No. 24-1217

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CURTIS TEMPLE,
Plaintiff-Appellant,

v.

LAWRENCE ROBERTS, et al.,
Defendants-Appellees,

and

OGLALA SIOUX TRIBE, et al.,
Movants-Appellees.

Appeal from the United States District Court for the District of South Dakota
No. 5:15-cv-5062-CBK (Hon. Charles B. Kornmann)

BRIEF FOR THE TRIBAL MOVANTS-APPELLEES

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SUMMARY OF THE CASE

The Oglala Sioux Tribe is a federally recognized Indian Tribe that reserved its original, inherent right to self-government in several treaties with the United States. The Supreme Court and this Court have repeatedly held that suits against Indian Tribes and Tribal officials acting in their official capacities are barred by Tribal sovereign immunity. In *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012), this Court held that third-party subpoenas issued in civil lawsuits to Indian Tribes and Tribal officials acting in their official capacities operate as suits against the Tribes and are barred by Tribal sovereign immunity.

In this case, Plaintiff issued deposition subpoenas to two Tribal officials, seeking to compel them to testify in their official capacities and to produce Tribal government records concerning actions taken and decisions made by the Tribe on Plaintiff's applications for grazing permits. The Tribe and the subpoenaed Tribal officials moved to quash the subpoenas. Applying *DeJordy*, the district court quashed the subpoenas.

This Court should affirm the district court's order quashing the subpoenas. The Court should also affirm the district court's orders dismissing Plaintiff's pre-impoundment claims, rejecting Plaintiff's due process challenge to the federal government's livestock trespass enforcement actions, and denying a motion to continue the bench trial. Tribal Movants request 15 minutes of oral argument.

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Tribal Movants adopt by reference Federal Defendants' Statement of Jurisdiction. *See* Federal Defendants' Brief ("Fed. Br.") 3.

STATEMENT OF THE ISSUES

1. Whether the district court acted within its discretion when it quashed subpoenas served by Plaintiff on two Tribal officials, seeking to compel them to testify in their official capacities and produce Tribal government records concerning actions taken and decisions made by the Tribe on Plaintiff's applications for grazing permits.

- *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012)
- *United States v. James*, 980 F.2d 1314 (9th Cir. 1992)
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- *In re Subpoena in Collins*, 524 F.3d 249 (D.C. Cir. 2008)

Tribal Movants adopt by reference Federal Defendants' Statement of Issues Nos. 1, 2, and 4. *See* Fed. Br. 3-4.

STATEMENT OF THE CASE

The legal and factual background of this case are set forth in extraordinary detail in the District Court's Findings of Fact, Conclusions of Law, and Judgment dated December 8, 2023, Appellant's Appendix ("App.") 317-348; R. Doc. 288, at 1-32, the Oglala Sioux Tribal Court's Order in *Temple v. OST Allocation Committee*,

Case Nos. CIV-13-0533, CIV-15-0333, and CIV-18-0038, dated August 22, 2019, App. 242-269; R. Doc. 180-1, at 1-28, the decision of the Regional Director of the Great Plains Regional Office of the Bureau of Indian Affairs ("BIA") on Plaintiff's administrative appeal of the decision of the Pine Ridge Agency Superintendent of the BIA to issue grazing permits to Donald "Duke" Buffington for range units 169 and P501, dated August 16, 2013, App. 235-237; R. Doc. 173-3, at 1-3, the letter of the Pine Ridge Agency Superintendent, dated July 2, 2015, Federal Defendants' Appendix ("Fed. App.") 1-6; R. Doc. 14-3, at 1-6, and Federal Defendants' Statement of the Case. Fed. Br. 4-28. Tribal Movants refer the Court to these materials.

In the discussion that follows, Tribal Movants highlight certain issues of particular importance, including among other things the factual and legal background relating to: the allocation of grazing privileges on the Pine Ridge Indian Reservation ("Reservation"); Plaintiff's erroneous claim that he should have been awarded grazing permits for range units 169 and P501 in 2012; and Plaintiff's erroneous claim that, even without grazing permits, he was entitled to graze his livestock on land he owned within those range units.

A. The Oglala Sioux Tribe

The Oglala Sioux Tribe ("Tribe") is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Treaty of 1851,

11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). The Tribe possesses sovereignty over both its members and its territory. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). It has the right to make its own laws and be ruled by them. *Williams v. Lee,* 358 U.S. 217, 220 (1959).

"The Tribe has roughly 51,000 enrolled tribal members and is headquartered on the Pine Ridge Indian Reservation, which encompasses approximately 3.1 million acres in southwestern South Dakota." *Oglala Sioux Tribe v. United States*, 674 F. Supp. 3d 635, 641–42 (D.S.D. 2023) (cleaned up).

As shown below, the Tribe exercises inherent powers of tribal self-government over the allocation of grazing privileges to grazing land on the Reservation and it has an interest in the efficient and sustainable management of those lands, including the prompt and efficient removal of trespassing livestock.

B. Grazing Land on the Pine Ridge Indian Reservation

The district court found that, "[g]razing land is one of the most valuable assets of the Tribe and its members ..." App. 318; R. Doc. 228, at 2 (citing Tribal Court Order of August 22, 2019, App. 246; R. Doc. 180-1, at 5). Among other things, the leasing of grazing land provides income to the beneficial owners of the land, including the Tribe and individual members of the Tribe, and it allows Tribal

member ranchers to earn a living and create employment opportunities for others through their livestock operations.

The United States recognizes the importance of grazing land, also referred to as Indian agricultural land, to Indian Tribes and their members. In the American Indian Agricultural Resources Management Act ("AIRMA"), Pub. L. 103-177, 107 Stat. 2011 (Dec. 5, 1993), Congress found that, "Indian agricultural lands are renewable and manageable natural resources which are vital to the economic, social, and cultural welfare of many Indian tribes and their members," and the "development and management of Indian agricultural lands in accordance with integrated resource management plans will ensure proper management of Indian agricultural lands and will produce increased economic returns, enhance Indian self-determination, promote employment opportunities, and improve the social and economic well-being of Indian and surrounding communities." 25 U.S.C.A. § 3701(3),(4).

C. Awarding Grazing Permits on the Reservation

The district court summarized the process for the awarding of grazing permits on the Reservation as follows:

> [G]razing land is divided into Range Units, which are numbered tracts of range land designated as management units for the administration of grazing privileges by the Tribe and the Bureau of Indian Affairs ("BIA"). Range Units may consist of tribal trust (or restricted) land, individual trust (or restricted) land, government land, or any combination thereof, consolidated for grazing purposes.

> Under existing tribal and federal law, the awarding of grazing privileges for Range Units on the Reservation is carried out jointly by the Tribe and the BIA. In most cases, grazing privileges are awarded pursuant to the Tribal Grazing Code … and the federal regulations at 25 C.F.R. Part 166. Under the Tribal Grazing Code, allocation applications and competitive bids are submitted to the Oglala Sioux Tribe Allocation Committee. The Allocation Committee reviews the applications and bids, makes eligibility determinations, and approves or denies applications and bids. The decisions of the Allocation Committee are forwarded to the Superintendent of the Pine Ridge Agency of the BIA as recommendations. The Superintendent makes the final decisions to award Grazing Permits, pursuant to the regulations at 25 C.F.R. Part 166.
>
> Under the Tribal Grazing Code, grazing privileges to Range Units are awarded through an allocation process. Range Units that remain available after the allocation process are subject to competitive bidding. Tribal member livestock operators with no more than 300 head of livestock are permitted to use the allocation process without competitive bidding, while other operators must compete for Range Units in the competitive bidding process. Preference is given in the competitive bidding process to tribal members with more than 300 head of cattle. Fraud and false statements in connection with allocation applications and competitive bids are not permitted.
>
> The Grazing Code provides a comprehensive administrative remedy for an individual aggrieved by a decision of the Allocation Committee. Under [the 2011 Tribal Grazing Code], the administrative remedy consisted of an appeal to the Oglala Sioux Tribe Executive Committee.

App. 318; R. Doc. 228, at 2-3 (citing Tribal Court Order of August 22, 2019, App. 246-247; R. Doc. 180-1, at 5-6).

The Tribal Grazing Code that was in effect at all times relevant to this case is Oglala Sioux Tribe Ordinance No. 11-05 (Mar. 31, 2011). App. 58-76; R. Doc. 1-1, at 46-64. In this case, grazing permits for range units 169 and P501 were awarded in

2012 through the allocation process. Section 3 of the Grazing Code governs the allocation process, and section 3(d) restricts eligibility for allocations to individuals who own no more than 300 animal units. App. 65-69; R. Doc. 1-1, at 53-58.

The Tribe's Allocation Committee reviews allocation applications and makes eligibility determinations in accordance with the eligibility requirements in the code. O.S.T. Ord. No. 11-05 at § 3(f). The Allocation Committee may ask the BIA to conduct a livestock count to determine whether an applicant owns more than 300 animal units. *Id*. at § 3(d), App. 66; R. Doc. 1-1, at 54.

The decisions of the Allocation Committee are transmitted to the Agency Superintendent, who makes the ultimate decision to approve or deny grazing permits, pursuant to the regulations at 25 C.F.R. Part 166. Under those regulations, it is the federal government, not the Tribe, that "will grant permits" for range units, like range units 169 and P501, that "contain[], in whole or part, individually-owned Indian land and range units that consist of, or in combination with individually-owned Indian land, tribal or government land." 25 C.F.R. § 166.217(c).

Federal Defendants note that, generally speaking, the BIA will implement a Tribe's decisions regarding allocation of grazing privileges to particular tribal members. Fed. Br. 7. That is not always the case. For example, unless tribal law directs otherwise, the BIA "will refuse" to issue a grazing permit to an applicant who has not paid penalties, damages, and costs assessed by the BIA for trespassing on

Indian agricultural lands. 25 C.F.R. § 166.817(a). The Tribe's Grazing Code states that an allocation application will be disqualified based on any outstanding bill owed to the BIA. O.S.T. Ord. No. 11-05 at § 3(a), App. 65; R. Doc. 1-1, at 53.

Grazing permits are revocable privileges. O.S.T. Ord. No. 11-05 at definition (o), App. 62; R. Doc. 1-1, at 50. They are issued by the BIA for five year periods, O.S.T. Ord. No. 11-05 at § 1, App. 64; R. Doc. 1-1, at 52, and the permittee is not entitled to renewal of the permit or the award of a new permit for the same range unit.

Under certain circumstances, not relevant to this case, the current permittee of a range unit may be eligible for preference in the awarding of a new permit for that unit. For example, current permittees may receive a preference in the allocation process, but only if they are "qualified applicants for allocation privileges." *See id*. at § 3(f)(1), App. 68; R. Doc. 1-1, at 56. In addition, in the competitive bidding process, previous permittees may be entitled to "first preference," allowing them to match the highest sealed bid. *Id*. at § 4(e).

D. Plaintiff's Application for Grazing Permits

Plaintiff had grazing permits for range units 169 and P501, which expired on October 31, 2012. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 7. *See also* Tribal Movant's Appendix ("O.S.T. App.") 24-31; R. Doc. 227, at 1-8 (Plaintiff's grazing permits).

Plaintiff was one of two tribal members who filed applications in 2012 for an allocation of grazing privileges to range units 169 and P501. App. 319; R. Doc. 228, at 3; App. 248-249; R. Doc. 180-1, at 7-8. The other tribal member was Donald "Duke" Buffington. *Id*. The Allocation Committee asked the BIA to conduct livestock counts of both applicants. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8. The BIA conducted livestock counts and determined that Plaintiff had approximately 1,622 cattle on the Reservation, whereas Mr. Buffington had approximately 92 cattle on the Reservation. App. 319; R. Doc. 22, at 3; App. 248; R. Doc. 180-1, at 8.

The Allocation Committee determined, based on the BIA livestock counts, that Plaintiff was ineligible, and that Mr. Buffington was eligible, for an allocation of grazing privileges to range units 169 and P501. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8. The Allocation Committee awarded the grazing privileges to range units 169 and P501 to Mr. Buffington. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8.

Plaintiff was not entitled to preference as the current permittee of range units 169 and P501 because he was not a qualified applicant for allocation privileges.

On October 17, 2012, the BIA notified Plaintiff that range units 169 and P501 were not allocated to him, but were allocated to Mr. Buffington. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8. The letter informed Plaintiff that his

application was denied since he exceeded the limitation of 300 head of livestock for allocation purposes. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8. The letter also notified Plaintiff of his right to appeal the Allocation Committee's decision to the Executive Committee. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8.

Plaintiff appealed the decision of the Allocation Committee to the Executive Committee. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8. The Executive Committee held a hearing on March 18, 2013, to consider the appeal. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8. Plaintiff attended the hearing. App. 248; R. Doc. 180-1, at 8. The Executive Committee upheld the Allocation Committee's decision based on Plaintiff's ineligibility for the allocation of range units 169 and P501. App. 319; R. Doc. 228, at 3; App. 248; R. Doc. 180-1, at 8.

The Superintendent issued grazing permits for range units 169 and P501 to Mr. Buffington on March 25, 2013. App. 319; R. Doc. 228, at 4; App. 248; R. Doc. 180-1, at 8. *See also* O.S.T. App. 30-50; R. Doc. 226, at 2-22 (Buffington's grazing permits).

E. Plaintiff's Federal Administrative Appeal

Plaintiff filed an administrative appeal of the Superintendent's decision not to award him grazing permits for range units 169 and P501. App. 319; R. Doc. 228, at 3; App. 248-249; R. Doc. 180-1, at 8-9. The Regional Director of the Great Plains

Regional Office of the BIA upheld the Superintendent's decision. App. 319-320; R. Doc. 228, at 3-4; App. 248; R. Doc. 180-1, at 9. The Regional Director stated: "The Superintendent … acted properly in issuing grazing permits to Donald 'Duke' Buffington for range unit 169 and P501 following the Oglala Sioux Tribe allocation process." App. 237; R. Doc. 177-3, at 3; App. 248; R. Doc. 180-1, at 9.

The Regional Director responded as follows to Plaintiff's claim that, as the current permittee of range units 169 and P501, he was entitled to continue leasing those units:

> Mr. Temple is, as any tribal member, eligible to apply for an allocation of any range unit on the Pine Ridge Reservation. An allocation is not an automatic renewal of the permit at the Pine Ridge Agency. It is the responsibility of the Oglala Sioux Tribe Allocation Committee to decide who will receive an allocation of grazing privileges for range units on the Pine Ridge Reservation. The Allocation Committee met on October 10, 2012, and determined Mr. Temple was ineligible for an allocation of Range Units 169 and P501 ….
>
> Livestock counts were conducted Range Units 169 and P501 on September 26, 2012. Livestock counts were conducted on Range Units 514 and 506 on September 28, 2012. One-thousand-six-hundred-twenty-two head of livestock were counted on these Range Units belonging to Curtis Temple ….

App. 236; R. Doc. 177-3, at 2; App. 248; R. Doc. 180-1, at 9.

Plaintiff appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA") on September 3, 2013. App. 320; R. Doc. 228, at 4; App. 248; R. Doc. 180-1, at 9. However, Plaintiff voluntarily dismissed his IBIA appeal on May 4, 2015. *Id*. *See also* App. 53; R. Doc. 1-1, at 41 (voluntary dismissal letter).

The IBIA issued an order dismissing the appeal on May 11, 2015. *See Temple v. Great Plains Regional Director, BIA*, 60 IBIA 296 (May 11, 2015).

F. Plaintiff's Tribal Court Lawsuit

In 2013, Plaintiff filed a civil suit in the Oglala Sioux Tribal Court against various Tribal and federal agencies and officials. App. 15-90; R. Doc. 1-1, at 3-78. Among other things, he sought judicial review of the decision made by the Tribe's Allocation Committee and affirmed by the Tribe's Executive Committee that Plaintiff was ineligible for an allocation of range units 169 and P501, and the Superintendent's decision to award grazing permits for range units 169 and P501 to Mr. Buffington.

The Tribal Court dismissed the federal defendants from the suit, finding that it has no jurisdiction over the federal government. App. 116; R. Doc. 55, at 10. Plaintiff appealed to the Tribal Supreme Court, which affirmed the dismissal. App. 116, 127; R. Doc. 55, at 10, 21.

The Tribal Court later dismissed the claims against the Tribal defendants based on the doctrine of Tribal sovereign immunity. The court held that the Grazing Code provides a Tribal administrative remedy for individuals aggrieved by allocation decisions, but it does not authorize suits in Tribal Court against Tribal agencies or officials. The Tribal Court further held that Plaintiff's claims against Tribal defendants could not proceed without the participation of the federal

defendants: "The United States is a necessary and indispensable party in cases affecting the disposition of Indian trust lands, including actions seeking to cancel, reinstate, or restore Grazing Permits and Grazing Leases concerning Indian trust lands." App. 265; R. Doc. 180-1, at 24. The Tribal Court noted that:

> Plaintiff's claims … are properly addressed to the BIA through the federal administrative process. The United States holds title to Range Unit lands in trust for the benefit of the Tribe and individual Indians. The United States is responsible for issuing grazing permits and approving leases for these units, based on the recommendations of the Tribal Allocation Committee. The Tribal Grazing Code governs the manner in which the Tribal Allocation Committee makes those recommendations. The Tribal Grazing Code contains an administrative remedy for individuals aggrieved by decisions of the Allocation Committee. Plaintiff exercised his Tribal administrative remedies under the Tribal Grazing Code. His appeals were heard and decided, and the administrative decisions are final.
>
> Plaintiff also exercised his federal administrative remedies. In April 2013, Plaintiff filed an administrative appeal to challenge the decision of the Agency Superintendent to issue grazing permits to another tribal member. In August 2013, the Great Plains Regional Director affirmed the decision of the Superintendent, concluding that the Superintendent acted properly in issuing the grazing permits. Plaintiff filed an appeal with the IBIA, but later voluntarily withdrew that appeal. The IBIA entered an order dismissing the appeal in May 2015. Thus, the decision of the Great Plains Regional Director is final and binding.
>
> Plaintiff's grievances have been heard and decided in the available administrative forums. Plaintiff waived his right to federal judicial review of the BIA's final approval and issuance of the grazing permits when he withdrew his IBIA appeal. Having failed to exhaust his administrative remedies and having failed to preserve these matters in the federal administrative process, Plaintiff will not be permitted to litigate them in this action.

App. 263-264; R. Doc. 180-1, at 22-23 (internal citation omitted).

Federal Defendants note that Plaintiff did not appeal the Tribal Court's decision to the Tribal Supreme Court. *See* Fed. Br. 13.

G. The BIA's Livestock Trespass Enforcement Actions

AIRMA authorizes the BIA to "carry out the trust responsibility of the United States and promote the self-determination of Indian tribes by providing for the management of Indian agricultural lands and related renewable resources in a manner consistent with identified tribal goals and priorities for conservation, multiple use, and sustained yield." 25 U.S.C. § 3702(1).

Tribal grazing lands are a limited resource and effective and sustainable management is necessary to ensure that the lands are not overgrazed, which can lead to soil erosion, destruction of the range forage, and degradation of the ecosystem.

Prompt and efficient removal of trespassing livestock is essential to the effective and sustainable management of grazing lands, since it protects grazing land, wildlife habitats, range forage (including native plant species), water and their natural resources, and culturally significant sites from depletion, contamination, or destruction by trespassing livestock. Preventing livestock trespass promotes the continuation of traditional grazing practices that are in harmony with the land. Enforcing livestock trespass laws also helps to reduce conflicts between landowners, permit holders, and those who might otherwise graze their livestock illegally by

providing a clear legal framework for addressing violations, which ensures that disputes are handled in an orderly and fair manner.

AIRMA authorizes the Secretary of the Interior to enact regulations to "establish civil penalties for the commission of trespass on Indian agricultural lands." 25 U.S.C. § 3713(a). The BIA enacted livestock trespass regulations at 25 C.F.R. Part 166, Subpart I (Trespass). Among other things, those regulations authorize the BIA to impound trespassing livestock after the BIA provides notice and an opportunity to be heard to the owner of the livestock. 25 C.F.R. §§ 166.803 (notice of trespass), 166.804 (opportunity to be heard) & 166.807(c) (authorizing impoundment of trespassing livestock after additional notice of intent to impound).

Following the expiration of Plaintiff's grazing permits, the BIA began conducting compliance checks to determine whether his livestock were in trespass. BIA field officers conducted at least 20 compliance checks on range units 169 and P501, all of which found substantial numbers of Plaintiff's livestock grazing in trespass. App. 320-324; R. Doc. 228, at 4-8. In some cases, the number of trespassing livestock exceeded 200 head of cattle. *See* Fed. Br. 14; App. 321-322, 324; R. Doc. 228, at 5-6, 8. Plaintiff received numerous trespass notices which gave him the opportunity to respond orally and in writing to the Superintendent.

The district court found that Plaintiff responded in writing to one trespass notice on June 5, 2015. App. 323; R. Doc. 228, at 7. *See also* Fed. App. 8-9; R. Doc.

15-2, at 2-3 (Plaintiff's written response). Plaintiff acknowledged in that written response that "there [have] been numerous notices of alleged trespass issued against [him] respecting range units 169 and 501," and that he had held "numerous past meetings" with the Superintendent about the "ongoing dispute." Fed. App. 8; R. Doc. 15-2, at 2. He asked the Superintendent to "defer any actions against [him] regarding [the] subject units and trespass pending the outcome of litigation in the Tribal courts." Fed. App. 9; R. Doc. 15-2, at 2.

In his written response, Plaintiff did not dispute the fact that his cattle were on range units 169 and P501. *See* Fed. App. 8-9; R. Doc. 15-2, at 2-3. Instead, he claimed that he owned thousands of acres in the range units and that those lands were not part of the Tribe's range management program. *See also* Fed. App. 8; R. Doc. 15-2, at 2. He admitted that he "does not have fencing enclosing portions of his particularly owned (allotted) land …" Fed. App. 9; R. Doc. 15-2, at 3.

The Superintendent responded in writing to Plaintiff. App. 323; R. Doc. 228, at 7. *See also* Fed. App. 1-6; R. Doc. 14-3, at 1-6. The Superintendent informed Plaintiff that he only had an ownership interest in 290.85 acres in range units 169 and P501, not the thousands of acres he claimed, and further that Plaintiff was a fractional owner, not the sole owner, of the 290.85 acres. Fed. App. 1; R. Doc. 14-3, at 1; App. 323; R. Doc. 228, at 7. The Superintendent informed Plaintiff that the

land in which he had an ownership interest had not been removed from the grazing permits for range units 169 and P501. Fed. App. 1-2; R. Doc. 14-3, at 1-2.

The Superintendent informed Plaintiff that he could "request" that his land be removed from the grazing permits, but that approval of such a request would be contingent upon the development of a lease or permit to provide income to the other beneficial owners of the removed lands and erection and maintenance by Plaintiff of a three wire stock tight fence separating his land from the rest of the range units. App. 323; R. Doc. 228, at 7; Fed. App. 1-2; R. Doc. 14-3, at 1-2. *See* O.S.T. Ord. No. 11-05, § 8(a), App. 71; R. Doc. 1-1, at 59 (providing that no land may be withdrawn from a range unit by the landowner for his or her own grazing or farming use unless the landowner erects and maintains a standard three-wire stock fence separating the land from the surrounding range unit).

The Superintendent notified Plaintiff that he "does not have any right to graze his livestock on Range Unit 169 and Range Unit P501," and if he "refuses to remove his livestock, I will have no alternative but to impound them." Fed. App. 2; R. Doc. 14-3, at 2. *Accord*, App. 323; R. Doc. 228, at 7.

Plaintiff asserts that the BIA's subsequent impounds were unlawful, in whole or in part, because his livestock were impounded from land he owns within range units 169 and P501. That is not correct as a factual matter. The district court found that through the use of sophisticated GPS data, the BIA did not impound Plaintiff's

livestock from any land in which the Plaintiff had an ownership interest. App. 324; R. Doc. 228, at 8. Moreover, the district court found that Plaintiff did not produce any record of having made a request to the BIA to remove from range units 169 and P501 any tracts of land in which he had an ownership interest. App. 323; R. Doc. 228, at 7. Further, the district court also found that Plaintiff did not erect a fence around those tracts or agree to pay the other interested owners in those tracts any rent for Plaintiff's use of the lands. *Id*.

H. Plaintiff's Deposition Subpoenas to Tribal Officials

Plaintiff caused third-party subpoenas to be served on Denise Mesteth and Jolene Provost to compel their testimony and production of documents at depositions. O.S.T. App. 11-13; R. Doc. 173-1, at 1-3; O.S.T. App. 14-16; R. Doc. 173-2, at 1-3. Mesteth and Provost are current or former Tribal officials. Mesteth is the former Director of the Land Office of the Tribe. Provost is the current Range Specialist in the Land Office of the Tribe.

Counsel for Tribal Movants conferred with counsel for Plaintiff and Federal Defendants to determine the nature and scope of Plaintiff's intended deposition of the Tribal officials. O.S.T. App. 3-4; R. Doc. 173, at 3-4. Based on that conference, it was apparent that Plaintiff intended to depose the Tribal officials in their official capacities as (present or former) officers and representatives of the Tribe about: actions taken, decisions made, or information obtained in their official capacities;

the pre-impoundment decisions and actions of the Tribe; and the deliberations, deliberative process, discussions, and reasons for the Tribe's actions and decisions. O.S.T. App. 4; R. Doc. 173, at 4.

Plaintiff also sought to compel the Tribal officials to produce extensive volumes of documents that are in the possession, custody, and control of the Tribe and that span a period of several years, including:

1. Records of the source of funding for the Land Office of the Tribe ("Tribal Land Office") from January 1, 2013, to the present;

2. All applications submitted by Plaintiff to the Tribal Land Office for a leasing or grazing permit of Tribal or allotted land from January 1, 2013, to the present;

3. All records of hearings and written determinations of the Tribal Land Office on all applications submitted by Plaintiff to the Tribal Land Office for a leasing or grazing permit of Tribal or allotted land from January 1, 2013, to the present;

4. All records of allocations of grazing privileges or leases to Plaintiff that were subsequently vacated for any reason by the Allocation Committee of the Tribe or the Executive Committee of the Tribe from January 1, 2013, to the present;

5. All records pertaining to any administrative appeal filed by Plaintiff in the Tribal Land Office, from January 1, 2013, to the present, concerning any decision of the Allocation Committee of the Tribe;

6. All decisions of the Executive Committee of the Tribe on any appeal filed by Plaintiff from January 1, 2013, to the present;

7. All correspondence from the Tribal Land Office to the Bureau of Indian Affairs ("BIA") and from the BIA to the Tribal Land Office concerning any Tribal or federal administrative appeal or lawsuit commenced by Plaintiff from January 1, 2013, to the present;

8. All correspondence from the Tribal Land Office to Plaintiff from January 1, 2013, to the present; and

9. Copies of all Tribal grazing ordinances in effect from January 1, 2013, to the present.

O.S.T. App. 12; R. Doc. 173-1, at 2; O.S.T. App. 15; R. Doc. 173-2, at 2.

Tribal Movants moved the district court to quash the subpoenas on the grounds that they operated as suits against Tribal officials acting in their official capacities and, as such, they were barred by the doctrine of Tribal sovereign immunity in accordance with this Court's decision in *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012). App. 214-216; R. Doc. 172, at 1-3. The district court granted the motion and quashed the subpoenas. App. 296-303; R. Doc. 184, at 1-8.

SUMMARY OF THE ARGUMENT

1. The district court properly quashed two subpoenas directed to Tribal officials acting in their capacities based on the doctrine of Tribal sovereign immunity. The district court correctly held that this Court's decision in *DeJordy* is controlling. *DeJordy* held that "a federal court's third-party subpoena is a 'suit' that is subject to Indian Tribal immunity," and absent a waiver, that immunity requires the district court to quash the subpoena. 675 F.3d at 1105-1106. Plaintiff's attempts to distinguish *DeJordy* are unavailing.

Further, Plaintiff fails to show how the district court's order quashing his subpoenas resulted in fundamental unfairness or actual prejudice affecting the outcome of the case. It did not. Plaintiff's subpoenas sought information relevant to pre-impoundment claims that had already been dismissed from the case.

2. The district court properly rejected Plaintiff's due process challenge to the BIA's livestock trespass enforcement actions. Plaintiff received multiple notices of trespass and was afforded multiple opportunities to be heard in a meaningful manner, orally and in writing, and at a meaningful time before his livestock were impounded.

3. The district court properly dismissed Plaintiff's pre-impoundment claims without prejudice for failure to exhaust Tribal court remedies. This Court has held that, "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. v. LaPlante*, 480 U.S. 9, 17 (1987)). After the Tribal Court dismissed Plaintiff's suit, he did not exhaust his available remedies in the Oglala Sioux Tribe Supreme Court.

4. Tribal Movants join in the Federal Defendants' argument that "[t]he district court acted within its discretion when it denied Plaintiff's motion for a continuance of the bench trial." Fed. Br. 50-52.

STANDARD OF REVIEW

Tribal Movants adopt by reference the Federal Defendants' statement of the standard of review. *See* Fed. Br. 30.

ARGUMENT

I. THE DISTRICT COURT PROPERLY QUASHED TWO SUBPOENAS DIRECTED TO TRIBAL OFFICIALS ACTING IN THEIR OFFICIAL CAPACITIES BASED ON THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

A. Plaintiff Has Not Met His Burden of Showing that the District Court's Discovery Order Was a Gross Abuse of Discretion Resulting in Fundamental Unfairness and Actual Prejudice.

Plaintiff asks this Court to vacate the district court's judgment and "remand the case for a new trial," Appellant's Brief ("App. Br."). 27, because the district court quashed two subpoenas directed to Tribal officials acting in their official capacities. The subpoenas sought to compel two current or former officers of the Tribe--Diane Mesteth and Jolene Provost--to testify and produce Tribal government documents concerning actions they took, decisions they made, and information they obtained in their official capacities as officers of the Tribe.

The subpoenas sought information relevant to Plaintiff's pre-impoundment claims, including information relating to the allocation, grazing, and leasing decisions made by the Tribe prior to the decisions by the United States to impound Plaintiff's livestock. The Tribe and its officials took no part in the federal government's impoundment of Plaintiff's livestock.

In its order quashing the subpoenas, the district court held that this Court's decision in *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012), "squarely controls this dispute." App. 303; R. Doc. 184 at 8. The district court correctly applied *DeJordy* and held that Plaintiff's subpoenas operated as suits against the Tribal officials and, as such, they were subject to and ultimately barred by Tribal sovereign immunity. App. 298, 303; R. Doc. 184, at 3, 8.

Plaintiff asks this Court to distinguish *DeJordy*--or overturn it--and to remand the case "with instructions to allow Temple's subpoena for deposition of Tribal government officials pursuant to the rules of discovery." App. Br. 30. However, Plaintiff's attempts to distinguish or undercut *DeJordy* are unpersuasive, as will be shown in parts (B), (C), and (D), below. Perhaps just as troubling is Plaintiff's failure to show how the district court's order resulted in fundamental unfairness or actual prejudice affecting the outcome of the case.

This Court has ruled that, "[a] district court has very wide discretion in handling pretrial discovery and we are most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *United States v. One Assortment of 93 NFA Regulated Weapons*, 897 F.3d 961, 966 (8th Cir. 2018). Further, this Court has ruled that, "[e]ven if 'a party can demonstrate a gross abuse of discretion by the trial court ... the complaining party must also demonstrate

prejudice.'" *Haukereid v. Nat'l R.R. Passenger Corp.*, 816 F.3d 527, 533-34 (8th Cir. 2016) (quoting *Gov't of Ghana v. ProEnergy Serv.*, LLC, 677 F.3d 340, 345 (8th Cir. 2012)).

Plaintiff makes no argument that the district court's order resulted in fundamental unfairness in the trial of the case or actual prejudice affecting the outcome of the case. To show prejudice, Plaintiff would have to show that he would have prevailed, or that he would have avoided an adverse judgment, in the district court had the subpoenas not been quashed. *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 746 (8th Cir. 2018); *Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003). He has not done so. This Court has held that, "[e]rrors not affecting the outcome of a case are not prejudicial." *Tilghman v. Allstate Prop. & Cas. Ins. Co.*, 22 F.4th 752, 755 (8th Cir. 2022).

Plaintiff cannot argue prejudice, since his subpoenas sought information relevant to his pre-impoundment claims, and those claims had already been dismissed from the case. App. 120-121, 151; R. Doc. 55, at 14-15, 45; App. 155, 161, 164; R. Doc. 147, at 2, 8, 11. Discovery on claims that were no longer a part of the case "would constitute nothing more than a fishing expedition." *One Assortment of 93 NFA Regulated Weapons*, 897 F.3d at 967. *Accord*, *Roberts v. Shawnee Mission Ford, Inc.*, 352 F.3d 358, 361 (8th Cir. 2003) (holding that district court

properly quashed subpoenas that "'were not directed at obtaining relevant, discoverable evidence' and [appellant] was on a 'fishing expedition'").

B. Tribal Sovereign Immunity Bars Suits Against the Tribe and Tribal Officers Acting in Their Official Capacities.

In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Indian Tribes are "domestic dependent nations," with inherent sovereign authority over their members and their territory, and in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), the Supreme Court held that suits against Indian Tribes are barred by Tribal sovereign immunity.

Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). The courts have noted that:

> Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but immunity also is thought to be necessary to promote the federal policies of Tribal self-determination, economic development, and cultural autonomy.

Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1182-1183 (10th Cir. 2010) (internal citations, quotation marks, and brackets omitted). *Accord, Alden v. Maine,* 527 U.S. 706, 715 (1999) (noting the "close and necessary" relationship between sovereignty and sovereign immunity, which is "central to sovereign dignity").

The Supreme Court has "time and again treated the 'doctrine of Tribal immunity as settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014) (quoting *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 756 (1998)). The Supreme Court has "held that tribes possess the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' Our cases have thus repeatedly emphasized that Tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the 'baseline position.'" *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 (2023) (quoting *Santa Clara Pueblo*, 436 U.S. at 58; *Bay Mills*, 572 U.S. at 790).

Additional cases in which the Supreme Court has upheld the doctrine of Tribal sovereign immunity include: *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416-417 (2001); *Kiowa Tribe*, 523 U.S. at 754; *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo,* 436 U.S. at 58; *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977).

This Court also has upheld the doctrine of Tribal sovereign immunity in numerous cases. Noteworthy cases include: *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019); *DeJordy*, 675 F.3d at 1100; *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011); *Hagen v. Sisseton-Wahpeton*

Community College, 205 F.3d 1040 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998); and *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995).

Tribal sovereign immunity extends to Tribal officers acting in their official capacities. This Court has held 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*, 916 F.3d at 697 (quoting *McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (cleaned up by *Stanko*). This Court held that, "'[t]here is no reason to depart from these general rules in the context of Tribal sovereign immunity.'" *Id.* (quoting *Lewis v. Clarke*, 581 U.S. 155, 163 (2017)).

Plaintiff did not argue in the district court, and he does not argue on appeal, that Congress has abrogated the Tribe's sovereign immunity. Further, Plaintiff does not argue on appeal that the Tribe has waived its sovereign immunity.

The Oglala Sioux Tribe has not waived its sovereign immunity. Rather, the Tribe has acted to preserve and protect its sovereign immunity, including the immunity of its officers from suit in any civil action arising from the performance of their official duties. Oglala Sioux Tribal Ordinance No. 01-22 provides that:

> [T]he Oglala Sioux Tribal Council, acting in the exercise of their Constitutional and Reserved Powers does hereby declare the Oglala Sioux Tribe, Oglala Sioux Tribal Officials, and Oglala Sioux Tribal Employees, acting in their official capacity, immune from suit, based on the Doctrine of Sovereign Immunity ….

O.S.T. Ord. No. 01-22 (Jul. 30, 2001), O.S.T. App. 17; R. Doc. 173-3, at 1. Similarly, Oglala Sioux Tribal Ordinance No. 15-16 provides that:

> The Oglala Sioux Tribe and its governing body, the Oglala Sioux Tribal Council, and its departments, programs, and agencies shall be immune from suit in any civil action and its officers, employees, and agents shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

O.S.T. Ord. No. 15-16 § 1(a) (Sept. 28, 2015), O.S.T. App. 22; R. Doc. 173-4, at 4.

The Supreme Court has held that, "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises*, 532 U.S. at 418 (quoting *Citizen Band of Potawatomi Indian Tribe*, 498 U.S. at 509). The laws of the Tribe provide that any waiver of sovereign immunity must be "unequivocally expressed," O.S.T. Ord. No. 01-22 at 1, O.S.T. App. 17, R. Doc. 173-3 at 1, and "it must make specific reference to a waiver of Tribal sovereign immunity," O.S.T. Ord. No. 15-16, § 1(b), O.S.T. App. 22; R. Doc. 173-4, at 4. There is no such waiver here.

The district court correctly concluded that Plaintiff "did not show the OST waived its sovereign immunity and consented to participation in this litigation." App. 302; R. Doc. 184, at 7. The district court rejected an argument made by Plaintiff in the district court, but abandoned on appeal, that the Tribe's Grazing Code waives the Tribe's sovereign immunity. *Id*. The district court held that the Tribe's Grazing Code subjects grazing permit holders to the jurisdiction of the Tribal Court, but it does not subject the Tribe to suit in federal court. App. 302-303; R. Doc. 184, at 7-

8. *See also* App. 232-234; R. Doc. 177-2, at 1-3; App. 242-269; R. Doc. 180-1, at 1-28 (Oglala Sioux Tribal Court decisions holding that Tribe's Grazing Code does not waive Tribal sovereign immunity).

C. Plaintiff's Third-Party Subpoenas Were "Suits" Against Tribal Officials Acting in Their Official Capacities and, as Such, They Were Barred by the Tribe's Sovereign Immunity.

In *DeJordy*, 675 F.3d at 1100, this Court held that Tribal sovereign immunity bars enforcement of third-party subpoenas against an Indian Tribe and its officers. The district court found *DeJordy* controlling and quashed Plaintiff's subpoenas directed to Tribal officials. App. 303; R. Doc. 184, at 8.

The *DeJordy* Court held that, "a third-party subpoena in private civil litigation is a 'suit' for purposes of the Tribe's common law sovereign immunity," and unless "that immunity has … been waived or abrogated," the subpoena may not be enforced. *Id*. at 1102. The court noted that, "'[t]he general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Id.* (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). Applying this standard, the court held that third-party subpoenas directed to the Oglala Sioux Tribe and an officer of the Tribe were "suits" since they "command a government unit to appear in federal court and obey whatever judicial discovery commands may be

forthcoming. The potential for severe interference with government functions is apparent." *Id*. at 1103.[1]

The *DeJordy* Court noted that, "permitting broad third-party discovery in civil litigation threatens to contravene 'federal policies of Tribal self-determination, economic development, and cultural autonomy' that underlie the federal doctrine of Tribal immunity." *Id*. at 1104 (quoting *Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir.1985). The court "conclude[d] from the plain language of the Supreme Court's definition of a 'suit' in *Dugan,* and from the Court's 'well-established federal policy of furthering Indian self-government,' that a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian Tribal immunity." 675 F.3d at 1105 (quoting *Santa Clara Pueblo*, 436 U.S. at 62).

This Court's decision in *DeJordy* is consistent with the Ninth Circuit's decision in *United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992), holding that Tribal sovereign immunity prohibits enforcement of a third-party subpoena *duces*

[1] *Accord*, *Boron Oil v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989) (holding that, "the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding interferes with the public administration and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function") (cleaned up; internal citations omitted).

tecum directed to a Tribal official for the production of Tribal government documents.

DeJordy is on all-fours with the present case and the district court properly applied *DeJordy* to quash the subpoenas directed to Mesteth and Provost. Plaintiff's third-party subpoenas sought to compel Mesteth and Provost to appear at depositions and testify about information obtained in their official capacities, including information that "would likely reveal deliberations" about Tribal policies and decisions. *Cf., DeJordy*, 675 F.3d at 1104.[2] If enforced, the subpoenas would have interfered with the public administration and self-government of the Tribe. Under *DeJordy*, the subpoenas were "suits" and, as such, they were barred by the Tribe's sovereign immunity.

In *DeJordy*, two third-party subpoenas were quashed: one was directed to the Oglala Sioux Tribe; the other was directed to a Tribal official; and both sought the production of Tribal documents. 675 F.3d at 1102. The subpoenas in this case are

[2] Tribal Movants noted in district court, and repeat here, that Plaintiff's subpoenas appeared to seek information protected by the "deliberative process" privilege, including information about the opinions, discussions, recommendations, deliberations, and reasons of Tribal officials concerning the pre-impoundment decisions. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001). The courts have held that examination of certain government officials concerning the reasons for administrative decisions is not permitted, since it would undermine the integrity of the administrative process. *See In re U.S.*, 197 F.3d 310, 313 (8th Cir. 1999); *United States v. Morgan*, 313 U.S. 409, 422-423 (1941). These arguments provide this Court with independent, alternate bases to affirm the district court's order quashing the subpoenas.

indistinguishable from the Tribal official subpoena in *DeJordy*. Like the Tribal-official subpoena in *DeJordy*, the subpoenas in this case compel the testimony of Tribal officials and they command the production of documents in the custody, possession, and control of the Tribe.

The *DeJordy* court noted that, "'[t]he general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" 675 F.3d at 1102 (quoting *Dugan*, 372 U.S. at 620). The *DeJordy* court held that third-party subpoenas directed to a Tribe and Tribal officer were "suits" since, among other things, they "command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming. The potential for severe interference with government functions is apparent." *Id*. at 1103. The court further noted that, "permitting broad third-party discovery in civil litigation threatens to contravene federal policies of Tribal self-determination, economic development, and cultural autonomy that underlie the federal doctrine of Tribal immunity." *Id*. at 1104 (internal citation omitted). These considerations apply with equal force in the present action. As in *DeJordy*, the third-party subpoenas directed to the Tribal Officers are "suits" barred by the Tribe's sovereign immunity.

If the subpoenas in this case were not quashed, they would have compelled the Tribal officials to appear and testify at depositions about information obtained in their official capacities, produce an extensive volume of documents in the possession, custody, and control of the Tribe, and "obey whatever judicial discovery demands may be forthcoming." *Cf.*, *DeJordy*, 675 F.3d at 1103.[3] These commands are identical to those in *DeJordy*, and they would have expended themselves on the Tribe's treasury and interfered with the administration of the Tribal government since they would compel the Tribal government "'to act in a manner different from that in which [it] would ordinarily choose to exercise its public function.'" *Id*. (quoting *Boron Oil v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989)).

Further, "the Tribe's gathering and production of the extensive documents" in this case, as in *DeJordy*, "would likely [have been] followed by depositions of all Tribal officials identified in those documents." *Id*. at 1104. "Information gleaned from this discovery would likely reveal deliberations establishing [Tribal] policies for the Reservation …" *Id*. Here, as in *DeJordy*, "[t]he potential for severe interference with government functions is apparent." 675 F.3d at 1103.

[3] Counsel for the Tribe also would be compelled, for all intents and purposes, to defend the depositions of the Tribal officials, further taxing the Tribal government.

D. Plaintiff's Attempts to Distinguish *DeJordy* Are Unavailing.

Plaintiff attempts to distinguish *DeJordy* on multiple grounds, none of which are persuasive. In the district court, Plaintiff argued that *DeJordy* has no applicability to this case because "Mesteth and Provost are federal employees." R. Doc. 176, at 2. The district court rejected that argument, holding 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.

Plaintiff concedes on appeal that Mesteth and Provost were, indeed, "tribal officials," App. Br. 28, but he contends that they were "acting pursuant to a federal regulatory scheme." *Id*. That is an incorrect statement of the law. It is also immaterial to the applicability of *DeJordy*.

Both the Tribe and the federal governments play important roles in the awarding of grazing privileges for range units on the Reservation, but each functions under its own inherent authority and its own laws.

This Court has recognized the inherent sovereign authority of Indian Tribes. For example, in *Nygaard v. Taylor*, 78 F.4th 995, 1000 (8th Cir. 2023), this Court cited with approval *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 689 (2022), for the proposition that "Native American Tribes possess inherent sovereign authority over their members and territories," and *United States v. Cooley*, 593 U.S. 345, 349

(2021), for the proposition that "Indian tribes may ... regulate domestic affairs among Tribal members."

Perhaps the most fundamental attribute of sovereignty possessed by Indian Tribes is the right to "self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883); *Accord*, *Talton v. Mayes*, 163 U.S. 376 (1896). The right to self-government involves "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. 217, 220 (1959). This right includes, without limitation, the inherent power to prescribe laws for disposition of Tribal land and resources.

In this case, the Tribe and its officials, including Mesteth and Provost, acted pursuant to Tribal law, not pursuant to a "federal regulatory scheme," as Plaintiff asserts. App. Br. 28. But, in any event, this Court's decision in "*DeJordy* did not turn on the source of law under which a subpoenaed Tribal official was acting." Fed. Br. 48. Instead, as the district court correctly held, *DeJordy* "turned on the concept of tribal sovereign immunity, which does not depend on the nature of the underlying suit." App. 300; R. Doc. 184, at 5. *DeJordy* held, without qualification, that "a federal court's third-party subpoena is a 'suit' that is subject to Indian Tribal

immunity," and absent a waiver, that immunity requires the district court to quash the subpoena. *DeJordy*, 675 F.3d at 1105-1106.

Next, Plaintiff incorrectly asserts that the Tenth Circuit rejected *DeJordy* in *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (10th Cir. 2014). App. Br. 28. *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). The court did not decide that question. In any event, this Court is bound by *DeJordy*, not *Bonnet*.

Next, Plaintiff mischaracterizes *DeJordy* by suggesting that its holding is "far from clear." App. Br. 30 (citing *DeJordy*, 675 F.3d at 1105). While it is true that the *DeJordy* Court recognized that different results may obtain in different contexts, *e.g.*, in criminal cases and in civil suits involving claims of state immunity under the Eleventh Amendment, the Court was unequivocal that in private civil litigation, third-party subpoenas directed to Indian Tribes and Tribal officials are barred by Tribal sovereign immunity:

> [W]e conclude from the plain language of the Supreme Court's definition of a "suit" in *Dugan,* and from the Court's "well-established federal 'policy of furthering Indian self-government,'" *Santa Clara,* 436 U.S. at 62, that a federal court's third-party subpoena in private civil litigation is a "suit" that is subject to Indian Tribal immunity. It may be that federal courts applying normal discovery principles could adequately protect Indian tribes from abusive third-party discovery without invoking Tribal immunity … But the Supreme Court has

> consistently applied the common law doctrine even when modern economic realities "might suggest a need to abrogate Tribal immunity, at least as an overarching rule," concluding that it would leave that decision to Congress. *Kiowa Tribe,* 523 U.S. at 758. Thus, even if denying Alltel the discovery it seeks in this case works some inconvenience, or even injustice, "it is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well-established."

DeJordy, 675 F.3d at 1105–06 (citations omitted; cleaned up).

Finally, Plaintiff erroneously suggests that the Supreme Court's decision in *Lewis v. Clarke*, 581 U.S. at 155, undermines this Court's decision in *DeJordy*. *Lewis* involved an "ordinary negligence action" arising from the "personal actions" of an employee of a Tribal commercial enterprise who was driving a vehicle on an off-reservation interstate highway. *Id*. at 157, 163. The Court found that the civil suit in *Lewis* was "a suit brought against a Tribal employee in his individual capacity." *Id*. at 158. In such a case, the Court held, "the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Id*. The Court noted: "This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'" *Id*. at 163 (quoting *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 687 (1949)).

Unlike *Lewis*, both *DeJordy* and the present case involve subpoenas (which operate as "suits") directed at Tribal officials in their official capacities. The real

party in interest in this case is the Oglala Sioux Tribe, not the individual officers, and as such, the subpoenas are barred by sovereign immunity. The Tribe agrees with Federal Defendants that Mesteth and Provost's "status as Tribal employees acting in their official capacities" is the reason why they were subpoenaed. The district court agreed, concluding that Mesteth and Provost were "OST employees acting in their official capacities" and, as such, they were "protected by OST's sovereign immunity." App. 300, R. Doc.184, at 5.

The subpoenas in this case sought to compel the Tribe, acting by and through Tribal officials acting in their official capacities, to testify about official actions of the Tribal government. The subpoenas also sought to compel the Tribe, acting by and through its Tribal officials, to produce large volumes of government documents that were, and are, the property of the Tribe. The courts have quashed similar subpoenas in cases involving federal officials on sovereign immunity grounds. In *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency,* 86 F.3d 1208, 1211 (D.C. Cir. 1996), the court held that a state subpoena commanding a federal agency to produce its records or have its employees testify about information obtained in their official capacities violates federal sovereign immunity. Similarly, in *In re Subpoena In Collins*, 524 F.3d 249, 251 (D.C. Cir. 2008), the Court held that, "[w]hen a subpoena nominally directed at an agency employee seeks such information, courts nonetheless regard the subpoena as directed at the agency."

Since *Lewis* was decided, this Court has continued to recognize the sovereign immunity of tribal officials acting in their official capacities. In *Stanko*, the Court held 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." 916 F.3d at 697 (quoting *McMillian*, 520 U.S. at 785 n.2) (cleaned up). The *Stanko* Court, citing *Lewis*, noted 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).

II. THE DISTRICT COURT PROPERLY REJECTED PLAINTIFF'S DUE PROCESS CHALLENGE TO THE BUREAU OF INDIAN AFFAIRS' LIVESTOCK TRESPASS ENFORCEMENT ACTIONS.

Tribal Movants join the argument of Federal Defendants that the district court properly rejected Plaintiff's due process challenge to the federal government's livestock trespass enforcement actions. *See* Fed. Br. 31-42.

Tribal movants agree that Plaintiff was not denied procedural due process because he received multiple notices of trespass and had multiple opportunities to be heard in a meaningful manner and at a meaningful time prior to the impoundment of his livestock. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Plaintiff received multiple notices that the BIA considered his livestock to be in trespass on range units 169 and P501. *See* App. 321-327; R. Doc. 228, at 5-11. Those notices afforded Plaintiff multiple opportunities, prior to impoundment, to

contest the notices, orally and in writing, and to explain why the trespass notices were in error. The relevant regulations provide that if, based on Plaintiff's explanation, the BIA were to determine that the trespass notices were issued in error, the BIA would be required to "withdraw" the notices. 25 C.F.R. § 166.804(b).

The district court found that "Plaintiff failed to take advantage of the many opportunities provided in the notices to cure the trespass or give sufficient notice of a legal right to graze the range units in question." App. 342; R. Doc. 228, at 26. That said, Plaintiff did have "numerous … meetings" with the Superintendent regarding this matter and he did submit one written response to the trespass notices. The Superintendent considered and reviewed Plaintiff's oral and written responses and wrote to Plaintiff, prior to any impoundment, explaining in detail why "Mr. Temple does not have any right to graze his livestock on Range Unit 169 or Range Unit P501."

Tribal Movants agree with Federal Defendants that this "pre-impoundment show-cause procedure" satisfied the procedural due process requirements because it afforded Plaintiff notice and an opportunity to be heard in a meaningful manner and at a meaningful time, before any livestock were impounded. *See* Fed Br. 34.

The federal government and the Tribe have strong interests in effective management of Indian agricultural land and the prompt and efficient removal of trespassing livestock. The BIA used sophisticated GPS technology and performed

repeated compliance checks to minimize the risk of an erroneous trespass determination.

Given the strong governmental interests at stake, the BIA's issuance of multiple notices of trespass to Plaintiff, Plaintiff's repeated failure to take corrective action, the serial nature of Plaintiff's noncompliance, and Plaintiff's failure, in all but one instance, to offer any written response to the trespass notices, it is difficult to see how Plaintiff can assert that he was denied due process. *See Yowell v. Abbey*, 532 F.App'x 708 (9th Cir. 2013); *Klump v. Babbitt*, 1997 WL 121193 (9th Cir. 1997); *McVay v. United States*, 481 F.2d 615 (5th Cir. 1973); *Jones v. Freeman*, 400 F.2d 383 (8th Cir. 1968).

III. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S PRE-IMPOUNDMENT CLAIMS FOR FAILURE TO EXHAUST TRIBAL COURT REMEDIES.

Tribal Movants join the argument of Federal Defendants that the district court correctly dismissed Plaintiff's pre-impoundment claims without prejudice for failure to exhaust Tribal court remedies. *See* Fed. Br. 42-47.

IV. THE DISTRICT COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR A CONTINUANCE OF THE TRIAL.

Tribal Movants adopt by reference the Federal Defendants' argument that "[t]he district court acted within its discretion when it denied Plaintiff's motion for a continuance of the bench trial." Fed. Br. 50-52.

CONCLUSION

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

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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 10,014 words.

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/s/ Steven J. Gunn
Counsel for Tribal Movants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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/ Steven J. Gunn
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