Larson v. United States, ___ F. Supp. 3d ___, 2021 WL 3634149 (D.S.D. Aug. 17, 2021)

- **Holding:** The Bureau of Indian Affairs' alleged failure to prevent non-permittees from grazing on permitted land and to provide administrative remedies concerning the permit's termination was not actionable under the Federal Tort Claims Act.
- **Summary:** Plaintiff received a ten-year grazing permit on tribal trust land within the Rosebud Sioux Indian Reservation for which she paid $10,090 annually. However, the BIA eventually cancelled the lease upon the Tribe's recommendation. In response, Plaintiff sued the United States under the FTCA on four grounds: "(1) the United States failed to provide accurate information to the Rosebud Sioux Tribe concerning Larson's grazing permit on two range units; (2) the United States failed to allow third-party grazing on Larson's range units; (3) the United States failed to prevent others from trespassing on Larson's range units; and (4) the United States failed to provide Larson with administrative remedies concerning the termination of her grazing permit." Because the Reservation is in South Dakota, that State provided "the law of the place" for FTCA purposes. The United States moved to dismiss on jurisdictional grounds, arguing that none of the claims fell within the FTCA's waiver of its immunity from suit. The district court granted the motion. Only the analysis of the last two claims implicated Indian law-related issues.

  The trespass-related claim arose from BIA's alleged failure "to prevent another individual to trespass on the range units with some 857 cattle grazing on the range units for 21 days." The court reasoned that although the agency's "obligation to prevent trespass on these range units arises from the terms of the permit, which is a contract[,] ... this obligation also appears to arise from federal regulations concerning the BIA's trespass policy"—specifically 25 C.F.R. §§ 166.801 and 166.803. "Under that policy, the BIA 'will' investigate and respond to claims of trespass. ... As a part of its response to the alleged trespass, the BIA 'will' instruct the trespasser of any corrective action that must be taken. ... If appropriate, the BIA 'will' assess monetary penalties against the trespasser and will ensure that damaged Indian agricultural land is rehabilitated." To the extent that the claim was predicated under an "independent duty" established by the trespass policy, Eighth Circuit precedent "made clear that the United States's failure to fulfill a federally imposed obligation is not actionable under the FTCA." But the claim also failed on an alternative basis; i.e., it fell within the FTCA's discretionary-function exception. That was so because if a trespasser failed to take the corrective action prescribed by the BIA, 25 C.F.R. § 166.806 provided that "'[the BIA] *may* take one or more of the following actions, *as appropriate*[,]'" which included impounding property involved in the trespass and/or assessing penalties, damages, and costs. "Because the regulation uses permissive language, it allows the BIA to exercise its judgment or choice in responding to alleged trespass" and thereby satisfied the first step of the discretionary-function test—"whether the action involves 'an element of judgment or choice.'" A presumption accordingly arose that the second (and final) step for the exception—whether the agency's determination was "'grounded in social, economic, or political policy'"—was met, and "Larson has failed to claim or make any argument that the BIA's decision was not grounded in policy considerations."

  As to the BIA's failure to provide Plaintiff with administrative remedies to challenge the permit cancellation, the court agreed with the United States "that this claim is not actionable under the FTCA because it is not a claim for which a private person could be

held liable under South Dakota state law." That conclusion was compelled by Plaintiff's reliance on the agency's alleged failure to follow the procedures set forth in 25 C.F.R. § 166.705(c)(3) as the claim's gravamen and her inability "to identify any South Dakota law that requires private persons to follow procedures similar to those that the BIA must follow" in this regulation.

- **Relevant (2021) Deskbook Section:** 3:11 nn.8-10.