UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CURTIS TEMPLE,

Plaintiff,

v.

CLEVE HER MANY HORSES, Superintendent, Pine Ridge Agency, Bureau of Indian Affairs,

Defendant.

Civil Action 15-5062-JLV

PLAINTIFF'S RESPONSE TO GOVERNMENT'S RENEWED MOTION TO DISMISS

The United States filed a renewed motion to dismiss the case. Jurisdiction has already been briefed more than once by the parties. This Court has jurisdiction in this case. Virtually every argument made by the government in its latest motion to dismiss have been made previously and responded to by plaintiff.

Plaintiff filed the present action seeking a restraining order and preliminary injunction prohibiting the Bureau of Indian Affairs (BIA) and its Superintendent, Cleve Her Many Horses, from taking any action preventing Curtis Temple from use of the range units specified in the complaint until such time as the Oglala Sioux Tribal Court (OSTC) has determined the merits of Temple's claims to them and from an inpoundment and sale of his cattle which at the time were being detained at the Gordon Livestock Sale Barn in Gordon, Nebraska, but which now are at the Tony Johnson Ranch near Crawford Nebraska and under quarantine because of a disease called Trichomoniasis resulting in the death of calves. The issue involving right to range units is independent from the issue of the unlawful impoundment and sale of the cattle.

Defendant maintains that this Court lacks jurisdiction over the issues raised in the

complaint, at the hearings in this matter, and in the briefs filed throughout these proceedings. For the reasons stated hereafter, this Court has jurisdiction under 1331, federal question jurisdiction; sovereign immunity is not a bar to this action; exhaustion of administrative remedies has occurred because the impoundment is not appealable.

A review of the complaint in this matter shows that all points raised and argued in this case were alleged in the complaint. See, e.g., Complaint ¶¶ 37, 38, 39, 42, 43, and 44. Plaintiff has alleged and consistently argued to this Court that the impoundment, proposed sale, and calculation of penalties were unconstitutional. He has also argued that the calculation of penalties and other action taken by the United States in this matter did not follow their own regulations and policies.

A. SUBJECT MATTER JURISDICTION

Federal courts have jurisdiction under 28 USC 1331, in conjunction with 5 USC 702, which waives the sovereign immunity of the United States, to review agency action, Califano v. Sanders, 430 U.S. 99 (1977), where equitable relief, like here, is being requested. Ceta Workers Organizing Committee v. New York, 617 F2d 926 (2nd Cir. 91). Moreover, where a controversy involves the alleged violation of rights arising out of the federal constitution or federal statutes, the district courts have federal question jurisdiction under 28 USC 1331. Mark v. Groff, 521 F2d 1376 (9th Cir. 1975). A case will be deemed to arise under a federal statute when a plaintiff alleges agency action contrary to the agency's own regulations. E.g., City Federal Sav. & Loan Asso. v. Crowley, 393 F.Supp. 644 (E.D. Wis. 1975).

Congress authorizes jurisdiction in federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 USC 1331; Verizon Maryland v.

Global NAPS, Inc., 377 F3d 355, 369 (4th Cir. 2004) (resolution depends on federal question). A non-frivolous claim of right or remedy under a federal statute or regulation is sufficient to invoke federal question jurisdiction. Auto Owners Ins. Co. v. Spirit Lake Tribal Court, 495 F3d 1017 (8th Cir. 2007). This also includes claims involving the validity of federal agency action, Runs After v. United States, 766 F2d 347 (8th Cir. 1985); Crow Creek Sioux Tribe v. Bureau of Indian Affairs, 563 F.Supp. 2d 964 (D.S.D. 2006), and claims based on the common law. Up State Federal Credit Union v. Walker, 198 F3d 372, 375 (2nd Cir. 1999) (contract disputes with government). Whether the validity of action complies with federal requirements, federal question jurisdiction exists. Rosebud Sioux Tribe v. South Dakota, 900 F2d 1164 (8th Cir. 1990); Colombe v. Rosebud Sioux Tribe, 835 F.Supp. 2d 736 (D.S.D. 2011). Constitutional torts by a private claimant are also cognizable under 1331. Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001). Congress also has enacted specific statutes authorizing federal district courts to hear causes relating to certain areas of federal law, such as under 5 USC 706 to review agency action and under 28 USC 1361to compel a federal officer to undertake a specific action. The well pleaded complaint rule requires a complaint showing that federal law creates the cause of action or that the right to relief depends on the resolution of a question of federal law. Franchise Tax Bd. V. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). In the present case there are substantial questions arising under both federal statutes and federal regulations and the constitutional validity of certain action taken by a federal agency. Black Hills Regional Institute v. Department of Justice, 12 F3d 737 (8th Cir. 1993) (challenging agency action and seeking relief other than money damages); Coomes v. Adkinson, 414 F.Supp. 975 (D.S.D. 1976) (review of BIA action rejecting plaintiff's lease bids). Clearly there is federal court jurisdiction in this case.

B. CLAIMS

1. IMPOUNDMENT

Plaintiff's position on impoundment was that his Constitutional right to due process under the Fifth Amendment was violated constituting irreparable injury supporting injunctive relief. Livestock Mktg. Ass'n. v. U.S. Dep't. Of Agriculture, 132 F.Supp.2d 817, 824 (D.S.D. 2001) (plaintiff only required to make prima facie showing that there has been an invasion of his right and that a preliminary injunction is essential to the assertion and preservation of those rights). Loss of Constitutional rights or freedom constitutes irreparable harm. See Elrod v. Burns, 417 U.S. 347, 373 (1976); Walker v. Wegner, 477 F.Supp. 648 (D.S.D. 1979), aff'd. 624 F2d 60 (8th Cir. 1980). The BIA took Temple's cattle, impounded them, and arranged an auction first scheduled for September 1, 2015, in order to pay a BIA self imposed determination of damages and penalties in the amount of $274,402 in addition to the expenses of keeping the cattle at the Gordon Sale Bar and Johnson ranch, all without court determination, hearing, jury trial, appeal, or any semblance of due process. Temple's property cannot "be taken away without that procedural due process required by the ...(Fifth Amendment)." Bell v. Burson, 402 U.S. 535, 539 (1971). See Oklahoma Gin Co. v. Oklahoma, 252 U.S. 339 (1920) (a denial of the right to equal protection is occasioned by statutes, which directly or indirectly limit the right of litigants to access to the courts, as where the legislature, in an effort to prevent an inquiry in the validity of a particular statute encumbers a challenge); U.S. v. One Parcel of Real Estate in Burleigh County, North Dakota, 48 F3d 289 (8th Cir. 1995) (lack of preseizure hearing before forfeitures constitutes violation of due process and required dismissal); State v. Miller, 248 NW2d 377 (SD 1976)(forfeiture statutes are unconstitutional if they contain no provision for notice and a

hearing; notice and hearing must be included in the statutes).

Plaintiff's claim against the improper impoundment in this case go far beyond the claim that the redemption is too high. First, the government seems to take the view that whatever the government does is not appealable under 25 CFR 166.803 (c). Second, there is no opportunity for defendant to contest the facts upon which the trespass allegations are founded. Third, there is no opportunity to contest the facts supporting the damages and penalties being claimed. Pure and simple, the cattle are sold without any opportunity to contest either the impoundment or justification for sale. Plaintiff was given no opportunity to make any contest to the government's seizure of his property. The government relies upon a limited number of instances of trespass to conclude that plaintiff has been trespassing for three years. There is absolutely no facts upon which that conclusion can be made even under the government's own documents.

2. EXCESSIVE PENALTIES

The imposition of severe and excessive penalties violates due process under the Fifth Amendment. Life & Casualty Insurance Company v. Barefield, 291 U.S. 575 (1934). Whether a penalty is reasonable or excessive is determined in light of the particular circumstances. Muncie Novelty Co. v. Department of Revenue, 720 NE2d 779 (Ind. Tax Ct. 1999). But a government has the power to impose a penalty after they have been found to be valid, and to impose a penalty for acts of disobedience committed after ample opportunity to test the validity of those penalties and failure to do so. Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651 (1915). The attempted imposition and collection of a penalty in the amount of $165, 534.78 is violative of due process especially because there has been no opportunity to have a preimposition hearing, no opportunity to question the facts upon which the value of forage has been determined, and no right of appeal

prior to the time that the penalty is collected. The BIA has specific directives on the manner in which cattle counts are made and certified. Buffington v. Acting Great Plains Regional Director, 37 IBIA 12 (2001); Lopez v. Aberdeen Area Director, 29 IBIA 5 (1995). The BIA must calculate the amount of forage consumed and apply it to each head of livestock for each day of trespass. Cheyenne River Sioux Tribe v. Aberdeen Area Director, 28 IBIA 288, 290 (1995); Eaton v. Aberdeen Area Director, 28 IBIA 283, 284 (1995). Temple must be given an opportunity to contest the adhereence of the BIA to its own rulings, contest the count, and contest the value of forage assessed before his cattle are sold, something that is not permitted under the BIA's regulations. See 25 CFR 166.803 (c) (trespass actions are not appealable under 25 CFR Part 2).

3. REGULATIONS

At the hearing on August 31, 2015, Cleve Her Many Horses, the Superintendent testified. He testified that he was not sure if his August 21, 2015, letter advising Curtis Temple that his cattle were impounded and were going to be sold had ever been personally delivered or served by mail upon Temple. Rather, there was testimony that the letter was given to Holly Wilson, a person who had previously acted as a lay advocate, but who was not an interested person as defined by 25 USC 2.2, i.e., she had no interests that were being adversely affected. Moreover, Her Many Horses testified that there was a right to appeal the decision impounding and proposing to sell the 121 head of cattle that had been impounded. The affidavit of Temple, previously submitted, shows that did not receive a copy of the August 21 letter either personally or by mail.

25 CFR 2.7 (a) provides that "(t)he official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail."

25 CFR 166.809 provides that "following the impoundment of unauthorized liverstock or other property, we will provide notice that we will sell the impounded property as follows: (a) We will provide written notice of the sale to the owner, the owner's representative, and any other known lien holder."

Without provision of notice as set forth above, i.e., to interested parties, owner, owner's representative, and any lienholder, there can be no sale and therefore no impoundment. The notice is analogous to a summons and complaint that commences any civil action. Without the requisite notice, rudimentary notice is lacking and violates due process. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950). Moreover, and as importantly, the BIA has not followed its own rules and regulations, a further violation of due process. E.g., Way of Life Television Network, Inc. v. FCC, 529 F2d 1356, 1359 (D.C. Cir. 1979); Rodway v. Department of Agriculture, 514 F2d 809, 814 (D.C. Cir. 1975); Coomes v. Adkinson, 414 F.Supp. 975 (D.S.D. 1976).

25 CFR 2.7 (c) states that "(a)ll written decisions...shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30 day time limit for filing a notice of appeal." See 25 CFR 2.3 (25 CFR Part 2 applies "to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions)." The August 21, 2015 letter also failed to advise Temple that he had the right to appeal the decision to sell the cattle. The lack of required notice of the right to appeal and procedures to be followed most certainly also violates due process and further evidence that the BIA has failed to follow its own rules and regulations. Coomes v. Adkinson, 414 F.Supp. 975 (D.S.D. 1976); Yankton

Sioux Tribe v. Kempthorne, 442 F.Supp.2d 774 (D.S.D. 2006).

4. RIGHT TO APPEAL AND LACK OF FINALITY

"No decision, which at the time of its rendition is subject to appeal...shall be considered final so as to constitute ..action subject to judicial review under 5 USC 704, unless when an appeal is filed, the official to whom appeal is made determines...that the decision may be made effective immediately." 5 USC 2.6 (a). "Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing notice of appeal has been expired and no notice of appeal has been filed." 5 USC 2.6 (b).

An appeal, previously submitted, of the decision to sell the 121 head of cattle has been taken. Therefore, the decision to impound and sell the cattle is not effective and will not become effective until the appeal has been determined unless the Regional Director determines that public safety, protection of trust resources, or other public exigency requires that the sale proceed without appeal rights. It would be hard for the deciding official to determine that the sale of cattle without appeal rights is required for public safety, to protect trust resources, or other public exigency.

The sale of Temple's 121 head of cattle cannot proceed since the notice of appeal keeps the decision to sell from being effective until the appeal has been determined. And even if the deciding official makes the decision to sell immediately effective, that decision would make the decision to sell the cattle a final decision subject to review in this Court under 5 USC 706. Although the regulations at 25 CFR 166.809-810 may be facially constitutional, which plaintiff does not concede, but they are unconstitutional as applied. You cannot take someone's property and essentially forfeit it without any kind of judicial or administrative process making it possible

to contest the facts and law giving rise to the sale. That notion went out with the idea of prejudgment garnishment and replevin. Goldberg v. Kelly, 397 U.S. 254 (1970) (no deprivation of means of livelihood without pretermination hearing); Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969) (prejudgment garnishment violates due process); Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin statute unconstitutional). See Kennerly v. United States, 721 F2d 1252 (9th Cir. 1983) ("we reverse the judgment in favor of the federal defendants because the payments of Kennerly's trust funds to the Tribe without any hearing on the amount or validity of the underlying debts or assignments violated his due process rights, and, given the unique role of the federal government as trustee, that violation indicates a breach of trust responsibilities).

If the BIA recognizes the appeal that has been taken, no sale can proceed with the cattle. The resolution of the appeal could take weeks if not months. In the meantime, it appears to be the BIA's position that they will keep the cattle impounded undoubtedly at the assumed expense of Temple. This expense could be substantial and would be greater and greater with each passing day. If kept for additional time, the expenses of keeping the cattle will undoubtedly reduce the amount that could possible be applied to any trespass damages. This was not the intent of the regulations.

Moreover, the condition of the cattle are deteriorating. One head has died already. Some of the cows appear to be calving. One new born calf was transported by semi-truck to another pasture, unheard of in the ranching business. The cattle appear to be infested with Trichomoniasis. The fact that Temple may be afforded some semblance of a post deprivation hearing in weeks or months is insufficient and therefore immaterial. The cattle cannot be sold

because to do so will violate the Fifth Amendment. The cattle should be returned to Curtis Temple.

Aside from the constitutionality of the process, the cattle can be returned to Curtis Temple as contemplated by 25 CFR 166.811 (b) providing that if no bid is received for any reason, an option is to return the cattle to the owner. The Court can make reasonable orders conditioning return on the cattle's availability in the future to satisfy any amount that is properly determined to be due for any proven trespass and damages sustained, if any.

C. SOVEREIGN IMMUNITY

A federal official acting outside of his power and authority is not protected by sovereign immunity from his illegal and unauthorized acts. Michigan v. Bay Mills Indian Community, 133 S.Ct. 907 (2013) (Michigan could bring suit against tribal officials or employees under Ex Parte Young and Santa Clara Pueblo); Ex Parte Young, 209 U.S. 123 (1908); Winnebago Tribe v. Babbit, 915 F.Supp. 157 (D.S.D. 1996) (no immunity for official acting outside of his scope of authority); Coomes v. Atkinson, 414 F.Supp. 975 (D.S.D. 1976) (immunity from injunction may not be claimed, in a suit involving Indian leases, by an official acting in excess of his authority); Sioux Valley Empire Elec. Ass'n. v. Butz, 367 F.Supp. 686 (D.S.D. 1973), aff'd. 504 F2d 168 (8th Cir. 1974) (sovereign immunity does not protect officer acting beyond statutory powers or where suit is to enjoin actions which have been exercised pursuant to unconstitutional powers or void because of the manner in which they are exercised); Calhoon v. Sell, 71 F.Supp. 2d 190 (D.S.D. 1998) (no sovereign immunity where government action limited by statute, ultra vires, or unconstitutional in matter involving Indian lands). In the present case, the Superintendent acted beyond and in excess of his authority and his actions with regard to the impoundment and

proposed sale of the cattle are unconstitutional and ultra vires. Moreover, 5 USC 706 is a waiver of sovereign immunity to review agency action. No money damages are sought, only the return of the 121 head of cattle.

A law that is constitutional on its face, may be unconstitutional as applied. E.g., National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (facially constitutional law can be applied in unconstitutional manner); Gonzalez v. Carhart, 550 U.S. 124 (2007) (law vulnerable to an as applied challenge but not facial challenge). As applied challenges are favored in the law because they resolve concrete, factual specific disputes. Washington State Grange v. Washington State Republican Party, 128 U.S. 1184, 1190-1191 (2008).

An official acting outside of his power and authority, either by failing to follow applicable statutes or regulations, or by acting unconstitutionally in the application of a statute or regulation, is not protected by sovereign immunity. E.g., Winnebago Tribe v. Babbit, 915 F.Supp. 157 (D.S.D. 1996); Coomes v. Adkinson, 415 F.Supp. 974 (D.S.D. 1976). Additionally, an official acting unlawfully in the impoundment and sale of livestock is not protected by sovereign immunity. See Jones v. Freeman, 400 F2d 383, 389 ("Even though the Secretary acted within his authority in promulgating the regulation, he has no right to claim sovereign immunity against a landowner who claims improper impoundment)". Finally, the APA waives sovereign immunity for equitable actions. 5 USC 702.

Government relies upon Key Medical Supply, Inc v. Burwell, 764 F3d 955 (8th Cir. 2015), for the proposition that Her Many Horses did not act ultra vires. First, that was a case where the plaintiff was a disgruntled bidder who alleged HHS exceeded its statutory authority when implementing a competitive bidding system where plaintiff had previously been able to

provide the same materials without bidding but could not meet the requirements of the new bidding system. Key Medical had no property or liberty right that was being taken away as in the present case. Key Medical, 764 F3d 965. A disgruntled bidder is far different than a property owner who is deprived of property without due process. Second, the case was decided against the backdrop of a regulation that prevented any judicial review unlike the present case and the Court prefaced its decision many times against that backdrop. Third, unlike in the present case, there was no allegation of an unconstitutional application of regulations. Key Medical has no application to the present case.

Muir v. Meacham, 427 F3d 14 (1st Cir. 2005), is not helpful to the government's case either. A review of that case shows that it was a case of statutory interpretation, not an unconstitutional taking as in this case. As Muir stated, "an officer's acts are not protected ...if the officer exercises that (statutory) power in an unconstitutional manner. Again, the justification for granting relief is the notion that the officer is not cloaked with legitimate sovereign power when he acts–the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity." 427 F3d 19.

The government argues that Her Many Horses was acting pursuant to regulations promulgated under 25 USC 3713. Nothing in 3713 authorizes the government to take property without due process of law. There is nothing in 3713 that says a government can impound cattle, based on an allegation of trespass, then proceed to sell the cattle without any opportunity, pre-impound or post-impound, to contest the amount of trespass damages, amount of penalties, or even the fact of trespass in the first instance.

Plaintiff previously analyzed the non-applicability of the cases previously cited by the

government discussing examples of impounding cattle in other instances. Docket 15, 4-6. And out of the Eighth Circuit there is Jones v. Freeman, 400 F2d 383, 389 (8th Cir. 1968) ("Even though the Secretary acted within his authority in promulgating the regulation, he has no right to claim sovereign immunity against a landowner who claims improper impoundment)."

The United States maintains there is no ultra vires conduct. Violation of due process under the Fifth Amendment is not permissible. Defendant is acting outside of his authority when he acts to deprive one of their due process rights. The impoundment, sale of cattle, and imposition of penalties, all without a hearing violates due process. Nothing requested by plaintiff would expend any money from the public treasury. All that he wants is his cattle back, a very simple task for the government to accomplish. Plaintiff has consistently taken the position in this case that defendant has exercised his powers in an unconstitutional manner.

The government insists that plaintiff has not established how the impoundment and sale regulations are unconstitutional. To the contrary, plaintiff has consistently set out the manner in which the regulations were unconstitutionally applied. In a related argument, government insists that plaintiff cannot claim that the penalties to be collected by the sale of the cattle are beyond his means when it was his conduct that lead to the impoundment. Whether or not plaintiff has been deprived of the range units in question is a decision that will be made by the OSTC, which determination the government is required to abide. And the government's obligation to act in a manner consistent with due process in impounding plaintiff's cattle, calculating damage and penalties, and selling the cattle does not evaporate because they believe plaintiff caused the problem himself, which certainly is not conceded.

Illogically, it is argued that sovereign immunity protects the government's actions in this

case because they impounded his cattle, infected them with Trichomoniasis, cannot get anyone to sell the cattle, and are racking up substantial impound fees. The government's predicament is of their own making. They cannot complain about the high price of their folly in this case and that sovereign immunity protects them. Plaintiff staunchly denies that he has continued to trespass after the hearings in this case. And finally, the relief being requested is from Cleve Her Many Horses. He took the action to impound the cattle; he can undo his wrong by returning the cattle.

D. EXHAUSTION

The doctrine of exhaustion is not a strict jurisdictional requirement, but a flexible concept which must be tailored to the circumstance of the case. South Dakota v. Andrus, 614 F2d 1190 (8th Cir. 1990); Vculek v. Yeutter, 754 F.Supp. 154 (D.N.D. 1990). Where an administrative appeal would be futile and little more than a formality, exhaustion is not required. Monson v. Drug Enforcement Agency, 522 F.Supp. 2d 1188 (D.N.D. 2007), aff'd. 589 F2d 952 (8th Cir. 2008). The futility exception applies where there is nothing to be gained other than agency decision adverse to plaintiff. Sioux Valley Hospital v. Bowen, 792 F2d 715 (8th Cir. 1986). If there is no provision for administrative appeal or review, there is nothing to exhaust, Schuck v. Montefiore Public School, 626 NW2d 698 (N.D. 2001), and exhaustion is not required where litigant's interest in judicial review outweighs the government's interests in the efficiency or administrative autonomy that exhaustion is designed to further. No exhaustion is required, where as here, there is a colorable constitutional claim, irreparable harm, and purposes of exhaustion would not be served. Fort Berthold Land and Livestock Ass'n. v. Anderson, 361 F.Supp. 2d 1045 (D.N.D. 2005). No exhaustion is required when administrative remedies are inadequate. Johnson v. Kolman, 412 NW2d 109 (S.D. 1987). Mordhorst v. Egert, 223 NW2d 501 (S.D.

1974), held that the factors to be considered in determining whether exhaustion is required are the extent of injury from exhaustion, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding on question of jurisdiction. Exhaustion is not required in this case because there are not provisions for appeal.

If recourse to an administrative remedy will be insufficient to fully and satisfactorily protect a constitutional right, exhaustion is not required. E.g., Public Utilities Com. v. United States, 355 U.S. 534 (1958); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

CONCLUSION

For all the above reasons, the impoundment and proposed sale of Temple's cattle are unconstitutional. The cattle should be returned to Temple pending the determination by the OSTC as to whether Temple is entitled to the range units at issue in this case. The BIA can continue its trespass administratively and if it appears Temple owes money the BIA can proceed to collect that according to established ways.

Dated November 13, 2015.

/s/ Terry L. Pechota

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CERTIFICATE OF SERVICE

I certify that on the above date I served Meghan Roche with a copy of the plaintiff's response to Government's renewed motion to dismiss by electronic transmission.

/s/ Terry L. Pechota

Terry L. Pechota