

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CURTIS TEMPLE,

Plaintiff,

vs.

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, Department of Interior, Bureau of Indian Affairs, and LIONEL WESTON, Branch of Realty, Pine Ridge Agency, Department of Interior, Bureau of Indian Affairs,

Defendants.

5:15-CV-05062-CBK

PRETRIAL BRIEF

COMES NOW Plaintiff, Curtis Temple, and hereby submits his Pretrial Brief consistent with the Order Lifting Stay and Order Setting Trial, Doc. 194.

BACKGROUND

Plaintiff Curtis Temple (Temple), an enrolled member of the Oglala Sioux Tribe, is a third-generation rancher whose family has been ranching on the Pine Ridge Indian Reservation in South Dakota for the past ninety years. *See* Second Amended Complaint, Doc. 152, ¶ 11. His

ranch operation consists of land within the boundaries of the Pine Ridge Indian Reservation (Reservation), as well as land outside the boundaries of the Reservation. For the land within the boundaries of the Reservation, the ranch operation was premised upon the continuous renewal of permits to graze livestock upon several range units. At one point, Temple's ranch operation encompassed approximately 1,000 head of cattle in his operation, although that number has been significantly reduced due to events occurring during the course of this action.

This action involves the United States Department of Interior – Bureau of Indian Affairs' (BIA's) management of Indian agricultural land within the Reservation through the BIA Grazing Permit Regulations, 25 C.F.R. Part 166 (BIA Regulations). The purpose of the BIA Regulations "is to describe the authorities, policies, and procedures the BIA uses to approve, grant, and administer a permit for grazing on tribal land, individually-owned Indian land, or government land." 25 C.F.R. § 166.1(a). Through its Regulations, the BIA consolidates several individual parcels of Indian land (generally, restricted land or land held in trust by the United States for the benefit of individual Indian landowners and tribes) into "Range Units" ("Units"), for the purpose of issuing a grazing permit to qualified permittees. The grazing permits allow permittees to graze a certain number of livestock on their designated Unit(s) for a set period of time, which is five years for the Pine Ridge Indian Reservation. 25 C.F.R. § 166.302.

Trust land may be withdrawn from a Range Unit, and thus not governed by the BIA Regulations, under certain circumstances. *See* 25 C.F.R. § 166.227. In addition, the exterior boundaries of the Range Units may encompass deeded land not governed by the Regulations. *See* 25 C.F.R. § 166.1(a) (describing the types of land governed by the BIA Regulations). As a result, there may exist parcels of land within the exterior boundary of a Range Unit that are not governed by the BIA Regulations.

The BIA Regulations encompass a wide array of topics, including but not limited to BIA's drawing of the boundaries for the range units, the BIA's determination of the total grazing capacity of each range unit, the determination of rental rates for each Unit, and the permitting process. *See* 25 C.F.R. §§ 166.302, 166.305, 166.400, Subpart C. The BIA Regulations also govern trespass on Indian agricultural land, including notice requirements, impound policies, as well as the assessment of penalties, damages, and costs. *See, e.g.*, 25 C.F.R. § 166.800. Pursuant to the Regulations, the BIA enforces the trespass provisions of the BIA Regulations but may defer to the tribal prosecution of any trespass upon the tribe's request. *See* 25 C.F.R. § 166.802(a).

In enforcing the trespass provisions, the BIA generally is required to provide a written notice to an alleged trespasser containing certain information relating to the alleged trespass such as the legal description of the location where the alleged trespass occurred and the brand of the livestock involved. *See* 25 C.F.R. § 166.803. Such written notice remains effective for one year upon receipt by the alleged trespasser. *See* 25 C.F.R. § 166.805. The BIA Regulations allow the alleged trespasser to contact the BIA "in writing to explain why the trespass notice is in error" and if the BIA determines that the trespass notice was issued in error, the BIA must withdraw the notice. *See* 25 C.F.R. § 166.804(b).

"If the trespass is not corrected in the time specified in the initial trespass notice," the BIA Regulations require that written notice of intent for impoundment be sent to the alleged trespasser or that public notice be posted and published in a newspaper prior to any impoundment. *See* 25 C.F.R. § 166.808. Under certain conditions, including if the BIA determines that no corrective action has been taken by the alleged trespasser, it may "[s]eize, impound, sell or dispose of unauthorized livestock or other property involved in the trespass" and "[a]ssess penalties, damages, and costs[.]" *See* 25 C.F.R. § 166.806. After any

impoundment of the livestock, the livestock are publicly sold, although the alleged trespasser may redeem the livestock prior to the public sale by “paying all penalties, damages, and costs” and “completing all corrective actions[.]” *See* 25 C.F.R. §§ 166.809, 166.810. Any “penalties, damages, and costs” collected by the BIA pursuant to this regulatory scheme are distributed pursuant to 25 C.F.R. § 166.818.

Tribes are involved in certain procedures within the grazing permitting process, such as determining the individuals that qualify for preferential status in obtaining a grazing permit. *See, e.g.,* 25 C.F.R. § 166.218. Despite the Tribe’s role, the BIA is in charge of administering the BIA Regulations and retains ultimate authority on the approval of the grazing permits. *See* 25 C.F.R. § 166.217.

Relating to this case, in 2015, Temple was initially awarded the permits for several range units that his family had previously held. The award, however, was subsequently vacated by the Tribe and awarded to other individuals, a decision that Temple had appealed to the Tribal Court. Despite the appeal of the rightful holder of the permits, the BIA began undertaking impoundment actions against Temple’s livestock. Temple brought this suit, seeking to halt any impoundment until the Tribal Court resolved the issue of the rightful holder of the grazing permits. Temple also took steps to remove a number of his parcels within the Reservation from trust status so that there were less restrictions on the parcels. Accordingly, these parcels are islands within the exterior boundaries of, Range Units, although the parcels themselves are not included under the scope of the BIA Grazing Permit Regulations.

Regardless of the above, on several occasions BIA officials have provided Temple with a Notice of Trespass, which indicated that if Temple objects to the Notice of Trespass, he may provide a written explanation regarding the objection. Temple has timely objected and explained

in writing why the livestock were not trespassing on Indian lands and that the notice is in error, although he has not received a response to his written explanations.

The BIA has issued several Notices of Impoundment as related to Temple's cattle and have subsequently impounded Temple's cattle from Temple's land within the exterior boundaries of the range units. The BIA then assessed penalties, fees, and costs upon Temple related to the impoundments. This, in turn, has required Temple to either redeem the cattle for an identified monetary amount or have his cattle sold in a sale to the highest bidder. Temple had appealed the assessments relating to the impoundments, which are pending before the Interior Board of Indian Appeals.

In the current action, the Court has denied Temple's Motions for Temporary Restraining Orders seeking to enjoin the BIA actions relating to the impoundment of cattle, and has also dismissed Claims 1, 7, 10, and 11 for failure to exhaust remedies. *See, e.g.*, Order, Doc. 55; Order, Doc. 183.

LEGAL ARGUMENT

The crux of this case is the violations of Temple's Fifth Amendment due process rights. The Court previously denied Temple's request for injunctive relief, concluding in part that Temple "failed to demonstrate he [was] likely to succeed on the merits of his Fifth Amendment due process claim relating to the BIA's impoundment regulations[.]" *See* Order, Doc. 55, at 32 (Feb. 19, 2016). However, the subsequent procedural inaction bolsters Temple's claims for due process violations and supports a contrary conclusion.

A procedural due process claim is established upon the showing of 1) "a protected property interest at stake"; and 2) "that [Plaintiff] was deprived of that interest without due process of law." *Soltész v. Ruchmore Plaza Civic Center*, 863 F.Supp.2d 861 (D.S.D. 2012). "The fundamental requisite of due process of law is the opportunity to be heard." Order, Doc.

55, at 35 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (2016)). “To be constitutionally adequate, due process requires ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Id.* (quoting *United States v. Colon*, 993 F. Supp. 42, 44 (D.P.R. 1998)). “‘Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances,’ but rather is ‘flexible and calls for such procedural protections as the particular situation demands.’” *Id.* at 31 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). “Fairness of procedure is ‘due process in the primary sense.’ (citation omitted).” *Quintana v. Harris*, 491 F. Supp. 1044, 1047 (D.N.M. 1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161, 71 S.Ct. 624, 643 (1951)).

Temple has a property interest in his cattle involved in the impoundments, as well as his land within the Reservation and the funds that he has been required to pay in order to redeem his cattle. *Cf. Coomes v. Adkinson*, 414 F. Supp. 975, 993-94 (D.S.D. 1976) (finding that an unsuccessful bidder for a grazing permit has a sufficient property interest “subject to the protections of procedural due process”). Next, the prolonged nature of the post-deprivation proceedings support that Temple’s opportunity to be heard has not occurred at a meaningful time. Indeed, albeit in the context of an agency’s consideration of a claimants’ supplemental security income (SSI) benefit applications, the United States District Court for the District of New Mexico has stated that “unreasonable delay in administrative proceedings which may result in the wrongful deprivation of benefits to claimants raises due process implications.” *Quintana v. Harris*, 491 F. Supp. 1044, 1047 (D.N.M. 1980).

Impoundments Prior to Final Decision on Permits

Regarding the alleged trespasses against Temple relating to Units 169 and P501, Temple previously held the grazing permits and then was denied the permit in 2012. Temple subsequently invoked the appeal process through the Tribe and Tribal Courts, with a decision by the Oglala Sioux Tribal Court being issued on August 22, 2019. *See Temple v. OST Allocation Committee, et al*, Consolidated Case Nos. CIV-13-0533, CIV-15-0333, CIV-18-0038 (Aug. 22, 2019).

Notably, this Court in *Coomes v. Adkinson*, 414 F.Supp. 975 (1975) indicated that “It is the opinion of this Court that until the appeal process is final, the prior lessee should not be forced to vacate and the status and penalties of trespass should not attach.”¹ To the contrary in this case, and despite the Tribal Court’s decision not being entered until August 22, 2019, the BIA began trespass actions against Temple on August 19, 2015. These trespass actions instituted prior to the Tribal Court’s decision should not attach, and accordingly, Temple’s procedural due process rights were violated.

Assessments on Appeal

As to the assessments against Temple, a final administrative decision has yet to be made by the BIA because the Interior Board of Indian Appeals had not reached a decision in the multiple years that the cases had been pending before it. *See Hall v. Tesoro High Plains Pipeline Co., LLC*, 478 F.Supp.3d 834 (N.D. 2020); 25 C.F.R. § 2.6. Despite the IBIA appeal proceeding, the BIA referred the alleged debt to the U.S. Department of Treasury in June 2017. The outstanding debt then formed the basis for the Tribe’s denial of Temple’s subsequent bids for grazing permits. In other words, despite the lack of a final decision on the alleged assessment,

¹ It appears that the appeal procedure was different for the *Coomes* case decided in 1976, however, the principle should remain.

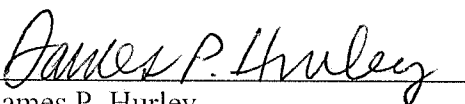
the evidence will show that Temple has been denied the ability to secure grazing permits because of the (alleged) debt subject to the IBIA appeal. *See Temple v. OST Allocation Committee, et al*, Consolidated Case Nos. CIV-13-0533, CIV-15-0333, CIV-18-0038 (Aug. 22, 2019).

Impoundments of Cattle on Temple's Property

Finally, Temple's Fifth Amendment rights are violated in instances when Temple's livestock has been allegedly impounded from Temple's own property.

In conclusion, the evidence at trial will support the foregoing claims that the BIA Regulations, as applied to Temple, have violated Temple's procedural due process rights.

Dated this 7th day of August, 2023.


James P. Hurley
Creekside Prof Offices
2640 Jackson Blvd
Suite 4, Box 4
Rapid City, SD 57702
605-381-6875
James.Hurley@hurleylawoffice.com

Attorney for Plaintiff