No. 13-1049

In the Supreme Court of the United States

RAYMOND D. YOWELL, PETITIONER

v.

ROBERT ABBEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court abused its discretion by entering an injunction, where the district court failed to identify and apply the correct standard for granting an injunction; neglected to make the findings of fact and conclusions of law required by Federal Rules of Civil Procedure 52(a)(1)-(2) and 65; and adopted a legal theory that the court of appeals found "illogical, implausible, or without support," 532 Fed. Appx. 708, 710.

2. Whether the court of appeals correctly held that petitioner's action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against two individual federal officials and the Department of the Treasury must be dismissed.

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OPINIONS BELOW

The opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted in 532 Fed. Appx. 708. The order of the district court (Pet. 36-51) and a subsequent order of the district court denying reconsideration and granting injunctive relief are not published in the *Federal Supplement* but are available at 2012 WL 2151520 and 2012 WL 3205864.[1]

[1] The reproduction of the court of appeals' opinion in the certiorari petition (at 31-35) contains errors and does not reproduce the opinion in full. The petition also does not include the district court's second order. This brief thus cites directly to the electronically available versions of the opinions below.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2013. A petition for rehearing was denied on September 26, 2013 (Pet. 52). On December 20, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 21, 2014. The petition was filed on January 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a cattle rancher and a member of the Te-Moak Tribe of the Western Shoshone Indians of Nevada. 2012 WL 3205864, at *1. In 2011, petitioner filed this action seeking damages under *Bivens*[2] and 42 U.S.C. 1983 based on, as relevant here, (a) the 2002 impoundment and sale of about 130 of his cattle by the Bureau of Land Management (BLM) following BLM's determination that petitioner had unlawfully and repeatedly grazed the cattle on BLM-managed federal land without authorization and without paying grazing fees, and (b) BLM's subsequent certification of the balance of petitioner's unsatisfied debt to the Department of Treasury's Financial Management Service (Treasury-FMS) for collection. *Id.* at *1-*2.

a. By 1940, the Te-Moak Livestock Association (TLA) had obtained a federal permit to graze livestock on BLM-managed lands in Nevada. C.A. E.R. 60. In 1984, petitioner—who was then the TLA's chairman—informed BLM that the TLA would no longer pay grazing fees to BLM and would instead assert aboriginal grazing rights. *Ibid.* BLM issued trespass notic-

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[2] *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

es to TLA and rendered a decision demanding payment of unpaid grazing fees. *Ibid.* The TLA appealed but, in 1989, withdrew the appeal. *Ibid.* TLA's grazing permit expired in 1989 and was not renewed. *Ibid.*

Petitioner thereafter asserted a right to graze his cattle without paying BLM fees based on his status as a "Traditional Western Shoshone Cattlem[a]n." C.A. E.R. 60. BLM issued multiple notices to petitioner to remove his cattle from BLM-managed lands. *Id.* at 60-61.

Petitioner's claim of right parallels claims of aboriginal rights to public land in Nevada that the Western Shoshone tribe has asserted over many decades in the face of federal court decisions. In 1962, the Indian Claims Commission held that "the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century, and [the Commission] later awarded the Western Shoshone in excess of $26 million in compensation." *United States* v. *Dann*, 470 U.S. 39, 41-42 (1985) (internal citation omitted). The award was paid to an interest-bearing trust account, but the Western Shoshone continued to demand the partial return of their former lands. *Timbisha Shoshone Tribe* v. *Salazar*, 678 F.3d 935, 936 (D.C. Cir. 2012).[3] In 2004, Congress ultimately enacted legisla-

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[3] See, *e.g.*, *United States* v. *Dann*, 873 F.2d 1189, 1200 (9th Cir.) (holding that the 1863 Treaty of Ruby Valley "conferred no individual [grazing] rights"; that "[t]ribal title to [the] lands" claimed by the Western Shoshone was resolved by the Western Shoshone claims ligation; and that compensation for that claim barred individual tribal members from "asserting the tribal title to grazing rights just as clearly as it bars their asserting title to the lands"), cert. denied, 493 U.S. 890 (1989); *Western Shoshone Nat'l Council* v. *Molini*, 951 F.2d 200, 203 (9th Cir. 1991) (holding that the "[Indian Claims] Commission award establishes conclusively that

tion to authorize a per capita distribution of the trust fund balance. *Ibid.*

After BLM made repeated attempts over several years to address petitioner's unlawful cattle grazing, Pet. 10, BLM notified petitioner in 1997 that he had incurred over $171,000 in unpaid grazing fees by grazing his cattle on BLM-managed lands and that petitioner's trespassing cattle would be impounded. C.A. E.R. 60-62. BLM's regulations prohibit such unauthorized grazing, 43 C.F.R. 4150.1(b), and specifically authorize BLM to impound and sell at auction trespassing cattle found on federal land after giving five days of notice, 43 C.F.R. 4150.4-2 (impoundment), 4150.4-5 (sale).

On May 24, 2002, BLM impounded petitioner's cattle after issuing "a 'Notice of intent to impound' issued pursuant to [BLM's] regulations." C.A. E.R. 85, 196, 203. BLM then transported petitioner's cattle for sale at a public auction after providing notice. *Id.* at 85, 203. Petitioner filed suit to stop the sale but failed to obtain an injunction. See Gov't C.A. Supp. E.R. 1-9, 18. "[T]he livestock were sold on May 31, 2002." C.A. E.R. 85, 203.[4]

b. BLM also sought to collect the balance of petitioner's unpaid debt for grazing fees and associated costs. BLM, however, was unable to collect the debt

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Shoshone title has been extinguished" and that "hunting and fishing rights are subsumed within [the] unconditional transfer of title"), cert. denied, 506 U.S. 822 (1992).

[4] Six years later, in 2008, petitioner "fil[ed] a 'takings case' to recover the damages he [allegedly] incurred" from the impoundment and sale of the cattle. C.A. E.R. 85. The Court of Federal Claims dismissed that action. *Ibid.* (describing *Yowell* v. *United States*, No. 08-368 (Fed. Cl. Apr. 29, 2009)).

through ordinary debt-collection processes. See C.A. E.R. 86, 204.

Congress has directed each federal agency to attempt to collect monetary claims of the United States arising from the agency's activities; to refer non-tax debts to the Department of the Treasury for collection if they have been delinquent for 180 days or more; and, if appropriate, to obtain administrative offset through the Treasury Offset Program. 31 U.S.C. 3711(a)(1) and (g)(1), 3716(a) and (c)(6); see 31 C.F.R. 285.5(d)(1), 901.3(b)(1). Before attempting an offset, the creditor agency must mail to the debtor's most current known address a written notice of the agency's intention to collect the claim by administrative offset and the debtor's statutory rights. 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.5(d)(6)(ii)(A). The debtor's rights include the right to inspect and copy records related to the claim, the right to administrative review of the agency's determination of indebtedness, and the right to make a written repayment agreement that would avoid an offset. 31 U.S.C. 3716(a)(2)-(4); 31 C.F.R. 285.5(d)(6)(ii)(B)-(D). Before Treasury will implement an administrative offset, the creditor agency must certify in writing that, *inter alia*, the debt is past-due, legally enforceable, and eligible for collection by administrative offset. 31 C.F.R. 285.5(d)(3)(i) and (ii). That certification must state that the agency has made a reasonable attempt to provide the debtor with the requisite notice and the opportunity to exercise his rights in connection with the debt. 31 C.F.R. 285.5(d)(3)(i), (ii) and (6).

BLM referred plaintiff's debt to Treasury for offset under the Treasury Offset Program. In 2008, Treasury began making partial, 15% deductions from Social

Security payments to petitioner. C.A. E.R. 86, 204; see 31 C.F.R. 285.4(e).

2. In 2011, more than nine years after BLM had impounded and sold petitioner's cattle, petitioner filed this *Bivens* and Section 1983 action seeking $30 million in damages. C.A. E.R. 190, 202; see *id.* at 190-205 (complaint). Petitioner named as defendants two senior supervisory BLM employees—Robert Abbey and Helen Hankins—in their individual capacities (the *Bivens* defendants); the Department of the Treasury; and several non-federal defendants. See *id.* at 190-196.

a. In June 2012, the district court denied the federal defendants' motion to dismiss. 2012 WL 2151520, at *4-*6. The court rejected the statute-of-limitations defenses asserted by those defendants. *Id.* at *6. The court also noted that "the only remedy available to [petitioner] against Treasury-FMS is a personal injunction requiring the BLM to withdraw their debt certification to Treasury-FMS." *Ibid.* That injunctive remedy, the court stated, would be "based on the BLM's violation of [petitioner's] due process rights in determining a deficiency debt owed and its certification of that debt to Treasury-FMS." *Ibid.*

Petitioner, who had not requested injunctive relief in his complaint, then moved for an injunction that, *inter alia*, would have directed BLM (a non-party in this case) to withdraw its debt certification to Treasury. C.A. E.R. 68-69. The federal defendants opposed that motion and sought both reconsideration and dismissal. Dist. Ct. Doc. 49, 59.

b. In August 2012, the district court granted injunctive relief and denied reconsideration. 2012 WL 3205864.

The district court first entered an injunction "requiring the BLM to withdraw their debt certification to Treasury-FMS." 2012 WL 3205864, at *3. The court stated that it was entering the injunction "[p]ursuant to [its] June 2012 order," *ibid.*, which, as noted, denied the federal defendants' motion to dismiss petitioner's damages claims. The court did not otherwise analyze or address the propriety of injunctive relief.

Second, the district court noted the individual *Bivens* defendants' argument that they were entitled to qualified immunity and Treasury's argument that a *Bivens* claim cannot be asserted against a federal agency, but the court denied reconsideration. 2012 WL 3205864, at *3-*4. The court stated that it found "no valid reason to reconsider" its decision. *Id.* at *4.

3. On interlocutory appeal, the court of appeals vacated the injunction, reversed, and remanded for further proceedings. 532 Fed. Appx. 708.

First, the court of appeals held that the district court "abused its discretion in requiring BLM to withdraw its certification of [petitioner's] debt to Treasury-FMS." 532 Fed. Appx. at 710. The court of appeals identified three independent bases for that conclusion: the district court (1) "failed to identify and apply the correct standard for granting an injunction"; (2) "failed to make findings of fact and conclusions of law required by Federal Rules of Civil Procedure 52(a)(1)-(2) and 65" and thus failed to articulate a reviewable "basis for [its] decision"; and (3) erred in its conclusions that arguably provided "the basis for the injunction." *Ibid.* The court of appeals noted that the district court had concluded that petitioner did not have a "pre-deprivation hearing before BLM impounded and sold his cattle" and that petitioner was

"not aware of the impoundment" at the time. *Ibid.* But the court of appeals concluded that "BLM was not required to provide a pre-deprivation hearing, *ibid.* (citing *Klump* v. *Babbitt*, No. 95-16109, 1997 WL 121193, at *2 (9th Cir. Mar. 17, 1997)), and that petitioner "plainly was aware of the impoundment before it happened, as evidenced by BLM's notices to [petitioner] and [petitioner's] own efforts to contest BLM's actions," *ibid.*

Second, the court of appeals held that the district court erred in failing to dismiss petitioner's *Bivens* claim against Treasury. 532 Fed. Appx. at 710. A *Bivens* action, the court of appeals explained, does not "lie against federal agencies like Treasury-FMS." *Ibid.* (citing *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994)).

Third, the court of appeals held that the individual *Bivens* defendants were entitled to dismissal of petitioner's claims. 532 Fed. Appx. at 710-711. The court explained that a *Bivens* action does not lie against federal officials for "strictly enforcing rules against trespass or conditions on grazing permits," *id.* at 710 (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 557 (2007)), but even if it did, the individual *Bivens* defendants here were entitled to qualified immunity, *id.* at 710-711. In so holding, the court noted that the Western Shoshone's claims to the grazing lands at issue "have long been settled," and that the United States "holds title to, and BLM now manages, those lands." *Id.* at 710 n.1.

The court of appeals also concluded that the district court erred in refusing to enter summary judgment on behalf of non-federal defendants who were

entitled to qualified immunity from petitioner's Section 1983 claims. 532 Fed. Appx. at 711.

4. On remand, the district court dismissed petitioner's claims against the two individual *Bivens* defendants and against Treasury. Dist. Ct. Doc. 106. The court also granted summary judgment to two non-federal defendants. *Ibid.* The district court did not, however, dispose of petitioner's claims against another non-federal defendant, which remain pending. See Dist. Ct. Doc. 115.

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly vacated the district court's injunction. Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Furthermore, "[e]very order granting an injunction * * * must * * * state the reasons why it issued," Fed. R. Civ. P. 65(d)(1), and the court granting such relief must "find the facts specially and state its conclusions of law separately," Fed. R. Civ. P. 52(a)(1) and (2).

The district court's injunction suffers from numerous errors, any one of which would independently require that the injunction be vacated. First, the district court entirely failed to consider the legal standards for granting injunctive relief. Second, the court failed to make any relevant findings of fact or conclusions of law. Instead, the district court granted relief on the basis of its *pleading*-stage decision to

deny a motion to dismiss. 2012 WL 3205864, at *3. Injunctive relief cannot be justified by such a decision to deny dismissal on the pleadings without considering the evidence submitted in support of and against injunctive relief. Third, the district court ordered injunctive relief against a federal agency (BLM) that was not even a party to the suit, entirely disregarding its limited authority to order equitable relief against a non-party. See *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9, 13-14 (1945); Fed. R. Civ. P. 65(d)(2).[5] Fourth, a *Bivens* action like the action here can provide only a damages remedy, not injunctive relief. See *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001) (distinguishing "injunctive relief" from "the *Bivens* remedy" of money damages). And, fifth, as discussed below, a *Bivens* action will not lie against a federal agency.

Petitioner briefly argues (Pet. 23) that Treasury was properly enjoined because, petitioner asserts, BLM could not have properly certified his debt to Treasury. That contention does not respond to the multiple deficiencies identified by the court of appeals, 532 Fed. Appx. 708, 710, and presents no issue warranting review by this Court.

2. The court of appeals correctly dismissed petitioner's *Bivens* claims, and its decision does not present any issue warranting review.

a. First, it is settled that a *Bivens* action cannot be maintained against a federal agency such as the De-

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[5] Treasury was the only federal-agency defendant named in the relevant complaints. See C.A. E.R. 73-78, 191-196 (naming defendants). Petitioner has never served BLM with process in this action.

partment of the Treasury. *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994).

b. Second, the court of appeals correctly concluded that petitioner failed to state a *Bivens* cause of action against the two individual *Bivens* defendants who, in any event, were entitled to qualified immunity. 532 Fed. Appx. at 710-711.

The court of appeals correctly concluded that a *Bivens* remedy for damages against individual government employees should not be inferred in this context. See *Wilkie* v. *Robbins*, 551 U.S. 537, 549-562 (2007) (no *Bivens* remedy is available against individual BLM employees acting within their enforcement authority to protect public lands). Petitioner contends (Pet. 23) that the "overzealous application" of BLM's grazing regulations distinguishes this case from *Wilkie*. But because a plaintiff can easily assert an "overzealous" application of such grazing rules, petitioner's contention, if adopted, would significantly undermine *Wilkie*'s conclusion that a *Bivens* remedy is unavailable against officials who "strictly enforc[e] rules against trespass or conditions on grazing permits," 551 U.S. at 557. Petitioner identifies no authority supporting his contention, much less a division of authority warranting review.

Moreover, "government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Petitioner's complaint failed to allege that the two individ-

ual *Bivens* defendants (Abbey and Hankins) violated clearly established constitutional rights. Indeed, petitioner's complaint failed to identify any particular actions taken by either of those individual defendants in connection with the impoundment and sale of petitioner's cattle. As the court of appeals explained, that failure to "tie any allegedly unlawful behavior to th[ose] individual[s]" is fatal to his *Bivens* claim. 532 Fed. Appx. at 711.

Petitioner asserts (Pet. 20-21) that his treaty rights to graze his cattle were clearly established. But that assertion does not identify any individual *constitutional* right that might form the basis of a *Bivens* action and further fails to identify actions by the particular *Bivens* defendants here that allegedly violated such a right. In any event, petitioner's broad assertion of "clearly established" rights is inconsistent with this Court's teachings. This Court has "emphasized" that the qualified-immunity inquiry requires a "'particularized'" analysis of whether the "'contours of the right'" asserted by a plaintiff were "'sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.'" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). Petitioner has not shown that his asserted rights would have been sufficiently clear to a reasonable official, nor has he identified any particular actions taken by the *Bivens* defendants here that would have violated such clearly established rights. Cf., *e.g.*, p. 3 n.3, *supra* (citing cases rejecting similar assertions of non-constitutional treaty rights under the Treaty of Ruby Valley).

c. Finally, petitioner identifies no division of authority warranting review. Petitioner asserts (Pet. 26-

27) that the court of appeals' decision conflicts with *Soldal* v. *Cook County*, 506 U.S. 56 (1992). But as petitioner appears to recognize, *Soldal* simply concluded that "the state action in th[e] case" that caused the removal of Soldal's mobile home constituted a "seizure" within the meaning of the Fourth Amendment. *Id.* at 61. The government does not dispute that the 2002 impoundment of petitioner's trespassing cattle constituted a "seizure" of property. But not all "seizures" are unlawful, and as the court of appeals concluded, petitioner has failed to show the defendants here *violated* petitioner's clearly established rights. Because *Soldal* expressly declined to address the "different question" whether a Fourth Amendment violation had resulted from an unreasonable seizure of Soldal's property, *id.* at 61-62, nothing in *Soldal* conflicts with the decision below.

Petitioner argues (Pet. 27-29) that the court of appeals' conclusion that "BLM was not required to provide a pre-deprivation hearing," 532 Fed. Appx. at 710, conflicts with *Porter* v. *DiBlasio,* 93 F.3d 301 (7th Cir. 1996), and *Siebert* v. *Severino*, 256 F.3d 648 (7th Cir. 2001). But neither decision reflects a conflict warranting review. Both *Porter* and *Siebert* involved state statutory provisions that were applied to the impoundment of animals seized from *private* property. The BLM regulations here address the impoundment of livestock trespassing on *government* property. Given the United States' "expansive" authority over public lands, *Kleppe* v. *New Mexico*, 426 U.S. 529, 539-540 (1976), and its significant interest in protecting those lands "from trespass and injury," *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917), BLM's impoundment regulations (which do not guar-

antee a pre-deprivation hearing in these circumstances) provided petitioner all the process that he was due. The decision of the court of appeals is consistent with decisions of other courts of appeals in similar contexts. See, *e.g.*, *McVay* v. *United States*, 481 F.2d 615, 616-617 (5th Cir. 1973) (impoundment and sale of livestock trespassing in National Forests); *Jones* v. *Freeman*, 400 F.2d 383, 385, 388-389 (8th Cir. 1968) (same).

Even if petitioner had identified a division of authority that might warrant review in some case, this *Bivens* action would be a poor vehicle to address the issue. As noted above, multiple independent grounds amply warranted dismissal of petitioner's *Bivens* claims. This Court's resolution of petitioner's asserted due-process right to a pre-deprivation hearing thus would not alter the judgment below. Moreover, even if that due-process issue were to warrant review, the Court should address the issue in a direct challenge to agency action, not a *Bivens* suit in which the plaintiff must establish the violation of a clearly established constitutional right in order to prevail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2014