UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CURTIS TEMPLE, Plaintiff, v. 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; CLEVE HER MANY HORSES, Superintendent, Pine Ridge Agency, Bureau of Indian Affairs; LIONEL WESTON, Branch of Realty, Pine Ridge Agency, Bureau of Indian Affairs, Department of Interior, Defendants.	CIV. 15-5062-JLV **BRIEF IN SUPPORT OF UNITED STATES' PARTIAL MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND TO DISMISS DEFENDANTS AND SUBSTITUTE THE AGENCY AS PARTY DEFENDANT**

This Court gave Plaintiff leave to file a Second Amended Complaint to delete previously dismissed claims or claims to which the Court does not have subject matter jurisdiction. Even after being given a second chance to amend his complaint, Plaintiff still includes claims that were previously dismissed or ordered stricken from the prior amended complaint. These claims must be struck in their entirety in the interests of justice and efficiency. Next, Plaintiff raises claims that first must be presented to the agency for review and exhausted prior to the Court obtaining jurisdiction in this matter. Those claims should be dismissed for lack of subject matter jurisdiction. Moreover, Plaintiff received two

final agency decisions with appeal rights pertaining to the first and second impoundments, yet he never filed an administrative challenge to those final agency decisions within the time period afforded by regulation. Accordingly, Plaintiff's failure to exhaust his remedies within the period of time mandated by law provides a bar for the Court obtaining jurisdiction to hear Administrative Procedure Act ("APA") claims related to either impoundment.

Plaintiff also fails to state a claim for many of his allegations pleaded in the Second Amended Complaint, including any attempt to raise a claim for negligence in this action or to obtain money damages as relief when jurisdiction is based on the Administrative Procedure Act. Finally, the United States moves to substitute the agency or its *de facto* head as the sole party defendant and asks that the Court dismiss all remaining defendants because any claim against the named defendants are official capacity claims against the United States and any stated relief would be provided by the agency itself. Thus, multiple defendants are duplicative and unnecessary. Accordingly, if all of the requested claims or facts are dismissed or stricken as the United States requests, the only remaining claims would be Plaintiff's challenge to the constitutionality of the Bureau of Indian Affairs' trespass regulations and whether Plaintiff's due process rights were violated through the two impoundments at issue here.

FACTUAL BACKGROUND

The Court is familiar with the extensive factual background in this case. Defendants incorporate their prior factual recitations found at Docket 13 at 2-8; Docket 21; Docket 24; Docket 29; Docket 33; Docket 34-1; Docket 44; Docket

48. As to the more recent factual developments, Defendants refer the Court to Docket 81 at 2-5; Docket 100; Dockets 112-118; Docket 124. Additional facts will be added below, if relevant.

LEGAL STANDARD

A court may grant a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction and for a failure to state a claim. *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Pursuant to Fed. R. Civ. P. 12(b)(1), a plaintiff bears the burden of establishing by a preponderance of the evidence at the onset of a case that the court possesses subject matter jurisdiction. Federal courts have limited jurisdiction, and the law presumes that a cause of action lies outside its jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

In deciding a motion to dismiss for lack of subject matter jurisdiction, a court is not limited to the allegations set forth in the complaint, but may consider material outside of the pleadings in an effort to determine whether it has jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). The Court must first distinguish between a facial attack and a factual attack. *Id.* at 729 n.6. For a facial attack, allegations in the complaint are taken as true and disputed issues are construed and all reasonable inferences drawn in favor of the Complaint. However, under a factual attack, the non-moving party loses the benefit of such safeguards. *Id.*

If the court views the motion to dismiss under Rule 12(b)(6), however, then the court accepts as true the factual allegations in the complaint and draws all reasonable inferences in favor of the nonmoving party. *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 438 (8th Cir. 2013) (citation omitted). In addition to the complaint, the court may consider materials that are part of the public record and materials that may be embraced by the complaint. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

ARGUMENT

I. Failure to Exhaust Administrative Remedies

There are two distinct arguments related to Plaintiff's failure to exhaust his administrative remedies. The first is for claims that are raised in this Second Amended Complaint, but have never been presented to the agency for its consideration. There, Plaintiff failed to exhaust his administrative remedies prior to haling the Bureau of Indian Affairs into federal court. Next, there are certain claims for which Plaintiff received two final agency decisions that contained appeal rights, which he did not appeal within the timeframe afforded under

relevant law. Accordingly, those claims are now barred because the Court cannot obtain subject matter jurisdiction to review them.

A. Claims that Have Yet to be Exhausted

Even though Plaintiff was given leave to amend his complaint to raise claims that have accrued since the initial impoundment and TRO hearing, Plaintiff brought some claims in federal court before the agency had a chance to rule or to allow the administrative process to conclude. Accordingly, 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). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell* ("Mitchell II"), 463 U.S. 206, 212 (1983). "Plaintiffs bear the burden of establishing the existence of subject matter jurisdiction." *Sac & Fox Tribe of Miss. in Iowa v. Bear*, 258 F. Supp. 2d 938, 940 (N.D. Iowa 2003) (citing *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990)). Plaintiffs also bear the burden of showing an express waiver of sovereign immunity. *VS Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

"The APA waives sovereign immunity for actions 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) (citation omitted). While federal district courts may eventually obtain subject matter jurisdiction under the APA

to review agency actions once finality has occurred, "the APA may not be used as an independent grant of subject matter jurisdiction to review agency actions." *Crow Creek Sioux Tribe v. Bureau of Indian Affairs*, 463 F. Supp. 2d 964, 968 (D.S.D. 2006) (citations omitted). "It is well settled that administrative remedies must be fully exhausted before jurisdiction vests in the federal courts." *Edwards v. Dep't of the Army*, 708 F.2d 1344, 1346 (8th Cir. 1983) (citations omitted).

1. Challenge to the BIA's Interpretation of "Public Sale"

The cattle impounded in August of 2015 were sold via public sealed bid in April of 2016. For the cattle impounded in June of 2016, a sale via public sealed bids was planned, but no bids were received. Plaintiff ultimately redeemed his cattle in November of 2016 (Docket 118 ¶¶ 9-11), so no sale ever took place for the cattle impounded in June of 2016. Plaintiff challenges the manner in which the agency conducted or attempted to conduct the two sales, in that he claims the processes utilized were not a "public sale" under the relevant regulations based on his understanding of what a public sale usually is in South Dakota. Docket 152 ¶¶ 26, 35, 46.

Much like the Court's conclusion that the BIA should be able to review a challenge to its penalties, damages, and cost calculation under the trespass regulations, the agency should be given the ability to determine if selling the cattle via sealed bids was a proper interpretation of a "public sale" as described in BIA regulations prior to involvement from a court. Exhaustion is favored because it allows the agencies (and those reviewing bodies like the Interior Board of Indian Appeals) who are familiar with both the subject matter of the challenge

and the regulations, the opportunity to opine on the meaning of their own regulations. As such, the agency should first have the ability to review the claim prior to the Court declaring what it believes the regulation means or requires.

2. Survey Issues

Plaintiff states the BIA failed to conduct a survey of his allotted or individually-owned lands that would allow him to graze his own cattle on fee land that belongs to him. He further argues that this conduct prohibits him from grazing cattle on his own land and deprives him of the use of improvements[1] upon that land. Docket 152 ¶ 47, Eleventh Claim. Plaintiff has established no legal right to have the BIA conduct a survey of his land and fails to bring forth a source of jurisdiction for his claim or otherwise provide sufficient information for the Court to find in his favor.

Moreover, as much of this argument also alleges that the BIA considers Plaintiff's land to be part of the Range Management Program, this issue is interrelated to pre-impoundment issues and should be barred by the tribal exhaustion doctrine and the law of the case as outlined in *infra* section II.A.

[1] Plaintiff fails to specify where the improvements are located. Improvements on permitted land may only be made if the permit allows for improvements. 25 C.F.R. § 166.316. For improvements that remain on the land after the permit terminates, the permittee may forfeit the right to remove the improvements, and the improvements may become the property of the Indian landowner. 25 C.F.R. § 166.317.

B. Failure to Timely Exhaust Administrative Remedies under 43 C.F.R. § 4.314 Results in Lack of Subject Matter Jurisdiction.

In previous briefing on this matter, the United States argued that the Court lacked subject matter jurisdiction over the two impoundments and proposed sales because Plaintiff had yet to exhaust his administrative remedies. However, as of February of 2017, Plaintiff failed to appeal two final agency decisions, one related to the August of 2015 impoundment and the other related to the June of 2016 impoundment. This failure is fatal to Plaintiff's claim because he failed to exhaust his administrative remedies within the timeframe afforded by law.

Plaintiff did not appeal the BIA's September 28, 2016, decision letter making a finding of trespass and final assessment of damages, costs, and penalties associated with the August of 2015 trespass and impoundment even though this letter included appeal rights. The time to appeal has run, and the September 28, 2016, decision is final for the Department of the Interior. Next, Plaintiff did not appeal the BIA's January 3, 2017, decision letter making a finding of trespass and final assessment of damages, costs, and penalties associated with the June of 2016 trespass and impoundment even though this letter included appeal rights. The time to appeal has run, and the January 3, 2017, decision is final for the Department of the Interior.

Due to Plaintiff's failure to exhaust his administrative remedies[2] as required pursuant to 43 C.F.R. § 4.314 and 25 C.F.R. § 2.6, the Court cannot

[2] Plaintiff has demonstrated that he knows how to utilize the process of challenging adverse decisions to the Regional Director and, ultimately, to the Interior Board of Indian Appeals ("IBIA"). Plaintiff currently has two IBIA appeals

obtain subject matter jurisdiction to review APA challenges to the findings of trespass, arguments pertaining to the impropriety of the impoundments, or challenges to the amount of the damages, costs, and penalties associated with each trespass and impoundment. Accordingly, Plaintiff's attempt to reassert those claims in his Second Amended Complaint should be rejected, and the claims should be dismissed on the merits.

1. September 28, 2016, Letter with Appeal Rights[3]

Once the sale of Plaintiff's cattle impounded in August of 2015 from Range Units 169 and P501 was concluded and the BIA determined that the proceeds from the sale of Plaintiff's cattle were going to be distributed to a known lienholder making a claim to those proceeds, the impoundment process was

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pending (now consolidated) where he is challenging decisions issued by the BIA Regional Director on March 14, 2016, and July 18, 2016. Those decisions dismissed Plaintiff's appeals due to lack of ripeness and stated that the impoundments and pending sales of the livestock are not administratively appealable and that, consistent with the Court's Order of February 19, 2016, when the BIA issued a finding of trespass and final assessment, Plaintiff would be able to challenge the calculation of damages, costs, and penalties for the redemption amount. By decision letters dated September 28, 2016, and January 3, 2017, the BIA notified Plaintiff of the BIA's finding of trespass and final assessment for each of the impoundments and gave Plaintiff appeal rights to challenge the finding of trespass and the calculation of the damages, costs and penalties. As is asserted in this Brief, Plaintiff failed to challenge the decision letters of September 28, 2016, or January 3, 2017. It is also worth noting that Plaintiff previously filed an earlier appeal of the BIA's decision denying a challenge to the allocation of grazing permits, which was dismissed after he voluntarily withdrew that appeal. *Temple v. Great Plains Regional Director*, 60 IBIA 296 (2015).

[3] This issue was not raised in the United States' second motion to dismiss (Docket 94) because the appeal timeframe given in the September 28, 2016, letter had not yet run at the time when Defendants filed their motion to dismiss on October 24, 2016. It was raised in a subsequent supplement to the record. Dockets 116-118.

deemed to be concluded. Docket 118 (Declaration of Tim LaPointe) ¶¶ 2-3. Accordingly, on September 28, 2016, the BIA sent a decision letter to Plaintiff that included the "final damages, costs, and penalties assessed by the BIA" from the impoundment occurring on August 19, 2015, and for Plaintiff's "trespass of livestock on Indian land[.]" Docket 118-1 (September 28, 2016 Final Decision Letter) at 1.

This decision letter included appeal rights. *Id.* at 4. It instructed how Plaintiff could appeal the decision, where and when the notice of appeal must be filed, and what the notice of appeal had to include. *Id.* The decision letter concluded by stating "[i]f no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time will be granted for filing a notice of appeal." *Id.*

The letter was received by Plaintiff through his attorney on September 30, 2016. *See* Docket 118-1 at 5. Plaintiff did not challenge this decision letter by appealing it to the Regional Director at all, let alone within 30 days of receipt. Docket 118 ¶ 4. As Plaintiff did not pursue an administrative challenge to the BIA's finding of trespass, the impoundment, and assessment of damages, costs, and penalties, the September 28, 2016, letter is the final decision of the Department. *See South Dakota v. U.S. Dep't of Interior*, 775 F. Supp. 2d 1129, 1140 (D.S.D. 2011) (citing 25 C.F.R. § 2.6(b) ("Decisions made by officials of the [BIA] shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.")).

United States Department of the Interior regulations provide an administrative remedy that Plaintiff had to pursue in support of his belief that the Superintendent's trespass finding and assessment of damages, costs, and penalties were incorrect. This procedure is not optional. With his knowing lack of appeal of the September 28, 2016, decision, Plaintiff waived his ability to challenge the BIA decision finding him in trespass and the assessment of damages, costs, and penalties pertaining to the August of 2015 trespass and impoundment here in federal court.

While the Court previously found that it had subject matter jurisdiction over the first impoundment due to the immediate threat of harm of sale (Docket 55 at 23), it also found that it did not have subject matter jurisdiction over the related calculation of damages because Plaintiff had not yet attempted to exhaust his administrative remedies and the agency should have had the ability to hear Plaintiff's complaints and correct its damages calculations, if appropriate. Docket 55 at 15-16. The Court noted at that time that "Mr. Temple also retains the ability to pursue an administrative appeal of the BIA's monetary levies after the livestock are redeemed or sold." *Id.* (citing 25 C.F.R. § 16.810). Since that determination, Plaintiff has failed to exhaust within the period of time required by law.

This failure is a shortcoming that cannot be excused when 25 C.F.R. § 2.6(a) and 43 C.F.R. § 4.314 require Plaintiff to exhaust his administrative remedies to obtain subject matter jurisdiction in federal court under 5 U.S.C. § 704. *See* 43 C.F.R. § 4.314 ("No decisions of a[]. . . BIA official that at the time of

its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal by order of the Board."); 25 C.F.R. § 2.6(a) ("Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."); *Klaudt v. United States Dep't of Interior*, 990 F.2d 409, 411-12 (8th Cir. 1993) ("The federal regulations provide that administrative procedures must be followed before seeking relief in the court system. There are clearly detailed administrative processes and remedies set forth in 25 C.F.R. Part 2 and 43 C.F.R. Part 4.") (emphasis added); *Crow Creek Sioux Tribe v. Bureau of Indian Affairs*, 463 F. Supp. 2d 964, 970 (D.S.D. 2006) (noting "[t]he jurisdictional requirement that the Court can only review final agency action is clear" when plaintiff failed to appeal the BIA's decision to the Regional Director, which would have been subject to appeal to the IBIA).

Judge Piersol expressly discussed the exhaustion requirement in 43 C.F.R. § 4.314 in *Estate of Sauser v. United States*, 171 F. Supp. 3d 947 (D.S.D. 2016). In *Sauser*, the Court noted that the APA itself does not require that a litigant comply with the exhaustion doctrine. Instead, exhaustion is only necessary when required "by an applicable statute or agency regulation." *Id.* at 954 (citation omitted). In *Sauser*, Judge Piersol found that "43 C.F.R. § 4.314 requires Plaintiffs to exhaust their administrative remedies." *Id.* In this matter, 43 C.F.R. § 4.314 also applies and requires exhaustion for subject matter jurisdiction to vest in this Court.

Plaintiff also cannot claim surprise at this result when he had additional notice that he must exhaust his administrative remedies pertaining to the finding of trespass and assessment of damages, costs, and penalties. In its February 19, 2016, order, the Court stated that it was dismissing without prejudice Plaintiff's challenge to the BIA's calculation of the damages, costs, and penalties related to the trespass because Plaintiff had not exhausted his administrative remedies. Then the Court noted that Temple "retains the ability to pursue an administrative appeal of the BIA's monetary levies after the livestock are redeemed or sold." Docket 55 at 16.

Now, the livestock were sold and the proceeds were distributed, but Plaintiff did not utilize his right to pursue an administrative appeal. Accordingly, he has waived his ability to challenge whether he was in trespass or the amount of the debt owed. *See Edwards*, 708 F.2d at 1346 ("It is well settled that administrative remedies must be fully exhausted before jurisdiction vests in the federal courts."); *Crow Creek Sioux Tribe*, 463 F. Supp. 2d at 970 (stating "an appeal of the BIA's final decision and an exhaustion of administrative remedies would be required before judicial review is available.").

Based on his failure to exhaust, Temple cannot challenge the trespass[4] finding or related claims (First Claim, Docket 152 ¶ 37; Second Claim, Docket 152 ¶ 38; Third Claim, Docket 152 ¶ 39; Fourth Claim, Docket 152 ¶ 40; Seventh Claim, Docket 152 ¶ 43); or the calculation of the redemption amount pertaining

[4] To the extent Plaintiff raises tort claims in his Second Amended Complaint, this lawsuit is not the proper forum, and he must raise those claims in the tort action, Civ. 17-5075. *See infra* section III.

to the first impoundment (Fifth Claim, Docket 152 ¶ 41; Sixth Claim, Docket 152 ¶ 42; Ninth Claim, Docket 152 ¶ 45).

2. January 3, 2017, Letter with Appeal Rights

The BIA impounded a second group of Plaintiff's trespassing cattle from Range Units 169 and P501 in June of 2016. Docket 118 (LaPointe Declaration) ¶ 5. Plaintiff redeemed these cattle on November 16, 2016. *Id.* The redemption signified the conclusion of the impoundment process; thus, the BIA sent a decision letter to Plaintiff through his attorney dated January 3, 2017. Docket 118-2. The decision letter made a finding of trespass and assessed relevant damages, costs, and penalties. The decision letter stated it provided the BIA's "final assessment of damages, penalties, and costs payable by your client, Mr. Curtis Temple, for the continuing trespass of livestock on Indian land, specifically for the livestock that were impounded on June 21, 2016." *Id.* at 1.

This decision letter included appeal rights. *Id.* at 4. It instructed how Plaintiff could appeal the decision, where and when the notice of appeal must be filed, and what the notice of appeal had to include. *Id.* The decision letter concluded by stating "[i]f no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time will be granted for filing a notice of appeal." *Id.*

The letter was received by Plaintiff through his attorney on January 5, 2017. *See* Docket 118-2 at 6 (Certified Mail Return Receipt, LaPointe Declaration). Plaintiff did not challenge this decision by appealing it to the Regional Director. Docket 118 ¶ 7. As Plaintiff did not appeal this decision within

the timeframe required, he has waived his ability to challenge the BIA's finding of trespass, the impoundment, and the assessment of damages, penalties, and costs pertaining to the June of 2016 trespass and impoundment here in federal court.

Like for the first finding of trespass and damage calculation, Plaintiff also waived his ability to challenge the BIA's finding of trespass or related claims (Docket 152 at ¶¶ 27, 29; Docket 152 ¶ 43) and assessment of damages, penalties, and costs (Docket 152 ¶ 32; Ninth Claim, Docket 152 ¶ 45) associated with the second impoundment.

While Defendants have previously requested that any challenge to the finding of trespass or the damages, costs, and penalties be dismissed because Plaintiff had yet to exhaust his administrative remedies, now Plaintiff should be barred from challenging the finding of trespass or these redemption calculations when Plaintiff failed to appeal those decisions within the time period mandated by clearly established law.

II. Motion to Strike/Dismiss Claims Previously Dismissed

In his Second Amended Complaint, Plaintiff realleges a number of issues that the Court previously dismissed (and ordered stricken again in August of 2018) because the doctrine of tribal exhaustion applied or because the claims were not yet ripe for review when Plaintiff did not exhaust his administrative remedies. Those issues should be stricken or dismissed again from the Second Amended Complaint based on the law of the case doctrine or for the previous reasons stated by the Court.

As this Court stated in its August 29, 2018, order "[u]nder the law-of-the-case doctrine, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Docket 147 at 7 (quoting *In re Tri-State Fin., LLC*, 885 F.3d 528, 533 (8th Cir. 2018) (quoting *Alexander v. Jensen-Carter*, 711 F.3d 905, 909 (8th Cir. 2013))) (internal quotations omitted). The Court also stated that the law of the case doctrine "prevents the relitigation of settled issues in a case, thus protecting the settled expectation of the parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Id.* at 7-8 (quoting *Sprint Commc'ns Co, L.P. v. Lozier*, 860 F.3d 1052, 1056 (8th Cir. 2017)) (quotations and citations omitted). Finally, the Court concluded that its prior February 2016 order was the law of the case and governs these issues in later stages of this case. *Id.* at 8 (citing *In re Tri-State*, 885 F.3d at 533). Those later stages included amended pleadings and any trial. *Id.*

Thus, the Court already made conclusive findings on Plaintiff's originally raised claims pertaining to allocation decisions, bidding preferences, removal of land from the Range Unit Program, or the BIA's execution of the Oglala Sioux Tribe's grazing/leasing decisions related to Range Units 169, 501, 514, and 505. This Court stated it "does not have jurisdiction to adjudicate Mr. Temple's claims stemming from the alleged pre-impoundment conduct of Mr. Her Many Horses relating to the allocation of tribal grazing permits." Docket 55 at 14. Then the Court provided a thorough recitation of the tribal exhaustion doctrine. The Court stated that resolution of Plaintiff's grazing permit allegations required

interpreting the Oglala Sioux Tribal Constitution and related ordinances. The Court also noted that Plaintiff's claims pertaining to how the grazing permits were awarded or allocated were asserted in both Temple's tribal court complaint and his original federal complaint. This remains true. Nothing has changed that would provide a different result. Accordingly, the Court's prior finding that "the doctrine of tribal exhaustion applies in this case as the resolution of Mr. Temple's pre-impoundment allegations hinge on issues of tribal law and governance and because Mr. Temple's claims are pending in Tribal Court[,]" is still applicable and is the law of the case. *See* Docket 55 at 15.

Moreover, the Court stated in its August 2018 order that "[b]ecause plaintiff does not provide sufficient and new facts to the contrary, the February 2016 order prohibits plaintiff from pursuing some of the causes of action in the amended complaint relating to pre-impoundment or the BIA's assessment and damage calculation." Docket 147 at 8. The Court also reiterated that the amending of a complaint was to "take into account developments in the case since the original complaint was filed[,]" but was "not an invitation to completely reshape the case and multiply the issues presented." *Id.*

A. Pre-Impoundment Claims Alleged Again in the Second Amended Complaint

This prohibition on repleading pre-impoundment claims would include Plaintiff's claim in his Second Amended Complaint that his allotted lands are not part of the Tribal Range Management Program. This issue has appeared in various ways throughout the litigation. The most frequent version of this claim stems from Plaintiff's claim that he notified the Superintendent that his land was

not part of the Range Management Program, that he had not filed a form 5-5525, that the BIA had not provided 180 days' notice of Allocation, or that he had removed his land from the Range Management Program in writing. These claims have appeared in the original Complaint (Docket 1 ¶¶ 9, 22, 29), the Amended Complaint (Docket 89 ¶¶ 12, 25, 32, 37, 42, 61, 72, 83b), and now appear in the Second Amended Complaint, but they are all variations on the same claim. This argument is related to Plaintiff's ability to graze on Range Units 169 and P501 without a valid permit and amount to pre-impoundment conduct that was dismissed in the Court's February of 2016 order. Docket 55 at 14 (noting the Court did not have jurisdiction over pre-impoundment claims because "Mr. Temple's allegations surrounding the tribe's grazing permit allocation process underlie his repudiation of the BIA's determination that his cattle were in trespass. The resolution of Mr. Temple's grazing permit allegations requires" interpretation of [tribal law].").

Accordingly, the claims found in the Second Amended Complaint in paragraphs 12 (stating Plaintiff's land is not part of Tribal Range Management Program), 13 (discussing the 2013 Tribal bidding process for Range Units 169, P501, 505 and P514), 15 (discussing how to remove land from the Range Management Program), 16 (discussing the 180 days' notice for allocation), 17 (Plaintiff's lands are not part of the Range Management Program), 18 (Plaintiff can graze his cattle without a BIA or Tribal permit because his lands are not part of the Range Management Program), and 47 (treatment of Plaintiff's land as being part of the Range Management Program and prohibiting him from grazing cattle

on his own land is unlawful) should be dismissed or stricken based on law of the case.

B. Redemption Amounts/BIA's Calculation of Damages Alleged Again in the Second Amended Complaint

The Court previously determined that it does not have jurisdiction to hear Plaintiff's causes of action that challenge the redemption amounts or the BIA's calculations for its assessment of penalties, costs, and damages related to impoundment and trespass. The Court found this to be "precisely the type of error the agency should be given an opportunity to correct" and that these issues "are not ripe for judicial review as he has not exhausted his administrative remedies." Docket 55 at 15.

Thus, Plaintiff's challenge to the assessment of damages, costs, and penalties for both the first and second[5] impoundments (now located at Docket 152 at ¶ 23; Docket 152 ¶ 42, Sixth Claim for Relief; Docket 152 at ¶ 45, Ninth Claim for Relief; and Docket 152, Prayer For Relief ¶ D) are not properly before the Court and should be stricken or dismissed from the Second Amended Complaint. This is in addition to the United States' argument that challenges to the BIA's redemption amount calculations are forever barred because Plaintiff failed to timely exhaust his administrative remedies.

[5] The assessment of trespass damages, costs, and penalties for the June 2016 impoundment was not raised in the original complaint, but the Court's finding that it does not have jurisdiction over a challenge to redemption amounts should encompass this second claim and warrant its dismissal.

III. Lack of Jurisdiction over Negligence Assertions or Claims for Money Damages

Plaintiff's Second Amended Complaint appears to focus on whether the BIA's conduct in impounding his cattle was arbitrary and capricious and whether his due process rights were violated in the two impoundment processes. There also is a challenge to the constitutionality of the trespass regulations. The Court would not, however, have jurisdiction over claims of negligence or claims for money damages under the Administrative Procedure Act. Any negligence claims or attempts to regain money damages should be rejected or dismissed in this action.

The United States only waives its sovereign immunity when claims of negligence are properly made against the United States or its employees through the Federal Tort Claims Act ("FTCA"), which is the exclusive source of jurisdiction for such claims. *See* 28 U.S.C. §§ 1346(b), 2674; *Mader v. United States*, 654 F.3d 794, 797 (8th Cir. 2011). The FTCA first requires presentment of the claim to the agency and exhaustion of administrative remedies prior to obtaining subject matter jurisdiction in federal court. 28 U.S.C. § 2675(a); *McNeil v. United States,* 508 U.S. 106 (1993). There is no dispute that at the time Plaintiff filed this original action, he had not presented his tort claim to the agency and exhausted his administrative remedies as required by the FTCA. There also is no dispute that Plaintiff has a viable, but albeit stayed, FTCA matter pertaining to these facts in a separate action. *See* Civ. 17-5075-JLV.

Thus, Plaintiff's references to negligence appearing in this Second Amended Complaint should be stricken or, at the least, ignored. This would

include, but is not limited to: Plaintiff's Third Claim for Relief, Docket 152 ¶ 39 (claiming unlawful transport of cattle across state lines); Plaintiff's Fourth Claim for Relief, Docket 152 ¶ 40 (arguing Defendants negligently intermixed and comingled Plaintiff's cattle with cattle belonging to others); and Fifth Claim for relief, Docket 152 ¶ 41 (referring to negligently increasing costs of the impoundment).

Next, Plaintiff requested in his prayer for relief an "[a]ward of judgment for the value of the cattle impounded and amounts paid for redemption of other livestock." Docket 152 ¶ F. Yet, the clear language of the Administrative Procedure Act provides that sovereign immunity is waived only for an action "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority[.]" 5 U.S.C. § 702 (emphasis added). Further, the Supreme Court said "suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002).

Furthermore, this Court has already found that the United States' sovereign immunity was waived under the Administrative Procedure Act, more specifically section 702. Docket 55 at 22. The Court noted that the waiver of the United States' sovereign immunity was not dependent on "the application of the procedures and review standards of the APA[,]" but "on the suit against the

government being one for non-monetary relief." Docket 55 at 22 (quoting *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 475 (8th Cir. 1988)).

As the Court has already found that this case is one in which the relief is solely non-monetary, Plaintiff's attempt at damages should be dismissed or rejected.

IV. Dismissal of Parties and Substitution of Agency

Plaintiff has named four individuals in this Second Amended Complaint. All four are named in their official capacity in the caption. Plaintiff's claims attempt to reach and challenge agency conduct, and the individuals are only sued in their official[6] capacity, thus, there is no reason for their inclusion in this lawsuit. *See Gomillion v. Univ. of Ark. Bd. of Trs.*, Civ. 14-281, 2014 WL 504732, at *1 (E.D. Ark. Feb. 7, 2014) (declining to allow plaintiff to amend his complaint and add individual employees of named defendant because they would be "redundant" when employees' employer was already a defendant).

In particular, Plaintiff challenges the constitutionality of BIA regulations, alleges violations of due process, and claims that certain agency conduct was arbitrary and capricious. Those challenges, as pleaded, are not cognizable

[6] The Eighth Circuit Court of Appeals has expressed that a plaintiff attempting to sue public officials in both their official and individual capacities or just in their individual capacities must clearly state as much in the complaint. *See Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1233 (N.D. Iowa 1998) (collecting circuit cases). When a plaintiff does not specify, it is presumed that the individual is sued in his or her official capacity only. *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 619 (8th Cir. 1995); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989).

against individuals. A government official cannot be sued in his or her individual capacity when the relief requested is equitable.[7]

Accordingly, the only proper defendant here would be the United States or the agency itself (or its *de facto* head); thus, Defendants request that substitution occur and all other defendants be dismissed. *See Eagle v. Morgan*, 88 F.3d 620, 629 n.5 (8th Cir. 1996) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (stating that a suit against an employee in his official capacity is against the official's office).

CONCLUSION

For the reasons stated above, the majority of Plaintiff's claims pleaded in the Second Amended Complaint should be dismissed. All defendants should be dismissed, and the United States or the agency (or its *de facto* head) should be

[7] *See, e.g.*, *Kirby v. City of Elizabeth*, 388 F.3d 440, 452 n.10 (4th Cir. 2004) (concluding that injunctive relief can only be awarded against a government employee in his or her official capacity); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) ("[T]he declaratory and injunctive relief Wolfe seeks is only available in an official capacity suit."); *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993) ("[S]uch equitable relief [reinstatement] could be obtained against Relin only in his official, not his individual, capacity."); *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990) ("[T]he injunctive relief sought and won by Scott can be obtained from the defendants only in their official capacity as commissioners."); *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) ("[T]he equitable relief Feit requests - a declaration that the policy is unconstitutional and an injunction barring the defendants from implementing the policy in the future - can be obtained only from the defendants in their official capacities, not as private individuals."); *see also Leyland v. Edwards*, 797 F. Supp. 2d 7, 12 (D.D.C. 2011); *Arocho v. Nafziger*, 367 Fed. App'x 942, 948 n.5 (10th Cir. 2010); *Segal v. C.I.R.*, 177 Fed. App'x 29, at *1 (11th Cir. 2006); *Cmty. Mental Health Servs. v. Mental Health & Recovery Bd.*, 150 Fed. App'x 389, 401 (6th Cir. 2005).

substituted when the claims that remain are challenging agency conduct or the promulgation of agency rules, and relief could only be afforded by the Government. Finally, Defendants contemporaneously file an answer defending all claims that may survive this partial motion to dismiss.

Dated this 30th day of November, 2018.

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