No. 24-1217

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Curtis Temple,

Plaintiff-Appellant

v.

Lawrence Roberts, Assistant Secretary of Indian Affairs, Department of Interior, Bureau of Indian Affairs, *et al.*,

Defendants-Appellees

Oglala Sioux Tribe, *et al.*,

Movants-Appellees

Appeal from the United States District Court for the District of South Dakota
No. 5:15-cv-05062-CBK (Hon. Jeffrey L. Viken and Hon. Charles B. Kornmann)

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

ALISON J. RAMSDELL
United States Attorney
District of South Dakota

YVETTE K. LAFRENTZ
STEPHANIE C. BENGFORD
Assistant U.S. Attorneys

Of Counsel:
KALLIE JACOBSON
CAITLIN LOCK COOMES
Attorney-Advisors
U.S. Department of the Interior
Bloomington, MN

TODD KIM
Assistant Attorney General

ANDREW M. BERNIE
JOHN EMAD ARBAB
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-4046
john.arbab@usdoj.gov

SUMMARY OF THE CASE

Plaintiff Curtis Temple, a member of the Oglala Sioux Tribe, held permits to graze cattle on two range units within the Pine Ridge Indian Reservation. After these permits expired by their own terms, the Tribe allocated them, with the Bureau of Indian Affairs' approval, to Tribe member Duke Buffington. But Plaintiff failed to remove his cattle from the range units despite repeated notices from the BIA, which advised Plaintiff that his cattle were in trespass and subject to impoundment and afforded Plaintiff an opportunity to show why his cattle were not in trespass. After the BIA impounded some of Plaintiff's trespassing cattle, Plaintiff filed this lawsuit, alleging (among other things) procedural due-process violations. The district court correctly rejected Plaintiff's due-process claims after a bench trial. The BIA's regulations provide owners of allegedly trespassing cattle an opportunity to show, orally and in writing, why the cattle are not in trespass before any cattle are impounded. As the court found, Plaintiff had many such opportunities but largely failed to avail himself of them.

Plaintiff has requested oral argument and the government has no objection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Rules

Tribal Law

INTRODUCTION

Plaintiff Curtis Temple is an enrolled member of the Oglala Sioux Tribe. This case arises from Plaintiff's repeated failures to remove his cattle from two range units (RUs), known as "169" and "P501," on the Tribe's Pine Ridge Indian Reservation in South Dakota. Plaintiff's grazing permits for those RUs expired on October 31, 2012, after which Plaintiff's cattle were in trespass. Following expiration of Plaintiff's grazing permits, the Tribe, with the approval of the BIA, allocated those permits to another member of the Tribe, Donald "Duke" Buffington, for a five-year period effective November 1, 2012.

Plaintiff had no legal right to graze his cattle on RUs 169 and P501 after his permits expired. BIA issued Plaintiff multiple written notices, consistent with 25 C.F.R. §§ 166.800-819, advising that his cattle were grazing in trespass, affording Plaintiff an opportunity to show why his cattle were not trespassing, and admonishing Plaintiff that his cattle were subject to impoundment if not promptly removed. *E.g.*, Fed. App. 31-32; R. Doc. 227, at 24-25 (April 30, 2013 BIA superintendent's letter to Plaintiff about trespassing cattle on RU P501).[1] Plaintiff nonetheless failed to remove his cattle or, except on one occasion, to avail himself of the opportunity to show why his cattle were not trespassing.

[1] "Fed. App." refers to the separate appendix filed by the federal Appellees with this brief. 8th Cir. Rule 30A(b)(3).

After the BIA impounded some of Plaintiff's cattle in 2015, Plaintiff filed this lawsuit, seeking declaratory and injunctive relief. App. 001-012; R. Doc. 1, at 1-12 (complaint).[2] Although the case has had, as the district court put it, a "tortuous history" (App. 317; R. Doc. 228, at 1), the court aptly summarized the heart of the matter in entering judgment for the Federal Defendants after a bench trial in 2023:

> The BIA was not required to allow [P]laintiff to continue to graze in trespass, depriving the owner of the grazing permit of lawful use of the grazing permits, overgrazing and causing damage to the range units, all the while paying no rent for the unlawful use of the grazing units. Plaintiff was acting as nothing but a holdover tenant and the BIA was legally authorized to institute trespass proceedings to protect the trust lands.

App. 343; R. Doc. 228, at 27.

On appeal, Plaintiff challenges four rulings of the district court, three of which were issued prior to trial. Opening Brief 2-3. In the pre-trial rulings, the district court: (1) dismissed without prejudice for failure to exhaust Tribal-court remedies Plaintiff's "pre-impoundment" claims, which challenged the Tribe's allocation of the grazing permits for RUs 169 and P501 to Buffington after Plaintiff's permits expired (App. 120-121, 151; R. Doc. 55, at 14-15, 45; *see also* App. 286-289, R. Doc. 183, at 17-20); (2) quashed, on tribal sovereign immunity grounds, subpoenas served by Plaintiff on two Tribal employees (App. 296-303; R. Doc. 184); and (3) denied Plaintiff's motion for a continuance of the bench trial

[2] "App." refers to the appendix filed by Plaintiff with his opening brief.

(App. 314-316; R. Doc. 216). After the bench trial, the court concluded that: "BIA's actions in providing notices of trespass, impoundments, [and] sale of [P]laintiff's livestock . . . pursuant to the BIA's trespass regulations did not violate [P]laintiff's right to due process." App. 342; R. Doc. 228, at 26. Plaintiff fails to show that any of these rulings are erroneous. The judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question) because Plaintiff's claims arose under U.S. Constitution (Fifth Amendment Due Process Clause), and 5 U.S.C. § 706(2) (Administrative Procedure Act). App. 168-181; R. Doc. 152, at 1-14 (second amended complaint). The district court entered a final decision and judgment resolving all remaining claims against all parties on December 8, 2023. App. 347-348; R. Doc. 228, at 31-32. Plaintiff filed a notice of appeal on February 1, 2024. R. Doc. 230. The appeal is timely. Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the BIA's trespass regulations, 25 C.F.R. §§ 166.800-.819, afforded Plaintiff a constitutionally sufficient opportunity to be heard prior to the impoundment of his cattle. U.S. Const. amend. V ("[N]or shall any person . . . be deprived of . . . property, without due process of law[.]"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985);

Mathews v. Eldridge, 424 U.S. 319 (1976); *Klump v. Babbitt*, 1997 WL 121193 (9th Cir. 1997).

2. Whether the district court correctly dismissed without prejudice Plaintiff's pre-impoundment claims for failure to exhaust Tribal-court remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834 (8th Cir. 2023); *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003).

3. Whether the district court acted within its discretion when it quashed subpoenas served by Plaintiff on two Tribal employees. *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012).

4. Whether the district court acted within its discretion in denying Plaintiff's motion for a continuance of the August 2023 bench trial. *Comcast of Illinois X v. Multi-Vision Electronics, Inc.*, 491 F.3d 938 (8th Cir. 2007); *Grunewald v. Missouri Pac. R. Co.*, 331 F.2d 983 (8th Cir. 1964).

STATEMENT OF THE CASE

A. Legal Background

1. Statutory background

The United States has long been involved in the management of grazing activities on Indian reservations. For example, in the Indian Reorganization Act of 1934, Congress directed the Secretary of the Interior to promulgate rules and

regulations "to restrict the number of livestock grazed in Indian range units to the estimated carrying capacity of such ranges." 25 U.S.C. § 5109.

Today, the principal source of such federal authority is found in the American Indian Agricultural Resources Management Act (AIARMA), 25 U.S.C. §§ 3701-3746. The AIARMA authorizes the Secretary of the Interior "to take part in the management of Indian agricultural lands, with the participation of the beneficial owners of the land, in a manner consistent with the trust responsibility of the Secretary and with the objectives of the beneficial owners." *Id.* § 3702(2).

"Indian agricultural lands" are "Indian land, including . . . rangeland . . . that is used for the production of agricultural products." *Id.* § 3703(1). *See also id.* § 3703(14) (defining "rangeland"). "Agricultural products" include cattle (*id.* § 3703(2)(B)) as well as "forage . . . grown or harvested for the feeding and care of livestock." *Id.* § 3703(2)(C).

The AIARMA authorizes the Secretary to "approve any agricultural . . . permit with . . . a tenure of up to 10 years" (or longer under specified circumstances). *Id.* § 3715(a)(1). The Act also requires the Secretary to issue regulations that "establish civil penalties for the commission of trespass on Indian agricultural lands." *Id.* § 3713(a)(1).

2. Regulatory background

The Secretary, through the BIA, promulgated grazing regulations to implement the AIARMA. *See* 25 C.F.R. Part 166.

a. Grazing permits

In general, any person or legal entity must obtain a permit before "taking possession of Indian land for grazing purposes." 25 C.F.R. § 166.200(a). Tribes are authorized to grant permits for tribal land with the BIA's approval. *Id.* § 166.203(a); *see id*. § 166.4 (definition of "Tribal land"). Similarly, individual Indian landowners may grant permits for their land with the BIA's approval. *Id.* § 166.203(b). The BIA may issue permits on behalf of Indian landowners who have granted the agency written authority to do so, or in the case of individual Indian owners of fractionated Indian land, when necessary to protect the interests of the individual Indian landowners. *Id.* §§ 166.205(a)(3), 166.205(a)(7). *See id*. § 166.4 (definition of "Indian landowner" to include tribes or individual Indians); *id.* (definition of "fractionated tract").

To manage Indian agricultural lands for grazing purposes, the BIA creates "range units" after consulting with the Indian landowners of rangeland. *Id.* §§ 166.300, 166.302. *See id.* § 166.4 (definition of "range unit" as "rangelands consolidated to form a unit of land for the management and administration of grazing

under a permit"). Range units consist of lands of compatible size, availability and location. *Id.* § 166.302.

The geographic scope of a permit may include tribal land, individually-owned Indian land, government land, or any combination thereof. *Id.* § 166.303. *See id.* § 166.4 (definition of "Indian land" as any tract in which any interest is owned by a tribe or individual Indian in trust or restricted status). *Cf.* Opening Brief 21 (erroneously suggesting that BIA regulations apply to "privately owned" reservation land).

A tribe may, with the BIA's approval, grant a grazing permit through a process called "tribal allocation." 25 C.F.R. § 166.217(a). *See id.* at § 166.218(a)-(b) (describing circumstances in which a tribe "may allocate grazing privileges"). "Allocation" is "the apportionment of grazing privileges without competition to tribal members . . . including the tribal designation of permittees and the number and kind of livestock to be grazed." *Id.* at § 166.4. Allocation decisions are made by tribes pursuant to tribal law. *See*, *e.g.*, *Claymore v. Great Plains Regional Director, Bureau of Indian Affairs*, 56 I.B.I.A. 246, 247, 2013 WL 3088085, at *1 (IBIA 2013).

Generally speaking, the BIA "will implement" a tribe's decisions regarding allocation of grazing privileges to particular tribal members. 25 C.F.R. § 166.218(c). That is, the BIA's role in determining eligibility for a tribal allocation and approving

grazing permits as allocated by a tribe is ministerial in nature. *See*, *e.g.*, *Claymore*, 56 I.B.I.A. at 247, 2013 WL 3088085, at *1.

b. Tribal law relevant to allocation of grazing permits

At all relevant times, the Tribe's grazing code, known as Tribal Ordinance No. 11-05, provided for the allocation of grazing privileges. App. 485 (Tribal court decision); R. Doc. 227, at 123. Under that ordinance, "allocation privileges were not competitively bid and could only be awarded to tribal members." *Id.* To be eligible for an allocation, the applicant's "ownership of livestock shall not exceed three hundred animal units." *Id.*

c. Trespass

The BIA's regulations define "trespass" as "any unauthorized occupancy, use of, or action on Indian agricultural lands." 25 C.F.R. § 166.800. In general, if the BIA has "reason to believe" that a trespass has occurred, the agency will "provide written notice to the alleged trespasser." *Id.* at § 166.803(a). The written notice "will include" numerous items of information, among them: (1) "[t]he basis for the trespass determination"; (2) a "legal description of where the trespass occurred"; (3) a "verification of ownership of unauthorized property (*e.g.*, brands in the State Brand Book for cases of livestock trespass)"; (4) "[c]orrective actions that must be taken"; and (5) "[p]otential consequences and penalties for failure to take corrective action." *Id.* § 166.803(a)(1)-(7).

The recipient of a BIA trespass notice must either "[c]omply with the ordered corrective actions" or "[c]ontact [the BIA] in writing to explain why the trespass notice is in error." *Id.* § 166.804(a)-(b). The recipient "may contact [the BIA] by telephone but any explanation of trespass you wish to provide must be in writing." *Id.* § 166.804(b). If the BIA determines that it "issued the trespass notice in error," it "will withdraw the notice." *Id.*

However, if the BIA does not withdraw the trespass notice, and the trespasser "fails to take the corrective action specified [in the notice]," then the agency "may take one or more of the following actions, as appropriate: (a) seize, impound, sell or dispose of unauthorized livestock . . . involved in the trespass"; and "(b) [a]ssess penalties, damages, and costs." *Id.* § 166.806(a)-(b).

B. Factual Background

1. Range Units 169 and P501

Two range units on the Pine Ridge Indian Reservation are relevant here: RUs 169 and P501. RU 169 is approximately 1,150 acres; RU P501 is approximately 5,900 acres. App. 381, R. Doc. 226, at 6 (RU 169); App. 389-390, R. Doc. 226, at 14-15 (RU P501). The land that is part of these RUs is held in trust by the United States for the Tribe or for individual members of the Tribe. App. 483, R. Doc. 227, at 121 (Tribal court decision); App. 343, R. Doc. 228, at 27 (district court decision referring to "the trust lands").

Plaintiff holds an ownership interest in some of the fractionated tracts within RUs 169 and P501, but he holds a 100% ownership interest in only one 80-acre tract. Fed. App. 30; R. Doc. 226, at 1 (BIA map: tract ID 3463-A in P501, shaded in green). Although not in the record, the BIA estimates that there are currently about 220 landowners on these two RUs (including Plaintiff).

2. The Tribe's allocation of grazing permits for RUs 169 and P501 to Buffington

Plaintiff is an enrolled member of the Tribe and a cattle rancher on the Pine Ridge Indian Reservation. App. 108; R. Doc. 55, at 2. At one time, Plaintiff held grazing permits for RUs 169 and P501, which were issued by the superintendent of the BIA's Pine Ridge Agency on the recommendation of the Tribe; but those permits expired on October 31, 2012. App. 319, R. Doc. 228, at 3; App. 483-484, Doc. 227, at 121-122.[3]

In 2012, the grazing permits for RUs 169 and P501 were allocated by the Tribe through the allocation process provided for in its grazing code (described *supra*, p. 8). App. 319, R. Doc. 228, at 3; App. 485, R. Doc. 227, at 123. Plaintiff and another tribal member Donald "Duke" Buffington both filed applications for an

[3] App. 351-353, R. Doc. 227, at 2-4 (Plaintiff's permit for RU 169 effective November 1, 2006 to October 31, 2012); App. 355-357, R. Doc. 227, at 6-8 (Plaintiff's permit for RU P501 effective for the same period).

allocation of those RUs. App. 319, R. Doc. 228, at 3; App. 485-486, R. Doc. 227, at 123-124.

In September 2012, the Tribe's allocation committee asked the BIA to conduct livestock counts of the herds of both applicants. App. 486; R. Doc. 227, at 124. The BIA did so and determined that Plaintiff had approximately 1,622 cattle on the Reservation, whereas Buffington had only approximately 92 cattle on the Reservation. *Id.*

On October 10, 2012, the Tribe's allocation committee determined, based on the BIA's livestock counts, that Plaintiff was ineligible, and that Buffington was eligible, for an allocation of the grazing permits for RUs 169 and P501. The size of Plaintiff's herd exceeded the limitation of 300 head of livestock for allocation purposes under the Tribe's grazing code. *Id.* Therefore, the Tribe approved Buffington's allocation application for RUs 169 and P501.

On October 17, 2012, the superintendent of the BIA's Pine Ridge Agency notified Plaintiff that RUs 169 and P501 were allocated by the Tribe to Buffington. App. 319, R. Doc. 228, at 3; App. 486, R. Doc. 227, at 124. The superintendent's letter explained that Plaintiff's application was denied because his herd exceeded the limitation of 300 head of livestock for allocation purposes under the Tribe's grazing code. *Id.* It also advised Plaintiff of his right to appeal the decision of the Tribe's allocation committee to its executive committee. *Id.*

3. Plaintiff's challenges to Buffington's allocation in Tribal court and within the Department of the Interior

Plaintiff appealed the decision of the Tribe's allocation committee to the Tribe's executive committee. *Id.* *See* App. 484; R. Doc. 227, at 122. The executive committee held a hearing on March 18, 2013, which Plaintiff attended. App. 319, R. Doc. 228, at 3; App. 486, R. Doc. 227, at 124. The executive committee denied Plaintiff's appeal and upheld the allocation committee's decision based on Plaintiff's ineligibility, due to the size of his herd, for an allocation of permits under the Tribe's grazing code. *Id.*

Shortly thereafter, on March 25, 2013, the BIA superintendent, acting on the Tribe's recommendation, issued the grazing permits for RUs 169 and P501 to Buffington, effective November 1, 2012 through October 31, 2017. *Id.*[4]

Plaintiff filed an administrative appeal from the BIA superintendent's issuance of the permits to Buffington with the BIA's regional director for the Great Plains region. App. 319; R. Doc. 228, at 3. In an August 16, 2013 decision, the regional director denied Plaintiff's appeal. App. 235; R. Doc. 177-3, at 1; *see also* App. 319-320, R. Doc. 228, at 3-4. The regional director's decision advised Plaintiff

---

[4] App. 377-380; R. Doc. 226, at 2-5 (Buffington's permit for RU 169); App. 385-388, R. Doc. 226, at 10-13 (Buffington's permit for RU P501). The BIA superintendent subsequently issued Buffington permits for these RUs effective November 1, 2017 through October 31, 2022. App. 487-488; R. Doc. 227, at 125-126. Buffington continues to hold the permits through October 31, 2027.

of his right to appeal to the Interior Board of Indian Appeals (IBIA). App. 237; R. Doc. 177-3, at 3. Plaintiff filed an appeal with the IBIA in September 2013, but voluntarily dismissed it in May 2015. App. 320; R. Doc. 228, at 4. *See Temple v. Great Plains Regional Director, Bureau of Indian Affairs*, 60 I.B.I.A. 296, 2015 WL 2432185 (2015) (order dismissing appeal).

In 2013, Plaintiff also filed a lawsuit in Tribal court challenging (as relevant here) the allocation committee's decision to allocate the grazing permits for RUs 169 and P501 to Buffington. App. 480-481; R. Doc. 227, at 118-119. In an August 22, 2019 decision, the Tribal court concluded, in part, that the Tribe and the defendant Tribal officials "enjoy sovereign immunity from suit in tribal court," and therefore dismissed Plaintiff's suit for lack of subject-matter jurisdiction. App. 501; R. Doc. 227, at 139. Plaintiff did not appeal the Tribal court's decision to the Tribe's supreme court. *See* App. 289; R. Doc. 183, at 20 (district court noting the availability of an appeal to the Oglala Sioux Nation's supreme court).

4. BIA's compliance checks and issuance of trespass notices to Plaintiff

Meanwhile, beginning in April 2013, BIA staff began conducting field checks (also referred to as "compliance checks") on RUs 169 and P501 as part of their normal trust responsibilities. App. 321; R. Doc. 228, at 5. They conducted at least 20 compliance checks on those RUs between April 2013 and March 2016. App. 321-327; R. Doc. 228, at 5-11. In all but one instance, BIA staff determined

that Plaintiff's cattle were grazing in trespass and—as the district court found after trial—"in numbers greatly exceeding the [carrying] capacity of those [RUs]." App. 331; R. Doc. 228, at 15.

To take just a few examples: (1) an April 25, 2013 compliance check found 228 of Plaintiff's cattle grazing in trespass on RU P501 and 56 of his cattle grazing in trespass on RU 169; (2) a May 9, 2013 compliance check found 286 of Plaintiff's cattle grazing in trespass on RU P501; (3) a March 7, 2014 compliance check found 127 of Plaintiff's cattle grazing in trespass on RU 169; (4) a September 25, 2014 compliance check found 177 of Plaintiff's cattle grazing in trespass throughout RU P501; (5) an April 22, 2015 compliance check found 214 of Plaintiff's cattle grazing in trespass throughout RU P501 and 38 head of Plaintiff's cattle grazing in trespass on RU 169; and (6) an August 5, 2015 compliance check found 267 of Plaintiff's cattle grazing in trespass on RUs 169 and P501. App. 321-322, 324; R. Doc. 228, at 5-6, 8.

After the compliance checks, the BIA superintendent sent Plaintiff letters warning him of the consequences of not promptly removing the trespassing cattle from RUs 169 and P501, specifically: (1) assessment of penalties pursuant to BIA regulations; (2) impoundment of the cattle; and (3) sale of the impounded cattle. In addition, each letter informed Plaintiff that he could explain why the cattle were not in trespass. App. 321-324; R. Doc. 228, at 5-8.

A representative example is the superintendent's letter dated April 27, 2015, which detailed the number and location of cattle that had been found grazing in trespass on RU P501 during the corresponding compliance check. App. 399-400; R. Doc. 226, at 29-30. The superintendent's letter warned Plaintiff:

> In accordance with 25 C.F.R. § 166.800 *et al.*, these livestock are considered grazing in trespass.
>
> * * * * You have three (3) days to remove the livestock *or show cause why these livestock are not trespassing* [on] this trust property. In the event these livestock are not removed or other arrangements have been made, it will be necessary to assess the penalties as provided [in] 25 C.F.R § 166.800 *et al.*, and take such other action as may be necessary, *including the impoundment and sale of the unauthorized livestock* to prevent continued trespass and to protect Indian lands.

App. 400; R. Doc. 226, at 30 (emphasis and brackets added).

The record demonstrates that Plaintiff only once availed himself of the opportunity to demonstrate in writing that his livestock were not in trespass. In a response to a June 2015 notice of trespass—to show cause why his livestock were not trespassing—Plaintiff claimed to own several thousand acres of land in RUs 169 and P501, asserted that those acres are not in the Tribe's range management program, and therefore that his cattle were not grazing in trespass. Plaintiff's letter also acknowledged that he and his Tribal court "lay advocate" had held "numerous past meetings" with the BIA superintendent about these matters. App. 323; R. Doc. 228, at 7; *see* Fed. App. 8; R. Doc. 15-2, at 1 (Plaintiff's June 5, 2015 letter to the BIA superintendent).

In a July 2, 2015 letter, the BIA superintendent considered and rejected the contentions Plaintiff advanced in response to the show-cause directive. The superintendent advised Plaintiff (among other things) that: (1) he owned an interest in only six tracts within RUs 169 and P501 totaling 290.85 acres (not thousands of acres as Plaintiff asserted); (2) there is a specific regulatory process available for removing such acreage from the RUs; and (3) if acreage were removed from the RUs, Plaintiff would have to construct a fence around the removed tracts. *Id.*; *see* Fed. App. 1-2; R. Doc. 14-3, at 1-2 (BIA superintendent's July 2, 2015 letter to Plaintiff). The superintendent's letter "remind[ed]" Plaintiff that he "does not have any right to graze his livestock" on RUs 169 or P501. Fed. App. 2; R. Doc. 14-3, at 2.

Plaintiff, however, did not remove his trespassing cattle. Nor did he comply with steps (2) and (3) outlined in the superintendent's July 2015 letter for removing acreage from the RUs. After the bench trial, the district court made the following findings of fact (none of which Plaintiff challenges on appeal):

> Plaintiff testified that he did notify the BIA that he wanted acres in which he had a beneficial interest removed from the Range Units and claimed that he was entitled to graze his cattle on his own land, notwithstanding any permit issued or not issued.
>
> *Plaintiff did not produce any record of having made any request to have acres in which he owned a beneficial interest removed from the Range Units. Plaintiff was unable to articulate the approximate date he allegedly made the request.*

> It is undisputed that, even if plaintiff did request to remove the tracts as he contends, *plaintiff did not erect a fence around those tracts which was required before plaintiff could graze his cattle on tracts contained within the Range Units in which he had an ownership interest*. There was never any contention in the record that plaintiff had an agreement to pay the other interested owners in those tracts any rent for plaintiff's use of the tracts.

App. 323; R. Doc. 228, at 7 (paragraph breaks and emphasis added).

5. Impoundment and sale of some of Plaintiff's trespassing cattle

a. The first impoundment (August 2015)

On August 19, 2015—after the BIA superintendent had given Plaintiff written notice that his trespassing cattle would be impounded if not removed from RUs 169 and P501 within three days of receipt (App. 183-184; R. Doc. 152-1, at 2-3)—the BIA impounded 121 head of cattle. This is referred to as the "first impoundment." App. 324; R. Doc. 228, at 8. The next day, August 20, 2015, Plaintiff filed the instant federal lawsuit and sought a temporary restraining order (TRO). *Id.*

On August 21, 2015, the BIA superintendent notified Plaintiff that the cattle in the first impoundment would be sold by public sale on September 1, 2015 at the Gordon Livestock Auction Market unless redeemed prior to sale. The superintendent's letter explained that, at that time, the cost of redemption was approximately $275,000 as calculated per the BIA's regulations (consisting of the cost of impounding and trucking the cattle, the value of the forage consumed by the

cattle, and a penalty of twice the value of the consumed forage). *Id.*; App. 186-188, R. Doc. 152-2, at 2-4.

However, the public sale scheduled for September 1, 2015 did not take place. App. 325; R. Doc. 228, at 9. The owner of Gordon Livestock Auction Market told the BIA that he did not want to sell the cattle because he feared litigation. Consequently, the cattle were moved to Johnson Ranch near Crawford, Nebraska. App. 324; R. Doc. 228, at 8.

On September 3, 2015, Plaintiff administratively appealed the BIA superintendent's notice of impoundment of cattle, and notice of public sale and calculation of the redemption amount, to the BIA's regional director for the Great Plains region. Fed. App. 14; R. Doc. 100-1, at 1.

Next, after holding two days of hearings on Plaintiff's TRO motion, the district court issued a decision on February 19, 2016 denying relief and permitting the BIA to "resume the standard processing of [Plaintiff's] cattle in accord with the applicable BIA regulations." App. 324; R. Doc. 228, at 8. *See* App. 150-151; R. Doc. 55, at 44-45.

Subsequently, a public sale of the cattle was scheduled to take place in March 2016 at Platte Valley Livestock Auction. However, after trial, the district court made the following findings of fact (none of which Plaintiff challenges on appeal):

> [T]he sale barn backed out of the sale when plaintiff's tribal lay advocate sent an email to the sale barn on March 16, 2016, *falsely stating that the [district court] denied permission to sell the cattle*, advising Platt[e] Valley Livestock that it may be liable, and threatening legal action if it chose to sell plaintiff's cattle.

App. 328; R. Doc. 228, at 12 (emphasis and brackets added).

On March 14, 2016, the BIA's regional director issued a decision on Plaintiff's administrative appeal. Fed. App. 14-16; R. Doc. 100-1, at 1-3. The regional director dismissed Plaintiff's appeal because (1) the BIA superintendent's notice of impoundment and notice of public sale were not appealable, and (2) the BIA's finding of trespass and calculation of damages was not ripe for appeal, but would be ripe after the livestock are redeemed or sold. Fed. App. 15; R. Doc. 100-1, at 2. The regional director advised Plaintiff that his decision may be appealed to the IBIA. *Id.* Plaintiff filed a notice of appeal with the IBIA on April 11, 2016. Fed. App. 33-35; R. Doc. 227, at 71-73.

Meanwhile, on March 17, 2016, the district court acted on a motion filed by the BIA and ordered that "[Plaintiff's] impounded cattle may be sold at public auction." Fed. App. 11; R. Doc. 61, at 2. *See also* App. 328; R. Doc. 228, at 12.

Soon thereafter, on March 25, 2016, the livestock in the first impoundment were offered for public sale by sealed bids. App. 328; R. Doc. 228, at 12. The BIA sold the livestock for approximately $73,000 and the funds were paid over to Plaintiff's lienholder, Bank of the West. *Id.*

b. The second impoundment (June 2016)

On June 21, 2016—after the BIA superintendent had given Plaintiff written notice that his trespassing cattle would be impounded if not removed from RUs 169 and P501 within five days of receipt (Fed. App. 19-26; R. Doc. 225-2, at 24-31)—the BIA impounded 252 head of cattle. App. 190; R. Doc. 152-3, at 2. This is referred to as the "second impoundment." App. 328; R. Doc. 228, at 8.

On June 24, 2016, the acting BIA superintendent notified Plaintiff that the cattle in the second impoundment would be sold at public sale on June 29 at Mitchell Livestock Auction unless redeemed prior to sale. At the time, the cost of redemption was approximately $35,000. Fed. App. 27-29; R. Doc. 225-2, at 52-54.

On June 27, 2016, Plaintiff administratively appealed the notice of impoundment, and the notice of public sale and calculation of the redemption amount, to the BIA's regional director for the Great Plains region. Fed. App. 36; R. Doc. 227, at 74.

The public sale scheduled for June 29 did not take place. The day before the scheduled sale, Plaintiff threatened to sue Mitchell Livestock Auction in South Dakota state court, and Mitchell Livestock Auction informed the BIA that it would not be involved in the sale of Plaintiff's cattle. App. 329; R. Doc. 228, at 13.

On July 18, 2016, the BIA's regional director issued a decision on Plaintiff's administrative appeal. Fed. App. 36-38; R. Doc. 227, at 74-76. The regional director

dismissed Plaintiff's appeal for the same reasons he had dismissed Plaintiff's earlier appeal in connection with the first impoundment. Fed. App. 36-37; R. Doc. 227, at 74-75; *see supra*, p. 19. The regional director advised Plaintiff that his decision may be appealed to the IBIA. Fed. App. 37; R. Doc. 227, at 75. Plaintiff filed a notice of appeal with the IBIA on August 15, 2016. Fed. App. 39-40; R. Doc. 227, at 77-78.

On September 13, 2016, the acting BIA superintendent notified Plaintiff that the cattle in the second impoundment would be sold at public sale by sealed bid to the highest bidder on September 21 at the Pine Ridge Agency's offices unless Plaintiff redeemed the cattle prior to the sale. App. 190-192; R. Doc. 152-3, at 2-4. At that time, the cost of redemption was approximately $108,500. App. 191; R. Doc. 152-3, at 3.

Shortly thereafter, on September 19, 2016, Plaintiff sought to block the scheduled September 21 sale by seeking a second TRO from the district court. App. 329; R. Doc. 228, at 13. On October 12, 2016, after holding a hearing, the court denied Plaintiff's motion as moot because the BIA received no sealed bids by the deadline set in the public notice of sale. Fed. App. 12; R. Doc. 91, at 1.

The sale was subsequently rescheduled for November 16, 2016. App. 329; R. Doc. 228, at 13. Plaintiff sought to block that sale by seeking a third TRO, which the district court denied on November 15. Fed. App. 17-18; R. Doc. 107, at 1-2.

Ultimately, the November 16 sale did not take place because Plaintiff redeemed his cattle on that date for a redemption amount of approximately $150,000. App. 329; R. Doc. 228, at 13.

c. District Court's stay of the federal case pending the IBIA's decision on Plaintiff's administrative appeals

In a September 30, 2019 order, the district court stayed "the case as a whole" pending the IBIA's resolution of Plaintiff's appeals. App. 294; R. Doc. 183, at 25. In that order, the court explained that in a prior order of February 19, 2016, it had ruled that Plaintiff's "due process claims relating to the impoundment of his cattle" are "exempt from the exhaustion requirement." App. 274; R. Doc. 183, at 5; *see* App. 129, 132; R. Doc. 55, at 23, 26. But given Plaintiff's "choice" to nevertheless "proceed with the administrative appeals process," the district court found it "appropriate to stay consideration of the impoundment claims pending resolution of the IBIA appeals." App. 275; R. Doc. 183, at 6.

C. Procedural Background and Rulings of the District Court Under Review

1. Dismissal of Plaintiff's pre-impoundment claims for failure to exhaust Tribal-court remedies

In October 2015, the BIA filed a motion to dismiss Plaintiff's original complaint. App. 106; R. Doc. 32. In a February 19, 2016 order, agreeing in part with the BIA, the district court dismissed Plaintiff's pre-impoundment claims

without prejudice for failure to exhaust Tribal-court remedies. App. 151; R. Doc. 55, at 45.

The district court explained that Plaintiff's allegations "surrounding the tribe's grazing permit allocation process underlie his repudiation of the BIA's determination that his cattle were in trespass," and that resolution of those allegations "requires interpreting provisions of the Oglala Sioux Tribe Constitution and Oglala Sioux tribal ordinances." App. 120; R. Doc. 55, at 14. The court concluded that "the doctrine of tribal exhaustion applies in this case as the resolution of [Plaintiff's] pre-impoundment allegations hinge on issues of tribal law," and at the time of the court's order, "[Plaintiff's] claims are pending in Tribal Court." App. 121; R. Doc. 55, at 15 (applying *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003)).

The district court addressed this issue again in a September 30, 2019 order. App. 286-289; R. Doc. 183, at 17-20. At that juncture, the court had directed Plaintiff to file a second amended complaint, and the BIA moved to dismiss it in part. App. 270; R. Doc. 183, at 1. In the September 30 order, the court "adhere[d] to its previous view that plaintiff's pre-impoundment claims must be adjudicated in the [Tribal] courts." App. 288; R. Doc. 183, at 19.

In that order, the district court also took judicial notice of the Tribal court's August 22, 2019 decision ruling that the Tribe and its agencies "enjoy sovereign

immunity from suit in tribal court with regard to grazing lease disputes." App. 289; R. Doc. 183, at 20 (internal quotation marks omitted); *see supra*, p. 13 (discussing Tribal court decision). The district court, however, did not consider the Tribal court's decision as constituting an exhaustion of Plaintiff's Tribal-court remedies because, at that juncture, Plaintiff had not yet appealed the Tribal court's decision to the Tribe's supreme court (which Plaintiff never did). *See* App. 289; R. Doc. 183, at 20.

2. Quashing of subpoenas served by Plaintiff on Tribal employees

During discovery, Plaintiff served deposition subpoenas on Tribal employees Denise Mesteth and Jolene Provost. App. 296; R. Doc. 184, at 1. At the time the subpoenas were served, Mesteth was the director of the Tribe's land office and Provost was the range specialist in that office. App. 297; R. Doc. 184, at 2. The Tribe and the subpoenaed employees, through counsel, entered an appearance in the district court and moved to quash the subpoenas on the ground that they infringed on the Tribe's sovereign immunity. App. 296; R. Doc. 184, at 1. *See also* App. 214-216; R. Doc. 172 (motion to quash).

The district court granted the Tribe's motion to quash. App. 296-303; R. Doc. 184, at 1-8. The court found that Mesteth and Provost were "tribal employees during the time period relevant to plaintiff's subpoenas," and that "[the Tribe's] employees acting in their official capacities are protected by the [Tribe's]

sovereign immunity." App. 300; R. Doc. 184, at 5 (applying *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012)).

3. Denial of Plaintiff's motion for a trial continuance

On May 24, 2023, the district court issued an order lifting the stay entered in 2019 and scheduled trial to begin on August 21, 2023. App. 446; R. Doc. 194, at 3. When the court issued its May 24 order, Plaintiff was represented by attorneys Terry Pechota and James Hurley. App. 314-15; Doc. 216, at 1-2.

However, on June 7, shortly after the trial date was set in the May 24 order, Pechota filed a motion for leave to withdraw. In his motion, Pechota stated that his withdrawal "should come as no surprise" and assured the district court that Plaintiff had other counsel "who can provide able representation, counsel, and advice" to Plaintiff. App. 306-307; R. Doc. 195, at 1-2. The district court granted Pechota's motion for leave to withdraw on June 12, 2023. App. 308; R. Doc. 196.

Then, on August 7, 2023, about two months after the court permitted Pechota to withdraw, Hurley moved for a continuance of the August 21 trial date. App. 309; R. Doc. 212. Also on August 7, Stacy Hegge (Plaintiff's counsel in this appeal) entered an appearance in the district court for Plaintiff. App. 448; R. Doc. 214.

In his continuance motion, Hurley stated that Pechota had taken depositions that he (Hurley) was not involved in, and that he needed time "to complete obtaining and copying and reading the discovery" from Pechota. App. 311 (¶14); R. Doc. 212,

at 3 (¶14). According to Hurley, a continuance was necessary for him and Hegge "to partake in this matter and become adequately prepared for trial." App. 311 (¶20); R. Doc. 212, at 3 (¶20). Hurley proposed that trial be continued to December 4, 2023. App. 312 (¶25); R. Doc. 212, at 4 (¶25).

In an order issued August 8, 2023, the district court denied Hurley's motion for a continuance. App. 314-316; R. Doc. 216, at 1-3. The court explained that, in his motion to withdraw, Pechota had represented that Plaintiff had "other counsel fully able to competently act as an attorney," and that Pechota was "obviously referring to" Hurley. App. 315; R. Doc. 216, at 2. The court explained that it had granted Pechota leave to withdraw, in part, based on the consideration that Plaintiff "had other competent counsel and would not be 'left in the lurch.'" *Id.*

Although acknowledging that Hurley sought a continuance "claiming an inability to be ready for trial on August 21," the court reasoned: "That may well be the case but whose fault is that? Having practiced law as a trial lawyer for 30 years, I was among that vast majority of attorneys at one point saying to oneself 'What was I thinking about when I agreed to take this case?'" *Id.*

Noting that the parties had filed their trial briefs and that the court had "the time set aside to try the case," the court stated that it "will try [the case] to finally end what has been going on" since 2013. App. 316; R. Doc. 216, at 3. "Plaintiff

and his attorneys have been very much responsible for all these delays," and the court would not "reward[ ]" them with a continuance now. *Id.*

4. Rejection of Plaintiff's procedural due process claim

The district court held a two-day bench trial August 21-22, 2023. After trial, the court issued findings of fact and conclusions of law. App. 317-348; R. Doc. 228.

The district court concluded, among other things, that "BIA's actions in providing notices of trespass, impoundments, [and] sale of [P]laintiff's livestock . . . pursuant to the BIA's trespass regulations did not violate [P]laintiff's right to due process." App. 342; R. Doc. 228, at 26. In so holding, the court relied on extensive case law, all of which had rejected procedural due-process challenges to similar trespass regulations of other federal agencies. The court also noted that "Plaintiff has cited no case law to the contrary." *Id.*

The district court further found that Plaintiff "failed to take advantage of the many opportunities provided in the notices to cure the trespass or give sufficient written notice of a legal right to graze the range units in question." App. 342; R. Doc. 228, at 26.

The court also rejected Plaintiff's contention that "his right to due process was violated when the BIA impounded cattle that were grazing on his own property." App. 343; R. Doc. 228, at 27. The court found:

> Any property to which plaintiff had any ownership interest which was contained in Range Units 169 and P501 was, along with all other

> property owned by the [Tribe] or its members, administered by the BIA as one range unit and leased under one lease per range unit. *Until plaintiff complied with the requirements for removing property in which he had a whole or fractional share from the range units, plaintiff had no grazing rights to that property. He only had the right to receive his portion of the rental payments (which he caused to be zero).*

Id. (emphasis added).

Summing up, the court concluded:

> The BIA was not required to allow [P]laintiff to continue to graze in trespass, depriving the owner of the grazing permit [*i.e.*, Duke Buffington] of lawful use of the grazing permits, overgrazing and causing damage to the range units, all the while paying no rent for the unlawful use of the grazing units. *Plaintiff was acting as nothing but a holdover tenant* and the BIA was legally authorized to institute trespass proceedings to protect the trust lands.

App. 343; R. Doc. 228, at 27 (emphasis added).[5]

Plaintiff appealed.

SUMMARY OF ARGUMENT

1. The district court correctly rejected Plaintiff's procedural due-process claim. There is no question that the BIA regulations provide for, and that Plaintiff received, notice that BIA considered his cattle to be in trespass on RUs 169 and P501 before any cattle were impounded. The regulations provide the alleged trespasser an opportunity to be heard at a meaningful time and in a meaningful manner

[5] Subsequently, the IBIA ruled that the district court's decision mooted Plaintiff's administrative appeal. *Temple v. Great Plains Regional Director, Bureau of Indian Affairs*, 69 I.B.I.A. 266, 2024 WL 816295 (2024).

because—before any livestock are impounded—the alleged trespasser can show the BIA, orally and in writing, why the livestock are not grazing in trespass. After trial, the district court made a factual finding (not disputed by Plaintiff on appeal) that Plaintiff "failed to take advantage of the many opportunities provided in the notices to cure the trespass or give sufficient written notice of a legal right to graze the range units in question." App. 342; R. Doc. 228, at 26.

2. The district court correctly dismissed Plaintiff's pre-impoundment claims without prejudice for failure to exhaust Tribal-court remedies. To exhaust his Tribal-court remedies, Plaintiff was required to, but did not, appeal the Tribal trial-court's August 22, 2019 decision to the Tribe's supreme court. Plaintiff's summary assertion that, under the Tribe's grazing ordinance, he had "first preference" for reissuance of the grazing permits on RUs 169 and P501 for 2012-2017 is wholly undeveloped and therefore abandoned; in any event, Plaintiff's argument is dubious under the terms of the grazing ordinance itself.

3. The federal appellees agree with the Tribe that the district court acted within its discretion when it granted the Tribe's motion to quash the subpoenas served by Plaintiff on Diane Mesteth and Jolene Provost. The court found that Mesteth and Provost were tribal employees during the time relevant to the subpoenas (a finding not challenged on appeal). The court correctly concluded that, because Mesteth and Provost were being subpoenaed in their official capacities as employees

in the Tribe's land office, they were protected from the subpoenas by the Tribe's sovereign immunity.

4. The district court acted within its discretion in denying Plaintiff's motion for a trial continuance. In the district court, Plaintiff did not demonstrate any compelling reason for a continuance, and on appeal, he does not show that the denial of the continuance prejudiced him in any specific way.

STANDARD OF REVIEW

1. The district court's ruling on a procedural due-process claim is reviewed de novo. *See Arroyo-Sosa v. Garland*, 74 F.4th 533, 543 (8th Cir. 2023) (petition for review).

2. The district court's ruling on the scope of the tribal-court exhaustion doctrine is a legal question reviewed de novo. *Gaming World Intern.*, 317 F.3d at 849.

3. The district court's decision to quash a subpoena is reviewed for an abuse of discretion. *United States v. Bueno*, 443 F.3d. 1017, 1026 (8th Cir. 2006).

4. The district court's denial of a motion for a trial continuance is reviewed for an abuse of discretion. *Farmers Co-op Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 499 (8th Cir. 2009).

ARGUMENT

Plaintiff's four assignments of error by the district court lack merit. The judgment should be affirmed.[6]

I. The district court correctly rejected Plaintiff's procedural due process challenge to the BIA's trespass regulations.

Plaintiff states that the "primary issue" on appeal "relates to the lack of due process when the BIA impounded his cattle." Opening Brief 12. Specifically, Plaintiff contends that he was denied "a timely opportunity to be heard on the BIA's determination that his cattle seized by the BIA on August 19, 2015 and June 21, 2016, were in trespass." *Id.* That contention lacks merit.[7]

---

[6] In the BIA's view, Plaintiff continues to graze his cattle in trespass on RUs on the Pine Ridge Indian Reservation where Plaintiff does not hold a grazing permit. Accordingly, there is a reasonable expectation that Plaintiff will again be subjected to the same BIA trespass regulations that he contends do not afford alleged trespassers constitutionally adequate procedural due process. In these circumstances, this appeal is not moot. *See*, *e.g.*, *Whitfield v. Thurston*, 3 F.4th 1045, 1047 (8th Cir. 2021) (discussing capable of repetition, yet evading review exception to mootness).

[7] It is unclear from the opening brief whether Plaintiff presses a facial challenge, an as-applied challenge, or possibly both, to the BIA's trespass regulations. *See United States v. Veasley*, 98 F.4th 906, 909-910 (8th Cir. 2024) (discussing differences between the two types of challenges); *Free the Nipple-Springfield Residents Promoting Equality v. City of Springfield, Missouri*, 923 F.3d 508, 509 n.2 (8th Cir. 2019) (per curiam) (explaining that the important inquiry is whether the claim and relief that would follow "reach beyond the particular circumstances of these plaintiffs") (quoting *Doe v. Reed*, 561 U.S. 186, 194 (2010)). The district court appears to have understood Plaintiff to assert both types of challenge, and the opening brief can be read that way. The Court need not decide this question because, however characterized, Plaintiff's procedural due-process claim lacks merit.

A. The BIA's regulations afforded Plaintiff a meaningful opportunity to be heard before his cattle were impounded.

"The essential requirements of due process" are "notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The BIA's regulations provide that, if the BIA has reason to believe that a trespass on Indian agricultural land has occurred, the alleged trespasser receives written notice of trespass, including the corrective actions that must be taken, *before* any livestock are impounded. 25 C.F.R. § 166.803(a).

Moreover, Plaintiff does not contest the district court's factual findings that the BIA superintendent provided him with numerous written notices of alleged trespass in 2015 and 2016, all of which were sent to Plaintiff *before* any cattle were impounded. App. 321-327; R. Doc. 228, at 5-11. *See supra*, pp. 13-15. In short, there is no question that the BIA's regulations provide constitutionally sufficient pre-impoundment notice of alleged trespass, and that Plaintiff repeatedly received such notices.

The due-process issue here centers on the requirement of "an opportunity to respond." *Loudermill*, 470 U.S. at 546. While required procedures may vary according to the interests at stake, the opportunity to be heard must be afforded "at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The "ordinary principle" is that

"something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343. That "ordinary principle" applies here.

To be sure, a trespass notice is not administratively appealable. 25 C.F.R. § 166.803(c). Even so, the BIA's regulations afford the owner of allegedly trespassing cattle an opportunity to be heard before any cattle are impounded. 25 C.F.R. § 166.804(a) provides the alleged trespasser with an opportunity to cure, *i.e.*, to "[c]omply with the ordered corrective actions"; but as an alternative to compliance, 25 C.F.R. § 166.804(b) provides the alleged trespasser an opportunity "to explain why the trespass notice is in error." If, based on that explanation, the BIA "determine[s] that [the agency] issued the trespass notice in error," then it "will withdraw the notice." *Id.*

Only *after* those steps in the regulatory process have occurred does the possibility arise that the BIA "may take one or more of the following actions, as appropriate," including impounding and selling the "unauthorized," *i.e.*, trespassing, livestock. *Id.* § 166.806(a). Put another way, the opportunity to be heard is "meaningful" because any impoundment of cattle does not occur until *after* the alleged trespasser has been afforded the chance to satisfy the BIA that the cattle are not grazing in trespass.

Accordingly, the only remaining question is whether, under the BIA's regulations, the pre-impoundment opportunity to be heard is afforded "in a

meaningful manner." *Mathews*, 424 U.S. at 333. The answer to that question is yes because the owner of the allegedly trespassing cattle may show cause to the BIA—orally and in writing—why the cattle at issue are not grazing in trespass before the agency takes further action.

Under the BIA's regulations, the recipient of a trespass notice may "[c]ontact [BIA] in writing to explain why the trespass notice is in error," and may also "contact [BIA] by telephone," albeit "any explanation of trespass you wish to provide must be in writing." 25 C.F.R. § 166.804(b). And as noted earlier, if based on the alleged trespasser's explanation the BIA determines that the trespass notice was issued in error, it "will withdraw" the notice. *Id.*

Plaintiff does not explain why this pre-impoundment show-cause procedure falls short of an opportunity to be heard "in a meaningful manner." Indeed, Plaintiff largely ignores 25 C.F.R. § 166.804(b) other than to cryptically assert that the regulation "does not afford an opportunity to be heard as pertaining to the BIA's *subsequent decision* on the cattle deemed in trespass." Opening Brief 21 (emphasis added). *See also id.* at 19 (asserting that the BIA did not provide Plaintiff a meaningful opportunity to be heard after the impoundments).

But that is effectively a concession that 25 C.F.R. § 166.804(b) *does* provide an opportunity to be heard in a meaningful manner *pre*-impoundment. Plaintiff's suggestion appears to be that, even so, the BIA is constitutionally required to afford

owners of trespassing cattle an *additional* opportunity to be heard on the trespass question *after* the cattle are found to be in trespass. Plaintiff, however, musters no authority for the surprising notion that the BIA is constitutionally required to give owners of trespassing cattle this type of "second bite at the apple."

Moreover, Plaintiff's contention is inconsistent with the purpose of the BIA's trespass regulations, which in turn reflect the agency's trust responsibilities. In furtherance of the agency's trust responsibility under the AIARMA, the BIA seeks to remove trespassing livestock from Indian agricultural lands in a prompt and efficient manner so as to prevent further damage to trust land. *See supra*, pp. 4-5 (discussing AIARMA). That purpose would be frustrated if, as Plaintiff suggests, the BIA were constitutionally required to afford alleged trespassers *multiple* opportunities to demonstrate that livestock are not in trespass before the agency may impound the livestock, remove them from the affected range units, and potentially sell them (if not redeemed by the owner).

Moreover, the record shows that Plaintiff largely did not avail himself of the repeated meaningful pre-impoundment opportunities provided by 25 C.F.R. § 166.804(b) to show cause why his cattle were not in trespass on RUs 169 and P501, such that the BIA should withdraw the trespass notices. This pre-impoundment opportunity arose some *20 times*, once after each trespass notice was issued to Plaintiff. *See supra*, pp. 13-15.

Indeed, the district court made a finding of fact—which Plaintiff does not dispute—that Plaintiff "failed to take advantage of the many opportunities provided in the notices to cure the trespass or give sufficient written notice of a legal right to graze the range units in question." App. 342; R. Doc. 228, at 26. To the very limited extent Plaintiff availed himself of that opportunity, the BIA superintendent responded to and gave reasons for rejecting his explanation. *See supra*, pp. 15-16. Procedural due process requires no more.

B. Plaintiff's counter-arguments lack merit.

Plaintiff offers several counter-arguments in an effort to establish a due-process violation, but each lacks merit.

1. The case law supports the district court's conclusion that the BIA's trespass regulations comport with procedural due process.

As the district court correctly recognized, the case law has generally upheld, against procedural due-process challenges, similar trespass regulations of other federal agencies involving trespassing livestock on public lands. App. 339-342; R. Doc. 228, at 23-27. *See Yowell v. Abbey*, 532 F.App'x 708 (9th Cir. 2013) (U.S. Bureau of Land management trespass regulations); *Klump v. Babbitt*, 1997 WL 121193 (9th Cir. 1997) (same); *McVay v. United States*, 481 F.2d 615 (5th Cir. 1973) (U.S. Forest Service trespass regulations); *Jones v. Freeman*, 400 F.2d 383 (8th Cir. 1968) (same).

Klump is particularly instructive. There, the Ninth Circuit concluded: "Because the government has a substantial interest in protecting the public land, and the regulations require notice and an opportunity to demonstrate that the livestock is not in trespass before it is impounded," the Bureau of Land Management's trespass regulations "do not violate [the plaintiff's] Fifth Amendment right to due process." 1997 WL 121193, at *2. The *Klump* court specifically noted that, under the regulations, "the trespass notice gives the alleged violator a[n] opportunity to present evidence that there is no violation." *Id.* The same is true of the BIA's trespass regulations.

This Court's decision in *Jones* is also instructive. There, plaintiffs challenged the Forest Service's trespass regulations "insofar as they permit the Forest Service to impound trespassing livestock, to assess expenses for so doing to their owners and, under certain circumstances, to sell the animals and retain a portion of the proceeds to cover their expenses—and to take these actions without giving the owners a trial-type hearing." 400 F.2d at 385. The Court concluded: "Since, incident to judicial review, the plaintiffs will be entitled to a trial de novo if there is no administrative hearing, we need not consider whether the failure to provide an administrative hearing is a denial of due process." *Id.* at 390.

Jones therefore effectively stands for the proposition that any arguable due-process requirement of "a trial-type" administrative hearing prior to an agency's

impounding and selling trespassing livestock is satisfied so long as the owners of the livestock subsequently receive a trial de novo in the district court. That is what happened here: Plaintiff received a bench trial de novo on his due-process claim in the district court, after which the court rejected that claim on the merits.[8]

Plaintiff's effort to distinguish *Jones*, *Klump*, and other cases cited by the district court is unpersuasive. Plaintiff references his "ownership interests in the lands that the BIA has accused Temple's cattle of trespassing on," and contends that his ownership interest is "far more significant" than that of the plaintiffs in the decided cases, which involved "exclusively government-owned lands." Opening Brief 18; *see also id.* at 20-21. However, Plaintiff's reliance on his ownership interest in RUs 169 and P501 is misplaced for three reasons.

First, before the impoundments occurred, the BIA had already explained to Plaintiff that the small acreage in which he has an ownership interest in RUs 169 and

---

[8] *Jones* does not stand for the proposition that procedural due process automatically entitles a plaintiff to a trial de novo in the district court in a livestock trespass case if there was no "administrative hearing" before the agency. *Id.* at 390. Rather, *Jones* expressly reserved that question. *Jones* does not suggest that the district court could not resolve a due-process claim on summary judgment where appropriate. *Jones* also did not address the effect of the Administrative Procedure Act, 5 U.S.C. § 554(a), which provides for formal adjudication before an administrative agency "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing." Neither the AIARMA nor any other statute requires such an adjudication at the BIA in livestock trespass cases. *Cf. Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981).

P501—about 290 acres, not the thousands of acres he claimed—is considered by the agency to be land within the RUs unless and until Plaintiff completes the regulatory procedure for removing acreage from the RUs. But after trial, the district court specifically *rejected* Plaintiff's claim that he had invoked the necessary removal procedure at the relevant time (and that factual finding is not challenged on appeal). *See supra*, pp. 16-17.

Second, after trial, the district court made a further factual finding (also not challenged on appeal) that the BIA, using GPS data, was careful not to impound any cattle found on parcels within RUs 169 and P501 in which Plaintiff has an ownership interest. As the court found, the BIA used "sophisticated GPS devices to determine on what parcel any particular animal was grazing," and consequently, "[n]o cattle were rounded up and impounded that were, at the time of impoundment, grazing plaintiff's parcels." App. 343; R. Doc. 228, at 27.

Third, the court's factual findings undercut Plaintiff's assertion that "[d]etermining whether cattle are in fact trespassing becomes a difficult task" for ranchers. Opening Brief 18. Ranchers know that their cattle are in fact trespassing where: (1) the rancher's grazing permit has expired; and (2) the rancher nonetheless continues to graze cattle on parcels within an RU in which he has an ownership interest but that have not been formally removed from the RU by the BIA.

As for Plaintiff's assertion that "whether fences must be erected is frequently an issue" (*id.*), it is undermined by yet another of the court's unchallenged findings:

> It is undisputed that, even if plaintiff did request to remove the tracts as he contends, *plaintiff did not erect a fence around those tracts which was required before plaintiff could graze his cattle on tracts contained within the Range Units in which he had an ownership interest*. There was never any contention in the record that plaintiff had an agreement to pay the other interested owners in those tracts any rent for plaintiff's use of the tracts.

App. 323; R. Doc. 228, at 7 (emphasis added).

Finally, Plaintiff attempts to distinguish the cases cited by the district court on the ground that the regulations at issue in those decisions "do not reflect modern mediation procedures" that were subsequently adopted by the Forest Service. Opening Brief 21. This argument is a *non sequitur*. The fact that an agency subsequently adopted mediation procedures does not mean that the agency's prior regulations failed to afford permit holders procedural due process in trespass cases.

In any event, the Forest Service mediation procedures cited by Plaintiff (Opening Brief 21-22) would be inapplicable here, even if the BIA had adopted them. Those mediation procedures are available where the Forest Service has suspended or cancelled a term grazing permit in whole or in part. *See* 64 Fed. Reg. 37843, 37846-47 (July 14, 1999). By contrast, the BIA did not suspend or cancel Plaintiff's grazing permits for RUs 169 and P501; rather, they simply expired by their own terms.

2. The case law is not distinguishable on the ground that Plaintiff was (supposedly) required to exhaust his administrative remedies.

Taking a different tack, Plaintiff seeks to distinguish the case law cited by the district court on the ground that those cases "do not account for the requirement to exhaust administrative remedies through the BIA and IBIA." Opening Brief 22. The argument appears to be that: (1) the district court concluded that Plaintiff's procedural due-process challenge to the BIA's impoundment of his cattle had to be administratively exhausted before the court could hear that claim; and therefore (2) the IBIA's "lack of action" on his administrative appeal effectively deprived Plaintiff of "due process for all intents and purposes." *Id.* at 22-23. *See also id.* at 20 (referring to the "prolonged nature of the post-deprivation proceedings" at the IBIA as supporting his due-process claim).

Plaintiff's argument fails, however, because its premise is wrong: the district court did *not* conclude that administrative exhaustion of Plaintiff's due-process challenge to the impoundment of his cattle was required. Rather, the court held the *opposite.* In 2016 and again in 2019, the district court ruled that Plaintiff's "due process claims relating to the impoundment of his cattle" are "*exempt* from the exhaustion requirement." App. 274; R. Doc. 183, at 5 (emphasis added) (Sept. 30, 2019 order); *see* App. 129, 132; R. Doc. 55, at 23, 26 (Feb. 19, 2016 order). However, given Plaintiff's "choice" to nevertheless "proceed with the administrative

appeals process," the court found it "appropriate to stay consideration of the impoundment claims pending resolution of the IBIA appeals." App. 275; R. Doc. 183, at 6. *See supra*, p. 22.

Consequently, as of February 19, 2016 (the date of the first of the district court's rulings on this exhaustion issue), Plaintiff knew he could proceed in the district court with his due-process challenge to the BIA's impoundment of his cattle *without* having to continue waiting for a decision from the IBIA. The court had stayed consideration of that claim only because Plaintiff chose to proceed with non-mandatory administrative exhaustion. At any time after the district court's February 2016 ruling, Plaintiff could have asked the district court to resume adjudication of his due-process claim. But Plaintiff did not do so.

II. The district court correctly dismissed Plaintiff's pre-impoundment claims without prejudice for failure to exhaust Tribal-court remedies.

Plaintiff contends that the district court erred in dismissing without prejudice his pre-impoundment claims for failure to exhaust Tribal-court remedies, *i.e.*, his claims that, under Tribal law, the grazing permits for RUs 169 and P501 should have been allocated to Plaintiff, not Duke Buffington, after Plaintiff's permits expired in 2012. Opening Brief 24. That contention lacks merit.

A. Plaintiff was required to, but did not, exhaust his pre-impoundment claims in Tribal court.

This Court has explained that the tribal exhaustion doctrine "favors exhaustion of available remedies in tribal court before a collateral or parallel federal court action may proceed." *Gaming World*, 317 F.3d at 849 (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 853-57 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-18 (1987)). The tribal exhaustion doctrine is "based on a policy of supporting tribal self-government and self-determination," and is "mandatory" when "a case fits within the policy." *Id.*

A dispute that "raises questions of tribal law and jurisdiction" should "first be presented to the tribal court." *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994). Moreover, and importantly here, "exhaustion of tribal court remedies 'means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.'" *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 837 (8th Cir. 2023) (quoting *Iowa Mut. Ins. Co.*, 480 U.S. at 17).

Consistent with these principles, the district court correctly recognized that tribal-court exhaustion of Plaintiff's pre-impoundment claims was required because those claims raised "questions of tribal law and jurisdiction." *Duncan Energy*, 27 F.3d at 1300. The jurisdictional question was whether tribal sovereign immunity barred Plaintiff's tribal-law claims against the Tribe's allocation committee. The

tribal-law merits question was whether, under the Tribe's grazing code, the allocation committee should have allocated the grazing permits for RUs 169 and P501 to Plaintiff rather than Buffington.

In its August 22, 2019 decision, the Tribal trial-court concluded that it lacked jurisdiction and therefore did not reach the merits question. *See supra* p. 13. But by obtaining that decision, Plaintiff did not exhaust his tribal-court remedies. Rather, "exhaustion of tribal court remedies 'means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts,'" *WPX Energy*, 72 F.4th at 837, and Plaintiff did not appeal the Tribal trial-court's decision to the Tribe's supreme court. *See* App. 289; R. Doc. 183, at 20 (district court noting availability of an appeal to the Tribe's supreme court). Accordingly, the district court correctly dismissed Plaintiff's pre-impoundment claims without prejudice for failure to exhaust tribal-court remedies.

Plaintiff does not dispute that he did not appeal the Tribal trial-court's August 22, 2019 decision to the Tribe's supreme court. But Plaintiff nevertheless faults the district court for not "reconsidering whether tribal exhaustion had been satisfied" after the Tribal trial-court issued its decision. Opening Brief 25. However, there was nothing for the district court to reconsider given that Plaintiff had not appealed (and never did appeal) that Tribal court decision to the Tribe's supreme court—as he was required to do to exhaust his tribal-court remedies. *WPX Energy*,

72 F.4th at 837. And while Plaintiff says that he "must have some forum" in which to bring his pre-impoundment claims (Opening Brief 27), Plaintiff did have such a forum—the Tribal supreme court. Plaintiff simply chose not to go there. Moreover, Plaintiff chose to voluntarily dismiss his pre-impoundment appeal at the IBIA (another forum in which to bring that claim). *See supra*, p. 13.

B. If not abandoned, Plaintiff's argument that he had "first preference" for reissuance of the grazing permits under tribal law is dubious.

Notwithstanding Plaintiff's failure to exhaust his tribal-court remedies, Plaintiff summarily asserts that, under the Tribe's grazing ordinance, he had "first preference" for reissuance of the grazing permits on RUs 169 and P501 for the period 2012-2017. Opening Brief 24. But that argument is wholly undeveloped and the Court should therefore deem it abandoned—particularly because it is a question of tribal law that Plaintiff did not exhaust in the tribal courts.[9]

In any event, Plaintiff's argument is dubious. Under Tribal Ordinance 11-05, there are two ways a grazing permit can be awarded: allocation or competitive bidding. They proceed sequentially, allocation first, then competitive bidding. An allocation application must be submitted to the allocation committee. App. 065;

---

[9] *See*, *e.g.*, *United States v. Drew*, 9 F.4th 718, 722 n.3 (8th Cir. 2021) (insufficiently developed argument deemed abandoned). *Accord Molasky v. Principal Mut. Life Ins.*, 149 F.3d 881, 885 (8th Cir. 1998) ("[I]t is not our job to research the law to support an appellant's argument.").

R. Doc. 1-1, at 53 (Ordinance § 3(a)). There are several eligibility requirements for an allocation, including that the applicant must own less than 300 head of livestock. App. 066; R. Doc. 1-1, at 54 (Ordinance § 3(d)).

If there are two or more *eligible* allocation applicants for a RU, it appears that the current permittee receives the allocation. App. 068; R. Doc. 1-1, at 54 (Ordinance § 3(f)(1)). If that is what Plaintiff means by "first preference" (Opening Brief 24), then this provision does not apply. Although Plaintiff applied for an allocation of RUs 169 and P501 in 2012, he was not eligible because he owned far more than 300 head of livestock. App. 319; R. Doc. 228, at 3.

Under the competitive bidding process, Tribal members might qualify for "first preference," which means that instead of having to submit an initial bid with all other bidders, they have five days after the bid opening to state that they will meet whatever the highest bid was. *See* App. 070; R. Doc. 1-1, at 58 (Ordinance § 4(e)) ("Preference Bids"). To qualify for "first preference," the tribal member must "own 100% of the ownership requirements to be grazed on the unit(s) competed for and who was the past permittee of the unit(s)." *Id.* (Ordinance § 4(e)(1)). This may be what Plaintiff is referring to as "first preference." Opening Brief 24.

However, if that is Plaintiff's "first preference" argument, there are multiple problems with it. Initially, the "first preference" provision is inapplicable here because the permits for RUs 169 and P501 were awarded via the allocation process,

which takes place first sequentially. Additionally, even if the "first preference" provision applies and Plaintiff satisfied its requirements, "first preference" means only that he would have a chance to meet the highest bid for those RUs. It does *not* mean Plaintiff automatically would be awarded the permits.

III. The district court acted within its discretion when it quashed subpoenas served by Plaintiff on Tribal employees.

The federal appellees agree with the Tribe that the district court acted within its discretion when it granted the Tribe's motion to quash subpoenas for depositions served by Plaintiff on Diane Mesteth and Jolene Provost. App. 296-303; R. Doc. 184, at 1-8. At the time the subpoenas were served, Mesteth was the director of the Tribe's land office and Provost was the range specialist in that office. App. 297; R. Doc. 184, at 2.

The district court found that Mesteth and Provost were "tribal employees during the time period relevant to plaintiff's subpoenas," and that "[the Tribe's] employees acting in their official capacities are protected by the [Tribe's] sovereign immunity." App. 300; R. Doc. 184, at 5. In quashing the subpoenas, the court correctly relied on *DeJordy*, 675 F.3d 1100, where this Court held that a third-party subpoena in private civil litigation in federal court is "a 'suit' that is subject to Indian tribal immunity." *Id.* at 1105. *See* App. 303; R. Doc. 184, at 8.

First, Plaintiff contends that *DeJordy* is distinguishable because "the tribal officials in that case were not taking action pursuant to a federal regulatory scheme,"

whereas Mesteth and Provost were acting "pursuant to the federal grazing permit regulatory scheme that the BIA ultimately administers." Opening Brief 28; *see id* at 29. But Plaintiff does not explain how that distinction matters, and it does not. *DeJordy* did not turn on the source of law under which the subpoenaed tribal official was acting. Rather, *DeJordy* held that, as a matter of law, "a federal court's third-party subpoena is a 'suit' that is subject to Indian tribal immunity," which, unless abrogated or waived, requires the district court to quash the subpoena served on the tribal employee. *DeJordy*, 675 F.3d at 1105-1106. That is the situation here.

Second, Plaintiff erroneously suggests that in *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (10th Cir. 2014), the Tenth Circuit "reject[ed] *DeJordy*'s conclusion." Opening Brief 28. Even if true, this Court must follow *DeJordy* rather than *Bonnet*. But in any event, *Bonnet* did not "reject" *DeJordy*. Rather, *Bonnet* concluded that "[a]lthough we *agree* with the Eighth Circuit's holding [in *DeJordy*] as to the immunity enjoyed by the Tribe itself, *we need not decide* whether a tribal official is also immune from an appropriate federal discovery request." *Bonnet*, 741 F.3d at 1161-62 (emphasis added).

Third, given *DeJordy*'s holding, there is no merit to Plaintiff's argument that the district court should have applied "the routine analysis on scope of discovery based on federal civil procedure." Opening Brief 29. Plaintiff would not have been entitled to subpoena Mesteth and Prevost under the Federal Rules of Civil Procedure.

See Fed. Rule Civ. P. 26(b)(1) (permitting discovery of "nonprivileged matter"); Fed. Rule Civ. P. 45(d)(3)(A)(iii) (on timely motion, the district court must quash a subpoena that "requires disclosure of . . . protected matter . . . if no exception or waiver applies"). The district court correctly relied on Rule 45(d)(3)(A)(iii) to quash Plaintiff's subpoenas. App. 303; R. Doc. 184, at 8 (granting Tribe's motion "[b]ecause the subpoenas would 'require[ ] disclosure of . . . protected matter'—documents and information protected by the [Tribe's] sovereign immunity").

Fourth, and finally, Plaintiff erroneously implies that *DeJordy* is no longer good law after *Lewis v. Clarke*, 581 U.S. 155 (2017). Opening Brief 30. *Lewis* addressed a different issue, holding that "in a suit brought against a tribal employee *in his individual capacity*, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." 581 U.S. at 157 (emphasis added). Here, Plaintiff's subpoenas were *not* served on Mesteth and Provost in their individual capacities. Indeed, their status as Tribal employees acting in their official capacities in the Tribe's land office appears to have been the reason why they were subpoenaed. *See* App. 300; R. Doc. 184, at 5 (district court's finding that Mesteth and Provost were Tribal employees "acting in their official capacities" when the subpoenas were served).

Moreover, after *Lewis*, this Court reaffirmed that "[a] suit against a governmental officer in his official capacity is the same as a suit against the entity

of which the officer is an agent." *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019) (quoting *McMillian v. Monroe Cty.*, 520 U.S. 781, 785 n.2 (1997) (cleaned up by *Stanko*)). And, invoking *Lewis*, the Court explained that "[t]here is no reason to depart from these general rules in the context of tribal sovereign immunity." *Id.* (quoting *Lewis*, 581 U.S. at 163).

IV. The district court acted within its discretion when it denied Plaintiff's motion for a continuance of the bench trial.

At the time Plaintiff's attorney James Hurley filed a motion for a continuance, this case had been pending in the district court for eight years (August 2015 to August 2023). As shown *supra*, pp. 26-27, the district court gave ample reasons for denying a continuance. For example, attorney Terry Pechota assured the court that, if he were allowed to withdraw, Plaintiff "had other competent counsel and would not be 'left in the lurch,'" Hurley was responsible for his own inability to be ready for trial on the original August 21, 2023 trial date, and the court reasonably desired to bring this long-running case to a conclusion. On this record, the court acted within its sound discretion in denying Plaintiff's continuance motion.

Decisions whether to continue trial are left to the broad discretion of the trial court and are "reversible only upon showing abuse of discretion." *Lessmann v. C.I.R.*, 327 F.2d 990, 996 (8th Cir. 1964); *see also Peter Kiewit Sons', Inc. v. Wall St. Equity Grp., Inc.*, 809 F.3d 1018, 1022 (8th Cir. 2016). This broad discretion is necessary "to facilitate the orderly trial of cases and the wise use of judicial

[resources]." *Janousek v. French*, 287 F.2d 616, 623 (8th Cir. 1961). Accordingly, reversals will occur "only in extreme cases." *Grunewald v. Missouri Pac. R. Co.*, 331 F.2d 983, 986 (8th Cir. 1964).

This is not an "extreme" case. Rather, Plaintiff contends merely that "an attorney's withdrawal from a case may warrant the granting of a continuance." Opening Brief 31 (citing *Grunewald*, 331 F.2d at 986). While that is true, Hurley was not seeking to withdraw; attorney Pechota had already been granted leave to withdraw, and in doing so, he had assured the district court that his withdrawal would not leave Plaintiff "in the lurch" because *Hurley* was ready and able to continue representing him.

Accordingly, the more pertinent proposition is that "[l]itigants do not have an absolute right to continuances to prepare for trial or to obtain counsel." *Schooley v. Kennedy*, 712 F.2d 372, 374 (8th Cir. 1983). Instead, courts determine whether, in the circumstances presented, the moving party provided a "compelling reason" to delay trial. *See Janousek*, 287 F.2d at 622-23. "In order for the denial of a continuance to be grounds for reversal, appellants *must show* that they were prejudiced as a result." *Comcast of Illinois X v. Multi-Vision Electronics, Inc.*, 491 F.3d 938, 946 (8th Cir. 2007) (emphasis added). Such prejudice may occur when there is a "significant new dimension" to the case that requires more time for

a party to prepare for trial. *See Nutt v. Black Hills Stage Lines, Inc.*, 452 F.2d 480, 483 (8th Cir. 1971).

In this case, there was no "significant new dimension" or "compelling reason" necessitating a trial continuance. Rather, Plaintiff sought a continuance to provide his attorneys Hurley and Hegge additional time to review discovery material that former attorney Pechota had compiled years earlier, and to follow up on that discovery as necessary. App. 311; R. Doc. 212, at 3 (¶¶14, 19). That is far from a compelling reason to delay a scheduled trial date, particularly where the court had lifted the stay and set the trial date months earlier and Hurley waited until only two weeks before trial to seek a continuance. App. 446; R. Doc. 194, at 3.

Moreover, Plaintiff fails to cite specific ways in which he suffered prejudice by the district court's denial of his continuance motion. Instead, Plaintiff references unidentified "additional motions" that attorney Hegge might have filed, and a possible negotiated resolution that she might have been able to reach, if the trial had been continued. Opening Brief 32-33. These sorts of vague allegations of prejudice do not compel reversal of the district court's denial of a continuance motion; if they did, reversals would not be limited to "extreme cases." *See Grunewald*, 331 F.2d at 986.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ John Emad Arbab

TODD KIM
Assistant Attorney General

ANDREW M. BERNIE
JOHN EMAD ARBAB
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-4046
john.arbab@usdoj.gov

ALISON J. RAMSDELL
United States Attorney
District of South Dakota

YVETTE K. LAFRENTZ
STEPHANIE C. BENGFORD
Assistant U.S. Attorneys

Of Counsel:
KALLIE JACOBSON
CAITLIN LOCK COOMES
Attorney-Advisors
U.S. Department of the Interior
Bloomington, MN

90-2-4-17573
July 12, 2024

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 12,971 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

3. This document complies with the requirement of Circuit Rule 28A(h)(2) because it has been scanned for viruses and is virus-free.

/s/ John Emad Arbab

Counsel for Federal Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2024, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John Emad Arbab

Counsel for Federal Appellees