998)(citing cases). When a clear statement of the plaintiff's wish to sue defendants in their individual capacities does not exist, it is presumed that there is only an official capacity claim. *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 619 (8th Cir. 1995); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989).

impoundment and TRO hearing, Plaintiff brings claims into federal court prior to allowing the agency to rule. Consequently, the Court does not yet have jurisdiction to adjudicate these matters.

“Sovereign immunity is jurisdictional in nature.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). “The APA waives sovereign immunity for action against the United States for review of administrative actions that do not seek money damages and provides for judicial review in the federal district courts.” *Middlebrooks v. United States*, 8 F. Supp. 3d 1169, 1174 (D.S.D. 2014) (citations omitted). Pursuant to the APA, federal district courts can obtain subject matter jurisdiction over BIA actions once finality has occurred. *Crow Creek Sioux Tribe v. Bureau of Indian Affs.*, 2006 DSD 18, ¶ 11, 463 F. Supp. 2d 964, 968 (D.S.D. 2006). “However, the APA may not be used as an independent grant of subject matter jurisdiction to review agency actions.” *Id.*

“The jurisdictional requirement that the Court can only review final agency actions is clear.” *Crow Creek Sioux Tribe*, 2006 DSD 18, ¶ 20, 463 F. Supp. 2d 964, 970. While the Court’s frustration with the length of time in which this case has been pending is understandable, Plaintiff’s failure to follow the appropriate administrative procedures has contributed to the drawn out nature of this matter. Plaintiff currently has two appeals pending with IBIA that encompass the claims in this case. One was filed in April 2016, the other in August 2016. Both were filed *after* this case commenced. That being the case, Judge Viken stated, “[c]onsidering the changed factual circumstances of this case and plaintiff’s choice to proceed with the administrative appeal process, the court finds it is appropriate to stay consideration of the impoundment claims pending resolution of the IBIA appeal.” Docket 183 at 6.

Requiring the plaintiff to exhaust his administrative remedies “discourages the frequent and deliberate flouting of the administrative processes.” *Crow Creek Sioux Tribe*, 2006 DSD 18, ¶ 15, 463 F. Supp. 2d 964, 969) (internal citations omitted). Plaintiff has repeatedly refused to follow proper procedure and should not be allowed to continue to do so. Judicial economy is found when the administrative agency is allowed to apply its expertise in developing a factual background for the issue in question. *Id.* at ¶¶14-15. The agency should be allowed to complete its process and issue a final decision.

III. Negligence – Claims Four and Five

Any claim of negligence is not appropriate under the APA. The Plaintiff claims jurisdiction under 5 U.S.C. §§ 701-706. Docket 152 at 2. Chapter 7 of Title 5 allows for judicial review of agency actions. Negligence claims, however, are appropriate under 28 U.S.C. § 2671 *et seq.*, the Federal Tort Claims Act.³

The court did not dismiss or strike references to negligence in its most recent Order. However, the court did recognize that “money damages” are typically unavailable under the APA. Docket 183 at 21; *see also* 5 U.S.C. § 702. While the court did state that references to negligence appear to be the result of “inartful pleading rather than seriously asserted negligence claims (Docket 183 at 21),” Defendants again assert that any money damages claimed as a result of alleged negligence are not appropriate for this case and should be dismissed.

IV. Constitutionality and Due Process – Claim Twelve

“The power of Congress to control public lands may be exercised through vesting in the Secretary of the Interior the right to make rules and regulations necessary to effectuate the

³ Plaintiff has filed a second case 17-CV-05075-CBK claiming jurisdiction under the FTCA. This case, by agreement of the parties, has been stayed until resolution of this matter. See Docket 13.

legislative policy.” *United States v. Fraser*, 156 F. Supp. 144, 147–48 (D. Mont. 1957), *aff’d*, 261 F.2d 282 (9th Cir. 1958). The Supreme Court has repeatedly upheld regulations, including regulations relating to grazing leases, issued by the Secretary of the Interior. *Id.* at 148 (citing *La Motte v. United States*, 254 U.S. 570, 41 S. Ct. 204 (1921); *United States v. Travis*, 66 F. Supp. 413 (W.D. Ky. 1946); and *United States v. Johnston*, 38 F. Supp. 4 (S.D. W. Va. 1941). As such, the regulations regarding the trespass and impoundment of cattle of Indian agricultural land are constitutional.

This Court has already found that Plaintiff’s argument regarding the validity of administrative regulations is likely to fail. Docket 55 at 31-37. A procedural due process claim does not focus on the deprivation, but on whether the deprivation is bounded by constitutionally adequate procedures. *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998). An inquiry into such a claim would require an examination of the procedural safeguards built into the administrative procedure and any remedies at law for erroneous actions. *Id.* In most instances, a pre-deprivation notice and hearing are constitutionally required, however, in some instances post-deprivation remedies are constitutionally sufficient. *Id.*

The BIA impoundment procedures are found under 25 C.F.R. Part 166. Under §166.800 a trespass is defined as “any unauthorized occupancy, use of, or action on Indian agricultural lands,” including land managed under a grazing permit. Within five business days of a believed trespass, a written notice will be provided to the alleged trespasser. 25 C.F.R. §166.803. The notice will contain specific information, including the time frame in which the alleged trespasser must comply with the ordered corrective action or contact the BIA to explain why the trespass notice is in error. 25 C.F.R. § 166.804. The alleged trespasser is also notified of potential BIA actions for failure to comply with the ordered corrective actions. 25 C.F.R. § 166.806. If

corrective action is not taken within the specified time frame, and the BIA finds it appropriate to impound unauthorized livestock, the BIA will notify the trespasser of its intent to impound the livestock. 25 C.F.R. § 166.808. After the livestock is impounded, notice will be provided as to sale of the impounded property and procedure to redeem the livestock prior to sale. 25 C.F.R. §§ 166.809-810.

Similar impoundment regulations have been reviewed by the court in multiple circumstances and found to be valid. For instance, in *Jones v. Freeman*, the court found that the Secretary of Agriculture had the authority to promulgate regulations for trespass on national forest property. 400 F.2d 383 (8th Cir. 1968). The statutes in question in *Jones*⁴ are similar to the statutes here and the court determined that the Secretary had the authority to impound trespassing animals. *Id.* The court in *McVay v. U.S.* specifically cited and upheld the constitutional finding in *Jones*. 481 F.2d 615, 617 (5th Cir. 1973). Finally, as also cited by Judge Viken in a previous order (Docket 55), the Ninth Circuit in *Bedke v. Salazar* found that impoundment procedures⁵, which are structurally similar to the impoundment procedures in this matter, have never been found to be invalid. 540 F. App'x 601 (9th Cir. 2013) (cert denied).

The statutes provide adequate notice and adequate remedies, and the BIA complied with 25 C.F.R. Part 166. Plaintiff was provided a Notice of Trespass for both the 2015 (Docket 14-6) and 2016 impoundment (Dockets 82-1, 82-2). Each notice provided Plaintiff with an opportunity to take corrective action or contact the BIA to discuss options. He did neither. Plaintiff was then provided with a Notice of Impoundment and information as to how to redeem. Dockets 14-7; 82-4. Plaintiff did not redeem his cattle in 2015, but did redeem in 2016. Plaintiff

⁴ The statutes at issue in *Jones* are codified at 36 C.F.R. 262.10, previously at 262.13.

⁵ 43 C.F.R. 4150.1 et seq.

also has the ability to administratively appeal the costs and penalties assessed to him. As such, the impoundment procedures meet the inquiry standard and there is no due process violation. *See Parrish*, 133 F.3d 612; *Quinn v. Doherty*, No. 22-CV-369 (ECT/BRT), 2022 WL 16554574, at *10 (D. Minn. Oct. 31, 2022).

V. Defendants Followed The Appropriate Regulations – Claims One, Two, Three, Four, Five, Six, and Nine

The Defendants followed the regulations promulgated by the Secretary of the Interior. Plaintiff was notified of his trespass consistent with 25 C.F.R. §166.803. Plaintiff was notified of corrective actions he could take consistent with 25 C.F.R. §§166.803-804. Plaintiff was notified of the potential for impoundment for failure to take corrective action consistent with 25 C.F.R. § 166.808. Plaintiff was notified of the impoundment and procedure for redemption consistent with 25 C.F.R. §§ 166.809-810. As these regulations are constitutional and Defendants followed them, Plaintiff has no claim and this matter should be dismissed.

As of November 1, 2012, Plaintiff's grazing permits had expired and he no longer held a valid permit for his livestock to graze on Range Units 169 and P501. From then until August 19, 2015, the date of the first impoundment, Plaintiff was issued several notices of trespass on these Range Units. Trespassing livestock were only counted when observed on the Range Units, not when on Plaintiff's tract in which he holds 100% interest or when on nearby land with free access to the Range Units, despite the presumption that cattle on private land that is intermingled with federal land and that are allowed free access to the federal land may also be deemed in trespass. *See Holland Livestock Ranch v. United States*, 588 F. Supp. 943, 948 (D. Nev. 1984). The BIA also issued repeated notices of intent to impound as required by 25 C.F.R. § 166.808. Yet, Plaintiff continued to allow his livestock to graze on range units where he had no valid permit. Therefore, as Plaintiff failed take corrective action, the BIA impounded the trespassing

livestock.

Following the impoundment, Plaintiff was provided with a Notice of Sale and Procedure to Redeem. Docket 14-7. This notice contains the penalties, damages, and costs associated with the trespass and which must be paid to redeem. Through the American Indian Agricultural Resource Management Act (AIARMA), 25 U.S.C. §§ 3701 et seq., Congress delegated authority to the Department of the Interior to establish damages, costs, and penalties for trespass on Indian lands and to establish procedures for assessing and collecting those sums. Subsequently, the BIA promulgated regulations regarding the penalties, damages, and costs to be assessed as the result of a trespass. 25 C.F.R. § 166.812-816. The penalties and costs assessed regarding the impoundment of Plaintiff's livestock were consistent with these regulations.

The BIA's notice of sale of August 21, 2015 provided a calculation of the costs, damages, and penalties associated with the impoundment, which are consistent with the relevant regulations. Along with the notice, Plaintiff received two spreadsheets that provided a more detailed summary of the costs, damages, and penalties that made up the redemption amount. Docket 14-7. The notice explained that the BIA added the impoundment and trucking costs (\$26,100.29) to the value of forage consumed (\$82,767.39) plus the penalty of twice the value of forage (\$165,534.78), for a total redemption amount of \$274,402.46. *Id.* The value of the products illegally used or removed was calculated by multiplying the monthly grazing rental rate for the Range Units by the number of months that the cattle were in trespass. A penalty equal to double the forage value was also imposed consistent with 25 C.F.R. § 166.812. The spreadsheets detailed the BIA's costs for its part in the handling of the impoundment. *Id.* Finally, the notice informed Plaintiff he was responsible for the continuing yardage and feed costs while the impounded livestock continued to be at the holding facility.

The scheduled livestock sale was not held because Plaintiff filed a request for a temporary restraining order, in this Court, seeking to halt the sale. The Court ultimately denied the request on February 19, 2016. Docket 55. However, while the impounded livestock were being held pending a ruling on Plaintiff's request for temporary restraining order, the Nebraska Bureau of Animal Industry placed the impounded livestock under quarantine after determining that a bull tested positive for Trichomoniasis. The BIA worked closely with the veterinarians in Nebraska and South Dakota to properly care for the impounded animals under quarantine and prevent spread of the disease, as well as to determine the appropriate disposition of the animals considering the quarantine. At the direction of the veterinarians, the BIA notified other individuals grazing cattle in the area around Range Units 169 and P501 regarding the presence of the disease and advised individuals to have their animals tested. Subsequently, other cattle belonging to Plaintiff in South Dakota that had previously been in contact with the impounded herd, also tested positive for Trichomoniasis. The cattle impounded on August 19, 2015, were eventually sold by public sealed bid on April 6, 2016, and April 27, 2016. The cattle were sold by public sealed bid because Plaintiff or his representatives repeatedly disrupted attempts to sell the cattle at traditional cattle auction businesses.

Plaintiff continued to allow his livestock to trespass on Range Units 169 and P501. On March 9, 2016, after multiple notices of trespass were issued, Plaintiff was again provided with notice of the BIA's intent to proceed with trespassing and impoundment procedures on these Range Units. Dockets 82-1, 82-2. On June 21, 2016, the BIA impounded the trespassing livestock on Range Units 169 and P501. After impoundment, Plaintiff was provided with a Notice of Sale and Procedure to Redeem. Docket 82-4. The costs, damages, and penalties were clearly outlined in the table included in the notice. The value of the products illegally used or

removed was calculated by multiplying the monthly grazing rental rate for the Range Units by the number of months that the cattle were in trespass (\$19,724.79). *Id.* The penalty amount is calculated as \$39,449.58. *Id.* Finally, a breakdown of the different categories of the BIA's trespass and impoundment costs, totaling \$14,824.02, is provided, resulting in a redemption amount of \$73,998.39. *Id.* Plaintiff redeemed his cattle on November 16, 2016.

Circumstances unforeseen by the BIA caused delay between impoundment and sale or redemption. The delays resulted in the BIA incurring additional costs for the care and transportation of the impounded livestock. In the case of the first impoundment, the Trichomoniasis diagnosis and subsequent quarantine required the BIA to carefully coordinate care, movement, and disposition of the cattle. It also limited the BIA's ability to find sale barns willing to hold and sell the impounded animals. The sale was delayed by Plaintiff's and his representatives' efforts to threaten and intimidate the sale barns. This required the cattle to be moved to a private pasture. The cattle impounded on June 21, 2016, were also scheduled to be sold a number of times. Delays were caused by Plaintiff and his representatives threatening the private sale barn with litigation and showing up at the barn requesting to take the cattle without paying the redemption amount as well as two additional requests for temporary restraining orders. Docket 78, denied at Docket 86; Docket 103, denied at Docket 107. While the redemption amounts are substantial, they are based on an egregious and continuous trespass that began in 2012. All of these costs could have been avoided, or limited considerably, if Plaintiff had taken action to cure the trespass or redeemed the cattle without threats to private sale barns.

Plaintiff has paid no grazing fees for Range Units 169 and P501 since they expired on October 31, 2012. The grazing fees are owed to the 392 individual Indian landowners who have not been paid for some of the grazing years under the existing permits. While the lawful

permittee has paid some of the grazing fees owed under the term of the permits, some grazing fees have not been collected and distributed to the Indian landowners, due to Plaintiff's trespass. In addition, multiple compliance checks on these range units have shown that not only has Plaintiff unlawfully used the range units, he has overused them. A stocking rate review was conducted on these units which, as a result of the degradation caused by overgrazing, recommended a reduction in the carrying capacity of Range Units 169 and P501. Dockets 44-3, 44-4. Therefore, Plaintiff's actions have not only prevented other Indian landowners from receiving grazing fees, they have impaired the ability of these landowners to receive fees in the future due to the degradation of the land his trespass has caused.

Defendants' conduct has been according to the appropriate regulations and not arbitrary or capricious. Agency actions are to be set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "This is a highly deferential standard providing a narrow standard of review." *Foster v. United States Dep't of Agric.*, 68 F.4th 372, 379 (8th Cir. 2023) (citing *Org. for Competitive Mkts. v. U.S.D.A.*, 912 F.3d 455, 459 (8th Cir. 2018)(internal quotations omitted)). So long as the agency's path can be reasonably discerned it should not be disturbed. *Foster*, 68 F.4th at 379. Such is the case here.

The compliance checks that determined the Plaintiff's cattle were trespassing were based on complaints that the agency received. The BIA investigated the complaints and then took action accordingly. The BIA received many complaints, provided multiple notices of trespass, and gave ample opportunity to cure the trespass to avoid further action. Once the cattle were impounded, Plaintiff's own actions increased the costs, damages, and penalties assessed by prolonging the period of impoundment. The agency's actions were consistent with the regulations and within the bounds of reasoned decision making. *See Baltimore Gas & Elec. Co.*

v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105, 103 S. Ct. 2246, 2256, 76 L. Ed. 2d 437 (1983).

Plaintiff's case is without merit and should be dismissed. First, he has failed to exhaust his administrative remedies. Second, Plaintiff's claim that the impoundment procedure promulgated by the Secretary of Interior is unconstitutional is baseless and should be dismissed. Finally, the BIA followed all the procedures in a reasonable manner as outlined in the regulation when they impounded Plaintiff's cattle. Therefore, the Court should find for the Defendants and dismiss this case with prejudice.

Dated this 7th day of August, 2023.

ALISON J. RAMSDELL
UNITED STATES ATTORNEY

/s/ Yvette K. Lafrentz
YVETTE K. LAFRENTZ
STEPHANIE C. BENGFORD
Assistant U.S. Attorneys
P.O. Box 2638
Sioux Falls, SD 57101-2638
Ph: (605) 330-4400
Fax: (605) 330-4402
Yvette.Lafrentz@usdoj.gov
Stephanie.Bengford@usdoj.gov