

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DANIEL D. HAWK,

Plaintiff,

Case No. 21-cv-1301

v.

REBECCA BURR and
DIANE BAKER, SUPERINTENDENT,
U.S. DOI BUREAU OF INDIAN AFFAIRS,

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANT DIANE BAKER'S
MOTION TO DISMISS THE COMPLAINT**

Plaintiff Daniel Hawk filed this lawsuit against Bureau of Indian Affairs (“BIA”) Superintendent Diane Baker in response to her October 29, 2021, Notice of Trespass letter notifying Hawk that he was trespassing on Indian land held in trust by the United States. *See* ECF Doc. 1-1. The BIA’s notice advised Hawk that his failure to vacate the premises would result in further action to evict him. *Id.* Hawk, however, does not allege that the BIA has taken any action against him beyond sending him this preliminary notice of trespass.¹ Therefore, there is no legal basis for a lawsuit against Baker, because the BIA has not taken any final agency action subject to judicial review under the Administrative Procedures Act, the only potential source for federal court jurisdiction. Accordingly, Hawk’s claims are not ripe for adjudication, depriving the Court of subject matter jurisdiction over his claims. Moreover, Hawk’s complaint fails to state a plausible claim for relief and is therefore subject to dismissal under Fed. R. Civ. P. 12(b)(6).

¹ As set forth in the attached Declaration of Diane Baker, as of the date of this filing, the BIA has not taken additional action against Hawk to pursue his eviction. *See* Baker Decl. ¶ 9. Of course, that could occur in the future, but this possibility does not impact Baker’s jurisdictional argument.

I. Background

On November 12, 2021, plaintiff Daniel D. Hawk, proceeding pro se, filed this action against Diane Baker, acting in her official capacity as an employee of the BIA, and Rebecca Burr, a private citizen.² According to the complaint, Burr lives next door to property held by Hawk's great aunt, Mae Sarah Jordan, which Hawk admits he is occupying. *See* ECF Doc. 1, at pp. 2-3.³ BIA Records show that this property is a parcel of trust land located on the Stockbridge Munsee Indian Reservation. *See* Baker Decl. ¶ 4. Trust lands are lands owned by the United States but held in trust for the beneficial use of an individual or an Indian Tribe. *See* 25 C.F.R. § 162.003.

In August 2021, Burr sought an injunction against Hawk in tribal court, alleging that Hawk was trespassing on Burr's neighboring property, and harassing her. *See Rebecca Burr v. Daniel Hawk a/k/a Holly Hawk and Daniel Kosowski*, Case No. 2021-RO-0003 (Stockbridge-Munsee Tribal Court). A file-stamped copy of the tribal court's decision and related pleadings is attached as Exhibit A.⁴ On August 19, 2021, the tribal court dismissed the action without prejudice, ruling

² Although Hawk alleges that "Burr works for Stockbridge Munsee Community," (see ECF Doc. 1, at p.2), it is apparent Hawk is complaining about actions Burr allegedly took in her private capacity. Based on the nature of the allegations and relief requested, Baker assumes that Hawk is suing Baker in her official capacity only.

³ BIA records, however, show that neither Ms. Jordan nor Mr. Hawk are current interest holders in the tract. Rather, the trust land parcel Hawk is occupying is held by the United States in trust for 20 individuals, 3 estates, and the Stockbridge Munsee Community, a federally recognized Tribe. *See* Baker Decl. ¶¶ 5-6.

⁴ In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may consider matters outside the complaint to determine whether it has jurisdiction. *See Crawford v. United States*, 796 F.2d 924, 928-30 (7th Cir. 1986); *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir.1993) (citations omitted) (courts may "properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction.").

that Burr failed to provide sufficient evidence to support her claims. Exhibit A at pp. 1-2. However, the Court noted the following in dicta:

Accompanying the request is a Letter to Superintendent Diane Baker at the Bureau of Indian Affairs, Great Lakes Agency, In the Letter, Tribal President Shannon Holsey request assistance by the BIA to determine the status of Daniel Hawk's presence on the trust land located at W11575 Town Hall Road. However, to date, the BIA has not provided a response, and such response is not guaranteed. However, the Court acknowledges that issue may be appropriate for filing in the future, pending a determination by BIA, and dismisses the present action without prejudice.

Id. at p. 2. Four days later, on August 23, 2021, Burr sought a similar injunction against Hawk in the Circuit Court for Shawano County, Wisconsin. *See Rebecca Burr v. Daniel Hawk*, Case No. 2021-cv-143 (Shawano County Circuit Court). A certified copy of the relevant pleadings in that case is attached as Exhibit B. In her petition for a harassment injunction, Burr claimed that Hawk was “camping out next door,” that she could hear gunshots from the campsite, and that she was in fear for her life. Exhibit B, at p. 1. On August 25, 2021, the court dismissed Burr's petition on res judicata grounds, finding that the matter had already been decided in tribal court, and referring Burr back to tribal court. Exhibit B.

About two months later, on October 29, 2021, at the request of the Stockbridge-Munsee Tribe, the BIA issued a “Notice of Trespass—Order to Cease and Desist” to Hawk. *See* ECF Doc. No. 1-1, at pp. 1-2. The Notice states in part that:

This office has received notice that you are occupying property on a parcel of land in trust status with the United States that is located at W11575 Town Hall Road, Gresham, Wisconsin. According to our records, you are not a co-owner, nor is there a lease to you approved by our office, to the above referenced Trust Land, and without ownership or title, or a lease as discussed above, you do not have authority to place or maintain any personal property on the trust allotment.

Id. at p. 1. The Notice further advised Hawk that the unauthorized possession or use of trust land is a trespass, and that the BIA “may take action to recover possession, including eviction, on behalf of Indian landowners . . .” *Id.* The Notice advised Hawk that he had thirty days to vacate the

premises and remove his personal property, at which time the BIA would follow up with Hawk to ensure that he had done so. *Id.* Although that thirty-day period reflected in Notice of Trespass has elapsed, the BIA has yet to institute the legal proceedings necessary to evict Hawk or to remove his personal property. *See Baker Decl.* ¶¶ 9-10. In fact, in order to avail itself of the legal remedies available to it, BIA will need to file an eviction complaint against Hawk, at which time he will have an opportunity for judicial review. *See Baker Decl.* ¶ 10

In the present lawsuit, Hawk alleges that after Burr was unsuccessful in her two injunction actions, she complained to Baker, causing her to issue the Notice of Trespass letter to Hawk. *Id.* at p. 2.⁵ Hawk alleges, *inter alia*, that the BIA's trespass notice is an attempt to "circumvent" the tribal court's rulings on Burr's injunction actions. *See ECF Doc. 1* at pp. 1-2. Hawk maintains that the tribal court's decision bars the BIA from attempting to evict him from the trust property. *Id.* at p. 4. Hawk therefore requests that the Court "honor the Stockbridge Munsee Tribal Court Decision [and] Order the Defendants to Cease and Desist from attempting to evict the Plaintiff." *Id.* Hawk further requests that "if this Court feels the Notice of Trespass concomitant Order to Cease and Desist was done to harass the Plaintiff that this Court might order reasonable costs and or punitive damages award to Plaintiff. . . ." *Id.*

II. Argument

A. Hawk's potential claims against the BIA are not ripe for adjudication; therefore, this Court lacks subject matter jurisdiction over this case.

Given the preliminary status of the trespass issue concerning Hawk, the case is not currently ripe for adjudication, depriving this Court of subject matter jurisdiction. On a Rule 12 (b)(1) motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the obligation to

⁵ Baker denies that she had any direct communication with Burr. Rather, as reflected in the tribal court decision, Baker issued her trespass notice at the request of the Stockbridge-Munsee Tribe. *See Exhibit A*, at p. 2.

establish jurisdiction by competent proof, and the court may properly look to evidence beyond the pleadings in this inquiry. *See Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir.1979) (“the party invoking jurisdiction has the burden of supporting the allegations of jurisdictional facts by competent proof.”); *see e.g. Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir.1993) (citations omitted) (courts may “properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction.”). When presented with evidence beyond the pleadings, the court may weigh the evidence in order to satisfy itself that jurisdiction exists; as such, disputes over material facts will not preclude the court from deciding jurisdictional issues. *Crawford v. United States*, 796 F.2d 924, 928-30 (7th Cir. 1986). There are no specific guidelines for evidentiary hearings on jurisdiction—“any rational mode of inquiry will do.” *Crawford*, 796 F.2d at 929. A district court may look to the procedures in Rule 56 as guidance in treating the motion as a loose “form of trial by affidavit” as long as the decision is based on jurisdiction and not a decision on whether sufficient evidence exists to proceed to a trial on the merits. *Id.* at 928–29.

Hawk does not plead a jurisdictional predicate for his complaint—beyond his citation to 28 U.S.C. § 1331 (federal question jurisdiction). Absent the Government’s waiver of sovereign immunity, that immunity “shields the Federal Government and its agencies from suit.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Here, Hawk has not identified any source of waiver for the BIA’s sovereign immunity; as such, this case may be dismissed on this basis alone.

A potential source of waiver might be the Administrative Procedures Act (“APA”), which waives the United States’ sovereign immunity for claims seeking declaratory or injunctive relief from an agency action. *See* 5 U.S.C. §§ 702-706. The APA, however, requires the existence of a “final agency action” before a plaintiff may seek judicial review of an agency action. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (requirement for final agency action is

jurisdictional). On the face of the complaint, the BIA's actions to date are preliminary in nature, and a number of additional steps are required before the BIA can evict Hawk and the agency actions can be considered final. Therefore, Hawk's claims are not ripe for APA review.

A federal court may not act in the absence of an actual present controversy between the parties. U.S. Constitution Art. III, § 2. "Ripeness is a doctrine which courts use to enforce prudential limitations upon their jurisdiction." *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247, 1261 (7th Cir. 1983). The two major aspects of the doctrine obligate the court to evaluate both "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136 149 (1967). With respect to federal agencies, "ripeness is a justiciability doctrine designed to . . . protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *National Park Hospital Association v. Department of the Interior*, 387 U.S. 136, 148-49 (1967). Where, as here, the plaintiff seeks declaratory relief "the disagreement must not be nebulous or contingent but must have taken on a fixed and final shape so that a court can see what legal issue it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Peick*, 724 F.2d at 1261 (internal quotation and citation omitted).

Applying these principles to Hawk's complaint, the case is not ripe for adjudication. Although the language of the BIA's letter to Hawk outlines the agency's obvious desire for Hawk to vacate the premises, there is no legal force bolstering the potential eviction unless additional actions are taken. The BIA does not have the authority to expel Hawk from the property until the agency institutes either an administrative or judicial proceeding against him. As explained in 25 C.F.R. § 162.023:

If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We *may* take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

Title 25 C.F.R. § 162.023 (emphasis added).

Under the BIA's regulations, the Notice of Trespass issued by Baker is merely a preliminary step to a potential eviction action. Its purpose is to inform Hawk that he is trespassing on trust land, notify him that the BIA *may* institute legal proceedings to recover possession on behalf of Indian landowners, and provide him the opportunity to contact the BIA to explain why the trespass is in error. *See* ECF Doc. 1-1. To actually evict Hawk, the BIA would first need institute a judicial eviction action, at which time Hawk could challenge his eviction. Baker Declaration, ¶ 10; *see also Grondal v. United States*, 2021 WL 1962563 at *7 (E.D. Wash. 2021) (noting that federal common law allows the Government to bring a trespass claim, acting in its sovereign capacity as trustee, to remove trespassers from Indian land).⁶ The mere delivery of the initial Notice of Trespass letter, which is analogous to an "order to show cause" letter, is only the first of several steps that would have to be taken before Hawk could be evicted from the property.

⁶ Another option might be for the BIA to make a finding under the BIA's leasing regulations that plaintiff is in fact in trespass. *See* 25 C.F.R. Part 162. That finding would then be appealable to the Regional Director, which in turn is appealable to the Interior Board of Indian Appeals. *See* 25 C.F.R. 162.025 (providing that administrative "appeals from BIA decisions issued under this part may be taken under part 2 of this chapter)." Only at that point would the BIA's decision become final for administrative review purposes under the APA. *See* 43 C.F.R. § 4.314 (requiring exhaustion of administrative remedies). *See also White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988) (in the BIA, "there is a series of agency procedures mandated for exhaustion of administrative appeals; a decision must first be appealed to the BIA Area Director, next to the Commissioner of Indian Affairs and finally to the Interior Board of Indian Appeals."). In addition, Mr. Hawk could apply for a lease from the Indian landowners and submit it to the BIA for approval under 25 C.F.R. § 162.010. If the BIA approves a lease, Mr. Hawk would not be in trespass or subject to potential eviction.

Accordingly, in its present posture, the claims Hawk presents—which purport to challenge a trespass action that has not been commenced—are not “fixed and final.” The existence as well as the nature of Hawk’s claim that the defendant’s actions violated his rights hinges on the outcome of a future administrative or judicial challenge to his eviction. *Cf. Ciszewski v. Milas*, 871 F. Supp. 1065 (E.D. Wis. 1994) (Gordon, J.) (finding lack of ripeness when the plaintiff’s claims were contingent on the outcome of a state arbitration proceeding). Thus, the BIA’s actions to date are far too preliminary and contingent to be considered a final agency action under 5 U.S.C. § 704 of the APA. As noted above, to the extent the BIA proceeds with either an administrative or judicial eviction action, Hawk will have every opportunity to present his claims at the appropriate time. Hawk, moreover, cannot demonstrate that withholding consideration of these issues until eviction proceedings are commenced will cause him undue hardship. Accordingly, his claims are not ripe for adjudication, and this Court should dismiss his complaint for want of subject matter jurisdiction.

B. The Complaint should also be dismissed for failure to state a plausible claim upon which relief can be granted.

As an alternative basis for dismissal, Hawk’s complaint is subject to dismissal on the ground that it fails to state a plausible claim for relief. In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), this Court may consider “[d]ocuments referred to in, but not attached to . . . plaintiff’s complaint that are central to its claim . . . if they are attached to defendant’s motion to dismiss.” *Duferco Steel v. M/V Kalisti*, 121 F.3d 321, 324 n.3 (7th Cir. 1997). Reviewing these materials, the Court accepts all well-pleaded facts as true, but rejects legal conclusions and conclusory allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). After excising the allegations not entitled to the presumption of truth, the court must determine whether the remaining factual allegations “plausibly suggest an

entitlement to relief” and, if they do not, grant judgment in favor of the defendant. *Iqbal*, 556 U.S. at 678.

As set forth above, the crux of Hawk’s complaint is his contention that the BIA’s Trespass Notice is an attempt to circumvent the Tribal Court’s decision dismissing Burr’s harassment injunction. But a review of that decision shows that this assertion lacks any plausible merit.⁷ In the Tribal Court decision, the court ruled only that Burr had failed to provide substantial evidence to support her claims that Hawk was trespassing—on both her property and the neighboring trust land—and attempting to kill her; the court did not purport to decide that Hawk had the legal right to occupy the trust property. *See* Exhibit A, at pp. 1-2. Indeed, the tribal court observed that the BIA was still in the process of determining the status of Hawk’s presence on the trust property, and that future proceedings might be appropriate once the BIA makes a final determination. *See id.* Hence, the court dismissed Burr’s complaint without prejudice, granting her the right to file a subsequent action on the same claim. *Id.* at p. 2.⁸ If Burr is not barred from refiling her harassment injunction based on trespass, surely the BIA, which was not a party to the injunction action, is not barred from proceeding to evict Hawk using appropriate administrative or judicial means.

⁷ The court may consider the Tribal Court pleadings on a motion to dismiss under Rule 12(b)(6) without the need to convert Baker’s motion to a summary judgment motion. *See Palay v. United States*, 349 F.3d 418, 425 n.5 (7th Cir. 2003) (citations omitted); *Mohamed v. Reinhart, Boerner Van Duren S.C.*, 2011 WL 1791288 (E.D. Wis. 2011). *See also George v. Kraft Foods Global, Inc.* 674 F.Supp.2d 1031, 1043-44 (N.D. Ill. 2009) (taking judicial notice of documents filed with the SEC for the purpose of showing what the documents contain, but not for the proof of the facts stated therein).

⁸ For this reason, collateral estoppel—or, issue preclusion, as it is called by some cases—does not apply to this situation. Collateral estoppel “forecloses relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action and reduced to judgment.” *Jensen v. Milwaukee Mut. Ins. Co.*, 204 Wis. 2d 231, 235 (Wis. Ct. App. 1996). Here, the tribal court did not purport to litigate and decide that Hawk has the legal right to occupy the trust land; rather, it only ruled that Burr had failed to provide substantial evidence to support her harassment claims, thus dismissing her complaint without prejudice.

Therefore, Hawk's complaint lacks facial plausibility and should be dismissed on this alternative basis.

III. Conclusion

For the reasons set forth above, defendant Diane Baker respectfully requests that the Court dismiss the complaint against her.

Dated at Milwaukee, Wisconsin, this 2nd day of March, 2022.

RICHARD G. FROHLING
United States Attorney

By: *s/ Chris Larsen*

CHRIS R. LARSEN
Assistant United States Attorney
Wisconsin State Bar No. 1005336
Attorneys for Defendant Baker
Office of the United States Attorney
Federal Building, Room 530
517 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 297-1700
Fax: (414) 297-1738
Chris.Larsen@usdoj.gov