No. 06-219

In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

v.

HARVEY FRANK ROBBINS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a damages action brought against officials of the Bureau of Land Management in their individual capacities based on alleged actions taken within the individuals' official regulatory responsibilities in attempting to obtain a reciprocal right-of-way across private property intermingled with public lands. The following questions are presented:

1. Whether government officials acting pursuant to their regulatory authority can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, of the predicate act of extortion under color of official right for attempting to obtain property for the sole benefit of the government and, if so, whether that statutory prohibition was clearly established.

2. Whether respondent's *Bivens* claim based on the exercise of his alleged Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or other statutes for the kind of administrative actions on which his claim is based.

3. Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases–Continued: Page

Cases–Continued: Page

Constitution, statutes and regulations:

Statutes and regulations–Continued: Page

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 438 F.3d 1074. An earlier opinion of the court of appeals (App., *infra*, 76a-84a) is reported at 300 F.3d 1208. The opinion of the district court (App., *infra*, 27a-48a) is unreported. An earlier opinion of the district court (App., *infra*, 49a-75a) is reported at 252 F. Supp. 2d 1286.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006 (App., *infra*, 85a-86a). A petition for rehearing was denied on March 14, 2006. On June 5, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 12, 2006. On June 28, 2006, Justice Breyer further extended the time to August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> * * * nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

The Hobbs Act provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. 1951.

STATEMENT

1. a. Under its Property Clause power, Congress has enacted numerous statutes governing the use of federal lands. The Secretary of the Interior is authorized under 43 U.S.C. 1761(a), a provision of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, to grant

rights-of-way over federal lands. FLPMA requires the Secretary to "take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. 1732(b). Similarly, under 43 U.S.C. 315(a), a provision of the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, the Secretary has the authority to grant owners of land adjacent to grazing districts rights-of-way over federal land in those districts. The Secretary has the power to "do any and all things necessary" to accomplish the purposes of the Act. 43 U.S.C. 315a.

The Bureau of Land Management (BLM), an agency within the Department of the Interior, has provided that it is the Secretary's objective to grant rights-of-way to business entities, among others, and to "regulate, control and direct" the use of those rights-of-way on public land to "[p]rotect the natural resources associated with the public lands" and to "[p]revent unnecessary or undue environmental damage to the lands and resources." 43 C.F.R. 2800.0-2, (a) and (b). BLM may, if it determines it to be within the public interest, require persons applying for a right-of-way over public land, as a condition for obtaining such right-of-way to give the government a reciprocal "equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. 2801.1-2.

If an applicant for a right-of-way refuses to grant BLM a reciprocal nonexclusive easement, his application may be denied. *Charles Ryden*, 119 I.B.L.A. 277, 279 (1991); see *Frank Robbins*, 146 I.B.L.A. 213, 219 n.4 (1998) (regulation authorizes BLM to "require that a road [right-of-way] applicant grant an equivalent, reciprocal [right-of-way] to the United States as a condition to receiving" a right-of-way under FLPMA). BLM's regulations likewise provide that the agency may include in a grazing permit a "statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." 43 C.F.R. 4130.3-2(h).

b. BLM actions are subject to administrative review, including review by the Interior Board of Land Appeals (IBLA). IBLA decisions are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* *Hoyl* v. *Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997).

2. Respondent, Harvey Frank Robbins, owns the High Island Ranch and Cattle Company, a commercial guest ranch near Thermopolis, Wyoming. Some of the ranch's activities involve use of a Special Recreational Use Permit (SRP), under which ranch guests may participate in cattle drives over federal lands. App., *infra*, 28a-29a. The ranch's private lands are intermingled with public lands. Access to the ranch is over a lengthy dirt road, called the South Fork, Owl Creek Road. C.A. App. 48. The road wanders generally westward from a county road some miles to the east, and it crosses both federal and private lands, including land owned by respondent.

Respondent acquired the High Island Ranch from George Nelson in May 1994. Nelson had obtained a right-of-way over the federal lands along South Fork, Owl Creek Road, which allowed him to perform maintenance on the road. As a condition of that right-of-way, BLM asked Nelson to provide a reciprocal right-of-way in the form of a nonexclusive easement for the same road. Nelson agreed and signed the necessary document, but, apparently because a corporate seal was missing, BLM returned the document to Nelson. Before Nelson sent back the document with a corporate seal, he sold the ranch to respondent, who recorded the deed. BLM determined that this recording of the deed without the easement in favor of the government rendered the easement unenforceable. App., *infra*, 2a; C.A. App. 48-49.

In February 1995, a BLM employee discussed with respondent the possibility of receiving an assignment of Nelson's right-of-way over federal lands, and in April 1995, Charles Wilkie wrote to respondent explaining that such an

assignment was necessary if respondent intended to maintain the road or engage in other than casual use of the road. The letter confirmed that "a condition of the right-of-way is the reciprocal grant of a non-exclusive easement to the United States for administrative access across your deeded lands in the Rock Creek area." The letter enclosed a copy of the easement that Nelson had signed and asked respondent to sign it. C.A. App. 30-39. Respondent did not respond to the letter. On June 16, 1995, BLM issued an interlocutory decision cancelling the right-of-way that Nelson had obtained because respondent had not made the required annual payment and had not signed a reciprocal non-exclusive easement. *Id.* at 40-41. Respondent did not respond, and on July 21, 1995, BLM issued a final decision cancelling the right-of-way. *Id.* at 42-43. Although this final decision was subject to administrative review before the IBLA and judicial review in district court, respondent did not seek review. *Id.* at 49-50.

In July 1997, BLM issued respondent a "cease and desist" notice, which alleged that respondent had "bladed" parts of the road on public land without a right-of-way. "Blading" is a smoothing operation in which loose material is pulled from the side of the road or material is used to fill surface irregularities and restore the road crown. Under 43 C.F.R. 2801.3(a), the use of public lands requiring a right-of-way without authorization is a trespass. In response, respondent submitted an invoice "for emergency repairs to South Fork Road in order to access private property—$2250.00." C.A. App. 49; *id.* at 44. BLM offered to settle the trespass charges for $1617 and offered to entertain an application for a right-of-way, stating explicitly that the reciprocal easement required of respondent would simply allow "access for federal employees in conjunction with their official duties; it would not allow any other type of access." *Id.* at 45. Respondent did not respond, and BLM issued a decision finding that he had trespassed and owed BLM $1617.

Respondent sought review before the IBLA, which upheld the decision. The IBLA held that respondent had admitted the blading when he sent his bill to BLM for the repair and that he had "repeatedly failed to respond to BLM offers concerning the existing [right-of-way], the filing of an application for a new [right-of-way] and, thereafter, the settlement of the trespass." *Frank Robbins*, 146 I.B.L.A. at 218. The IBLA also rejected respondent's allegations that BLM was trying to "blackmail" him into providing a reciprocal right-of-way, and it held that "[t]he record effectively shows * * * intransigence was the tactic of [respondent], not BLM." *Id.* at 219. Respondent did not seek judicial review of this decision.

Respondent also had disputes with BLM over his grazing permit. Based on 43 C.F.R. 4310.3-2(h), the permit stated that respondent was required to "provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." C.A. App. 54. Respondent, however, insisted that BLM employees obtain his advance written permission. The IBLA found that "BLM is authorized reasonable administrative access across [respondent's] private and leased lands" and that "[a]dvance written permission from [respondent] shall not be required." *Ibid.* The IBLA later ruled that "administrative access is an implied condition of a grazing permit" when such access is necessary for BLM to carry out its statutory duties. *Id.* at 56; see *id.* at 61. The IBLA explicitly rejected the argument that administrative access constitutes a taking under the Fifth Amendment. *Id.* at 62. Respondent did not seek judicial review of these orders.

Respondent also had a dispute with BLM over his Special Recreational Use Permit. Respondent had taken over Nelson's SRP, which had a five-year term, but after respondent had committed numerous violations of the SRP's terms, BLM suspended the SRP in 1995 and reduced it to a one-year term, a form of probation. In June 1999, BLM denied respondent's

application to renew the SRP, citing the earlier suspension, the blading incident described above, ten grazing trespass notices respondent had received, some in conjunction with SRP activities, and his noncompliance with his grazing permit and allotment management plan on at least 20 occasions other than the trespasses. C.A. App. 70-76. The IBLA upheld the cancellation of the SRP, holding that "the entire record and the pattern of violations represented by the repeated notices he has received since receiving the first SRP in 1994 provide more than a reasonable factual basis for BLM's decision in this case not to renew the permit." *Id.* at 75. Respondent did not seek judicial review of that order.

3. In August 1998, respondent brought an action against petitioners under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming various constitutional violations, and under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, charging the BLM employees with attempting to extort a reciprocal easement from him. Petitioners moved to dismiss for failure to state a claim and based on qualified immunity. The district court granted that motion. It dismissed the RICO claims on the ground that the plaintiff had not sufficiently pleaded damages, and the *Bivens* claim on the ground that the availability of judicial review under the APA, 5 U.S.C. 701 *et seq.*, and the Federal Tort Claims Act (FTCA) precluded a *Bivens* cause of action in this context.

The court of appeals reversed and remanded. App., *infra*, 76a-84a (*Robbins I*). First, it held that at the pleading stage, RICO plaintiffs could make general allegations of damages. *Id.* at 78a-80a. Second, the court held that respondent's *Bivens* claim was precluded to the extent that it was based on final agency action. However, because the APA does not provide a remedy "for constitutional violations committed by individual federal employees unrelated to final agency action," the court held that respondent's allegations of miscon-

duct "unrelated to any final agency action" are "properly within the scope of a *Bivens* claim." *Id.* at 81a-82a. The court further held that "the existence of a potential FTCA claim is an insufficient basis for the district court to preclude [respondent's] *Bivens* claim." *Id.* at 83a.

Following a remand, respondent filed a second amended complaint, and petitioners moved to dismiss on the ground of qualified immunity. The district court granted the motion in part and denied it in part. App., *infra*, 49a-75a (*Robbins II*). The court held that respondent had alleged violations of clearly established law under the Hobbs Act, 18 U.S.C. 1951 (extortion), and under Wyoming law of blackmail. App., *infra*, 60a-61a. The court also held that respondent had alleged the violation of a clearly established right not to be retaliated against for the exercise of a Fifth Amendment to exclude others from his property. *Id.* at 72a-74a. But the court dismissed claims under the Fourth Amendment for malicious prosecution, *id.* at 62a-67a, and under the Fifth Amendment for procedural and substantive due process, *id.* at 67a-72a.

Limited discovery ensued. Petitioners then moved for summary judgment based on qualified immunity. Respondent also filed a third amended complaint, mostly reiterating the allegations of the second amended complaint and adding petitioner David Wallace as a defendant. The district court again denied petitioners' motion. Pet. App. 27a-48a (*Robbins III*). Based on its earlier decision, the court held that both the law underlying the RICO claim and the constitutional right at issue in the *Bivens* claim were clearly established and that qualified immunity had to be denied. *Id.* at 33a-39a. The court declined to reconsider its holding based on the materials submitted on summary judgment. *Id.* at 39a-48a.

4. The court of appeals affirmed. App., *infra*, 1a-26a.

The court began with respondent's *Bivens* claim that petitioners' "conduct violated his right to be free from retaliation

for exercise of his Fifth Amendment right to exclude others from his property." App., *infra*, 10a-11a. The court rejected petitioners' threshold contention that respondent's *Bivens* claim is completely precluded by the APA. It explained that, in the prior appeal in this case, the court had held that "only [respondent's] allegations involving individual action unrelated to final agency action are permitted under *Bivens*." *Id.* at 25a. But the court concluded that petitioners had failed to ask the district court on remand from the prior appeal to review respondent's complaint "to determine which allegations remain and which are precluded" under that ruling. *Ibid.* Accordingly, the court declined to determine which particular allegations were precluded under the reasoning of its prior decision.

As to the merits of the *Bivens* claim, the court first held that the Fifth Amendment not only protects a "right to exclude" the government from one's property by requiring just compensation, but protects a property owner from takings outside the eminent domain process. App., *infra*, 12a-13a. The court explained that, "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a; see *id.* at 14a ("[Respondent] has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power."). In addition, according to the court, that "right to exclude others from one's property" outside the eminent domain process was clearly established. *Id.* at 15a.

The court further held that the Fifth Amendment "right to exclude" includes an anti-retaliation prohibition. The court explained that, "[b]ecause retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is

meaningful." App., *infra*, 15a. Although the court recognized that there was no precedent supporting a right against retaliation for the exercise of a Fifth Amendment right, it held that *DeLoach* v. *Bevers*, 922 F.2d 618 (10th Cir. 1990), a First Amendment case, "requires only that the right retaliated against be clearly established." App., *infra*, 16a. The court, therefore, held that petitioners were not entitled to qualified immunity on the Fifth Amendment retaliation claim.

The court also denied qualified immunity on the RICO claim. The court rejected petitioners' argument that the predicate act for extortion under color of official right under the Hobbs Act required a showing that the alleged conduct was independently wrongful. Although the court did not question that petitioners had regulatory authority to take each of the allegedly retaliatory acts, it concluded that "if [petitioners] engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO." App., *infra*, 18a. The court also concluded that respondent had stated a RICO predicate act under the Wyoming law concerning blackmail. *Id*. at 24a. The court further held that, viewed at the "proper level of generality," respondent had alleged a violation of "clearly established statutory rights." *Id*. at 21a-22a.

5. Petitioners filed a petition for rehearing en banc, but the petition was denied on March 14, 2006. App., *infra*, 85a-86a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case holds that government officials may be subject to damages actions under RICO and *Bivens* for engaging in regulatory activity that the court assumed to be within the employees' duties and without the purpose of personal gain. The basic regulatory activity giving rise to this case—attempting to secure a reciprocal

right-of-way over private land intermingled with public lands—is one in which federal officials routinely engage in managing federal lands. The court of appeals' ruling takes the kind of give and take that is a standard aspect of negotiations between property owners with interlocking and interdependent parcels and transforms it into a constitutional tort. Because that kind of give and take is authorized by regulation, the decision is of critical importance to the government's land management responsibilities. But the decision's analytical reach is even greater because it potentially transforms lawful regulatory activity into *racketeering* activity under civil RICO whenever a plaintiff alleges that a government official exercised such authority with an intent to extort.

The court of appeals' far-reaching decision in this case directly conflicts in several different respects with the precedents of this Court and other circuits. The court's holding that a RICO predicate act of extortion under color of official right may be shown by merely alleging that government officials had an extortionate intent to obtain property for the benefit *of the government*—with no allegation that they had any personal interest in the property or acted outside the scope of their lawful regulatory duties—conflicts with a decision of the Eighth Circuit. *Sinclair* v. *Hawke*, 314 F.3d 934 (2003). Indeed, the Eighth Circuit found the proposition embraced by the court of appeals here to be "ludicrous on its face," and explained that "regulators do not become racketeers by acting like aggressive regulators." *Id.* at 943.

The court of appeals' decision to allow respondent's *Bivens* claim to proceed is novel and unfounded in at least three different respects. First, as a threshold matter, the court's ruling that the availability of APA review for all the major incidents in this context did not preclude respondent's *Bivens* action conflicts with the decisions of at least three other circuits, which have held that the APA's remedial scheme precludes a *Bivens* claim challenging administrative

action, "even when the administrative remedy does not provide complete relief." *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006). Second, the court of appeals' ruling that respondent had a Fifth Amendment right to exclude the government from his property *except through the eminent domain process* conflicts with decisions of this Court recognizing that the Fifth Amendment does not entitle individuals to prevent the government from taking their property (but instead affords them a right to just compensation when a taking occurs), and that takings may occur outside the eminent domain process. Third, the court of appeals' ruling that the Fifth Amendment confers a right against retaliation is, by the court's own admission, the first decision of its kind. App., *infra*, 14a-16a.

The last two aspects of the court of appeals' Fifth Amendment analysis, when combined, transform the normal give and take between owners of intermingled parcels of private and public lands into unconstitutional state action. There is nothing sinister about the government seeking an easement from an adjoining property owner "outside the eminent domain process," and conditioning an easement over public land on a reciprocal easement over interlocking parcels of private land is not unconstitutional retaliation. The court of appeals' contrary decision effectively creates a constitutional impediment to responsible federal land management.

The court of appeals' denial of qualified immunity in the context of this first-of-its-kind decision is even more problematic. This Court has made clear that, even when a plaintiff has properly alleged the violation of a constitutional or statutory right, a defendant is entitled to qualified immunity unless the plaintiff shows that "the law *clearly established* that the [official's] conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). At a minimum, the court of appeals failed to identify the violation of any *clearly established* right. This Court has

repeatedly stressed the importance of the qualified immunity doctrine to ensure that government officials are not inhibited in the exercise of important government responsibilities. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). The court of appeals' decision completely disregards bedrock immunity principles and warrants this Court's review.

A. The Court of Appeals' RICO Holding Conflicts With A Decision Of The Eighth Circuit And Would Expose Public Officials To Personal Liability, Including Treble Damages, For Taking Lawful Regulatory Acts

The court of appeals held that a RICO predicate act of extortion under color of official right may be shown by a mere allegation that government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government, with no allegation that they had any personal interest in the property. That holding directly conflicts both with this Court's case law on extortion and *Sinclair* v. *Hawke*, 314 F.3d 934 (8th Cir. 2003).

1. Extortion under color of official right requires a showing that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992); see also *Scheidler* v. *NOW*, 537 U.S. 393, 402 (2003) ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office."). Moreover, there must be a *quid pro quo* for the payment—*i.e.*, an understanding that the payment is in exchange for official acts. *McCormick* v. *United States*, 500 U.S. 257, 273 (1991).

It is not always necessary that the defendant himself benefit from the extortion; there may be extortion if the payments are made to a third party, or entity, at the direction of the defendant. Cf. *United States* v. *Clemente*, 640 F.2d 1069,

1079-1080 (2d Cir.), cert. denied, 454 U.S. 820 (1981) (aiding payment of kickbacks to another). But no precedent holds that a government official may extort property solely by attempting to facilitate transfer of the property *to the government itself* pursuant to entirely lawful procedures. There is a critical difference between an overzealous regulator and an extortionist; an alleged extortionist must attempt to "obtain" the victim's property. *Scheidler*, 537 U.S. at 404. This requirement reflects the reality that, if the government demands property to which it is not legally entitled, the owner of that property may block the government in court or seek judicial review of the government's action. But just as the government itself cannot be guilty of extortion, neither can the government's agent who makes the demand *on behalf of the government*, unless he or some other non-governmental party is to receive a personal benefit as a result.

2. The court of appeals did not dispute that petitioners' actions were within their regulatory authority, but it nevertheless held that the allegation of an intent to "extort" made their conduct actionable. App., *infra*, 18a (If petitioners "engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO."). An intent to "extort" is not possible when one assumes that government action is authorized and there is no allegation of personal benefit. That is particularly true in this context, where, as authorized by regulation, the government seeks to obtain reciprocal treatment of interlocking parcels.

While respondent has alleged an elaborate conspiracy by petitioners to obtain a reciprocal right-of-way on behalf of the government, he does not allege that any of them had a personal stake in that goal. Respondent's theory is that petitioners were trying to "extort" from him a reciprocal easement for the benefit of the government. He makes no allegation that petitioners had a *personal* interest in obtaining such an

easement. Moreover, the government was acting like a typical property owner in seeking through lawful means to encourage another owner to agree to a reciprocal property right. The government at times may have more means at its disposal in negotiating such an arrangement than the typical private property owner, and that may justify giving the private property owner greater recourse against the government to avoid overreaching, such as the availability of APA review. But there is no basis for converting a legitimate effort to obtain reciprocity for the government into RICO extortion or, as discussed below, a *Bivens* claim.

3. The court of appeals' decision holding that such conduct may subject government officials to RICO liability directly conflicts with the Eighth Circuit's decision in *Sinclair* v. *Hawke*, *supra*. In *Sinclair*, the Office of the Comptroller of the Currency took escalating regulatory actions against a bank, eventually threatening to issue a safety and soundness order that would have hampered its lending efforts and later issuing a notice of charges against the bank. The Eighth Circuit rejected the bank's civil RICO claim, explaining that "federal employees who take regulatory action consistent with their statutory powers [do not] engage in a 'pattern of racketeering activity' if those actions are adverse" to a particular business; "regulators do not become racketeers by acting like aggressive regulators." 314 F.3d at 943-944. Indeed, the Eighth Circuit went so far as to observe that the contrary proposition—the basic theory adopted by the decision below—is "ludicrous on its face." *Id.* at 943.

The court of appeals attempted to distinguish *Sinclair* on the ground that it involved no disputed issue of fact as to the regulators' extortionate intent. App., *infra*, 21a ("In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from [respondent]."). But insisting on a recip-

rocal right-of-way was part of the regulatory regime that petitioners were enforcing. And the court was mistaken in speaking of an extortionate intent, because there is no allegation in this case that petitioners sought any *personal benefit* from the property. Instead, respondent fully admits petitioners were trying to obtain the interest in property for the government, which does not rise to an extortionate intent.

The court of appeals' RICO ruling has potentially severe consequences for government officials who have direct regulatory contact with private citizens. Under the decision below, BLM and Forest Service officials like petitioners who regulate intermingled public lands; bank regulators like the defendants in *Sinclair*; and potentially countless other regulatory officers may be subject to extortion charges under RICO, along with the prospect of personal liability and treble damages, for taking tough regulatory actions, even if those actions are authorized by law and the officials have no personal interest in the property they have sought on behalf of the government. There, of course, need to be checks (such as the APA) against unauthorized or excessive regulators, but the prospect of RICO liability based on a mere allegation of extortionate intent is not an appropriate check and threatens to chill appropriate and vital regulatory actions.

B. The Court Of Appeals' Holding That Respondent's Retaliation Claim Based On His Alleged Fifth Amendment "Right To Exclude" Others From His Property States A Claim Under *Bivens* Conflicts With Precedents Of This Court And Other Courts Of Appeals.

The court of appeals' conclusion that respondent's *Bivens* claim should proceed to trial also warrants review. First, the court erroneously rejected petitioners' threshold contention that the *Bivens* remedy was completely precluded in light of the administrative review mechanism established by the APA. Second, the court erroneously embraced—as "clearly estab-

lished," no less—respondent's novel claim of a constitutional right to be free from retaliation for the exercise of a Fifth Amendment "right to exclude" the government from one's property. Those rulings also conflict with the decisions of this Court and other courts of appeals.

1. The court of appeals erred in holding that respondent's Fifth Amendment retaliation claim was actionable under *Bivens*. In *Bivens*, this Court inferred a private action for damages against federal law-enforcement agents who violated a person's Fourth Amendment rights. But in recent years, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). That restraint corresponds with the Court's "retreat[]" from its "previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3; see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

The Court has emphasized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Malesko*, 534 U.S. at 69 (quoting *Chilicky*, 487 U.S. at 421-422). To the contrary, when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Court has declined to create additional remedies under *Bivens*. *Chilicky*, 487 U.S. at 423. Thus, for example, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to create a *Bivens* cause of action for federal employees seeking to challenge personnel decisions even though "existing remedies [did] not provide complete relief," *id.* at 388, and there was no remedy at all for certain personnel actions against probationary employees, *id* at 385 n.28.

In the initial appeal in this case, petitioners argued that the remedial mechanism established by the APA—which permits judicial review of final agency action that is allegedly contrary to a "constitutional right, power, privilege, or immunity," 5 U.S.C. 706(2)(B)—precluded respondent's *Bivens* claim. The court of appeals rejected that argument in part, reasoning that *Bivens* was precluded only to the extent that respondent challenged final agency action. Thus, under the court of appeals' initial ruling—which the court reaffirmed below, App., *infra*, 25a-26a—*Bivens* is available with respect to allegations that are "unrelated to final agency action." *Id.* at 82a; see *id.* at 81a-82a. Because "[n]ot all of [respondent's] allegations serving as a basis for his *Bivens* claim involve individual action leading to final agency decisions reviewable pursuant to the APA," the court held that respondent's *Bivens* claim was entitled to proceed. *Id.* at 82a.

That ruling conflicts with the decisions of the other circuits that have addressed the availability of *Bivens* in this context. Those circuits have recognized that the APA precludes the creation of a *Bivens* remedy, even where the scope of the two remedies may not be entirely coextensive. As the Eighth Circuit has explained: "When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the [APA] is sufficient to preclude a *Bivens* action." *Sinclair* v. *Hawke*, 314 F.3d at 940; see *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006). That is true, the Eighth Circuit underscored, "even when the administrative remedy does not provide complete relief." *Nebraska Beef*, 398 F.3d at 1084. The Eleventh and Ninth Circuits have reached the same conclusion. See *Miller* v. *United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("the existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action"); *Moore* v. *Glickman*, 113 F.3d 988, 994 (9th

Cir. 1997); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146, 1148 & n.4 (9th Cir. 1991), cert. denied, 506 U.S. 816 (1992).

Respondent's complaint states only a single count of retaliation allegedly in violation of the Fifth Amendment. That claim ultimately is based solely on respondent's refusal to grant the government a reciprocal right-of-way, which BLM regulations expressly granted petitioners the regulatory authority to pursue. Thus, the fact that the APA provides no remedy for certain conduct—*i.e.*, that involving acts "unrelated to final agency action," App., *infra*, 82a—does not mean that a *Bivens* action may be inferred with respect to that conduct. Indeed, inferring such a *Bivens* action would be inconsistent with Congress's decision to *shield* non-final agency action from review under the APA. 5 U.S.C. 704; see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Given that the major incidents that give rise to respondent's claim involve final agency action, the court of appeals' rule has the perverse consequence of inferring a constitutional action only as to those incidents that Congress considered too trivial or too tentative for judicial review in the APA context. The APA establishes what Congress deemed to be the appropriate mechanism for judicial review in this context. The court of appeals erred in supplanting that scheme with *Bivens*.

Moreover, this Court's decisions in *Bush* and *Chilicky* prevent the courts from creating a *Bivens* remedy simply because a particular plaintiff has *no* relief at all under a comprehensive statutory review mechanism. See *Bush*, 462 U.S. at 372; *Chilicky*, 487 U.S. at 425; see also, *e.g.*, *Jones* v. *TVA*, 948 F.2d 258, 264 (6th Cir. 1991) ("In the field of federal employment, even if no remedy at all has been provided by the [Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111], courts will not create a *Bivens* remedy.") (citing cases); *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) ("the CSRA precludes even those *Bivens* claims for which the act prescribes no alternative remedy"); *Volk* v. *Hobson*, 866 F.2d

1398, 1402 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989) ("The lesson of *Bush* is not that courts should assess the efficacy of existing remedies, but that they should abstain completely from inventing other remedies when Congress has set up a complete, integrated statutory scheme."); *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (interpreting *Chilicky* to require preclusion when the plaintiff has "no remedy whatsoever" in the remedial scheme).

The APA establishes a comprehensive remedial mechanism governing challenges to administrative action, including to the type of administrative challenge underlying this case. See p. 18, *supra*. The fact that the APA does not confer a remedy with respect to every one of respondent's allegations underlying his Fifth Amendment claim does not provide a basis for inferring a cause of action under *Bivens*. More fundamentally, extending *Bivens* to this context would radically expand *Bivens* in direct contravention of this Court's precedents and principles of judicial restraint. See *Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").

The court of appeals rejected petitioners' argument that respondent's *Bivens* claim is precluded in its entirety because of the availability of judicial review under the APA in the prior appeal and reaffirmed that ruling in the decision below. See App., *infra*, 25a-26a.[1] Because that threshold argument is inextricably intertwined with petitioners' defense of qualified immunity as to the *Bivens* claim, it was properly before

[1] In their brief below, petitioners argued not only that particular allegations should be dismissed under the reasoning of the court of appeals' initial ruling, but also that the entire *Bivens* claim was precluded. See Pet. C.A. Br. 21 ("Since the decision to deny [respondent] a right-of-way absent easement is subject to administrative and judicial review under the APA, [respondent's] *Bivens* action should, strictly speaking, be precluded as to *all* of the allegations.").

the court of appeals in the interlocutory appeals of the district court's qualified immunity rulings and is properly before this Court. See, *e.g.*, *Hartman* v. *Moore*, 126 S. Ct. 1695, 1702 n.5 (2006) (holding that Court had jurisdiction in qualified immunity appeal to address elements of *Bivens* causes of action for malicious prosecution and retaliatory prosecution because the question of the elements of the *Bivens* claim was "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on interlocutory appeal" concerning qualified immunity).

2. This Court's review is also warranted to address the denial of qualified immunity on the ground that respondent adequately alleged that "[petitioners'] conduct violated his right to be free from retaliation for exercise of his Fifth Amendment right to exclude others from his property." App., *infra*, 11a.

a. It is common ground that individuals possess a "right to exclude" others—including the government—from their property. This Court has held that such right to exclude was "[o]ne of the main rights attaching to property" found at common law, see *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978), and that the right's contemporary source is state law. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Respondent's *Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment. App., *infra*, 10a-16a.[2] The

[2] While the right to exclude may be connected at a general level with the right to be free from unreasonable searches and seizures under the Fourth Amendment, *Roth*, 403 U.S. at 577; see App., *infra*, 13a, this case does not involve any allegations of an improper search or seizure. A malicious

Fifth Amendment, however, protects the right to exclude provided by state law vis-à-vis the government *only* by way of the Takings Clause's guarantee of just compensation. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). The right to exclude thus is not absolute; it is qualified by the government's eminent domain authority. Equally important, the right to exclude is not a right to exclude without consequence. With interlocking or interdependent parcels of land, exercising the right to exclude and denying an easement can be expected to result in the denial of a reciprocal easement. When the government is one of the property owners, its efforts to maximize both owners' interest in their property by negotiating reciprocal easements do not infringe the right to exclude.

Respondent does not allege any taking in violation of the Fifth Amendment, and thus has not sought just compensation for any taking.[3] Rather, his basic claim is that the BLM *tried* to take his property by allegedly pressuring him to give the government a reciprocal right-of-way over his property. Far from alleging that the government has taken his property, respondent's Fifth Amendment *Bivens* claim is predicated on his assertions that he is being denied the use of *public* lands (*i.e.*, maintenance of the federal portion of the road and grazing privileges on federal lands) because he will not consent to a reciprocal right-of-way over his portion of the road.

The court of appeals held that "[respondent] has a Fifth Amendment right to *prevent* BLM from taking his property when BLM is not exercising its eminent domain power."

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prosecution claim founded on the Fourth Amendment was dismissed by the district court. App., *infra*, 67a. That claim, however, is not before the Court in this action.

[3] Respondent made a takings claim in one of the administrative actions that he filed against the BLM. The IBLA rejected that claim and respondent did not seek judicial review of that order. See *High Island Ranch*, No. 98-180R (IBLA May 20, 1999), slip op. 5 (C.A. App. 62), discussed p. 6, *supra*.

App., *infra*, 14a (emphasis added). But this Court has made clear both that individuals have no Fifth Amendment right to *prevent* a taking (only a right to just compensation to remedy the taking), *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1016, and that takings may occur outside of the eminent-domain process, see *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (noting that the Court has recognized since 1922 "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment").

The court of appeals also ignored the statutory remedy for takings. Respondent may not sue individual government employees for a taking (or for an attempted taking); rather, his sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act once a taking has occurred. See 28 U.S.C. 1491. That necessarily follows from the fact that the Takings Clause does not prohibit the government from taking property but simply requires the government to pay just compensation if it does. Thus, if the government eventually provides just compensation for a taking, the taking itself does not violate the Fifth Amendment. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); see *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (purpose of the Fifth Amendment is "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"); *id.* at 314 (Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").

Kaiser Aetna—the principal case on which the court of appeals relied, App., *infra*, 12a-14a—is not to the contrary.

That decision makes clear—in language omitted by the court of appeals—that the "right to exclude" *may* be taken so long as just compensation is paid. 444 U.S. at 179-180 (footnote omitted and emphasis added) ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take *without compensation*") (emphasis added). Respondent, however, does not claim any taking and thus has never pursued the statutory remedy for an alleged taking. Accordingly, any takings claim would be premature in any event. *Williamson County*, 473 U.S. at 195 ("taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491"); accord *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). Especially in the context of interlocking properties, the careful scheme of the Takings Clause cannot be replaced by individual officer liability when the negotiation process for a reciprocal easement breaks down.

b. The court of appeals further erred in holding that the Fifth Amendment confers a right to sue for money damages for retaliation for the exercise of alleged Fifth Amendment rights. To begin with, respondent cannot claim retaliation for the exercise of his Fifth Amendment rights, when he has not exercised the right protected by the Fifth Amendment—the right to receive just compensation for any taking. His Fifth Amendment retaliation claims fails for that reason alone. In any event, the court of appeals erred in holding that the Fifth Amendment confers its own anti-retaliation right.

The First Amendment is the only context in which this Court has recognized a constitutional anti-retaliation right. But the Court has long showed heightened sensitivity to concerns about chilling protected activity in the First Amendment context. See, *e.g.*, *Bates* v. *State Bar*, 433 U.S. 350, 380 (1977) ("First Amendment interests are fragile interests, and a person who contemplates protected activity might be dis-

couraged by the *in terrorem* effect of the statute."); see also *Hartman* v. *Moore*, 126 S. Ct. 1695, 1701 (2006) ("as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out") (citation omitted); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'") (brackets in original).

The Court's focus on the First Amendment in creating a remedy for retaliation is fully in keeping with the Court's special solicitude for First Amendment rights. Indeed, the Court has developed a variety of other legal doctrines that apply in the First Amendment context alone. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003) (overbreadth); *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (least restrictive alternative); *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530 (2002) (prior restraints); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (third-party standing); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648-649 (2000) (independent review of fact finding).

Neither this Court nor any circuit court other than the court below has recognized an anti-retaliation right outside the First Amendment context. Indeed, the decision below relied on *dictum* in a First Amendment case (*DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)) in holding that respondent possessed a right against retaliation for the exercise of his Fifth Amendment rights. App., *infra*, 15a-16a.[4]

[4] While *DeLoach* referred in general terms to the exercise of "a constitutionally protected right," the claim there was that the police had arrested the plaintiff in retaliation for her right to retain counsel, and the court predicated its holding on the First Amendment: "Bevers contends that DeLoach had no Sixth Amendment right to counsel when she was merely a suspect in the

Nor do the same concerns exist in the Fifth Amendment context about chilling protected activity. Unlike the First Amendment, the Fifth Amendment was not intended to encourage a particular type of citizen activity that could be chilled if not robustly protected. Moreover, unlike the First Amendment context, the Takings Clause, with its guarantee of a remedy, assumes a degree of permissible interference with property rights. Nor is the Takings Clause primarily an absolute prohibition of government action, but rather a means of ensuring the remedy of just compensation. And especially in the context of interlocking properties and reciprocal easements, there is a broad scope of legitimate give and take that makes liability for going too far in retaliating for failing to grant a reciprocal easement particularly troubling. The ability to obtain just compensation for any taking is itself a robust incentive for invoking one's Fifth Amendment rights. The court of appeals' unprecedented creation of a civil damages remedy for retaliation in the Fifth Amendment context accordingly warrants this Court's review.[5]

C. The Court of Appeals' Qualified Immunity Analysis Is Fundamentally Flawed And At Odds With This Court's Teachings

At a minimum, the court of appeals erred in holding that the foregoing RICO and Fifth Amendment rights were *clearly established*. Even when a plaintiff has properly alleged the violation of a constitutional right, a defendant is entitled to qualified immunity unless the plaintiff shows that "the law *clearly established* that the [official's] conduct was

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criminal investigation. The right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech." 922 F.2d at 620.

[5] Of course, retaliation for First Amendment protected speech could take the form of interference with the speaker's property rights (including interferences short of a taking), but that is not the nature of respondent's claim.

unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). Moreover, the determination whether a right was "clearly established"—"it is vital to note"— "must be undertaken in light of the specific context of the case, not as a broad proposition." *Ibid.*; see *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (to determine whether a right is clearly established, it must be "defined at the appropriate level of specificity"). That requirement "serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier*, 533 U.S. at 201.

As this Court explained in *Wilson* v. *Layne*, *supra*, a right is clearly established if "in the light of preexisting law the unlawfulness [is] apparent." 526 U.S. at 615. That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. at 202; see *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (it must be clear to a reasonable official "that his conduct was unlawful in the situation he confronted"); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what *he* is doing violates that right.") (emphasis added).

Petitioners in this case had no reason to believe that they were violating any clearly established right in attempting to obtain a reciprocal right-of-way from respondent through the exercise of their lawful regulatory authority. No previous decision of any court suggests that petitioners' conduct would violate any statutory or constitutional right. Indeed, the court of appeals itself acknowledged that "no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights." App., *infra*, 16a. That admission, alone, entitles petitioners to qualified immunity on respondent's novel Fifth Amendment retali-

ation claim. As discussed above, the court of appeals' RICO extortion ruling is similarly unfounded. Particularly given the potential breadth of the court's RICO and Fifth Amendment rulings and its sharp departure from existing precedent, the court of appeals' ruling that petitioners are not entitled to qualified immunity warrants further review.

D. The Court Of Appeals' Decision Could Severely Disrupt Important Government Functions And Subject Government Employees To Threat Of Civil Damages Actions Simply For Performing Their Lawful Regulatory Duties

The court of appeals' decision in this case could severely disrupt legitimate regulatory activity and, in particular, land management functions. In the American West, millions of acres of publicly owned lands are intermingled in a patchwork fashion with private lands. Indeed, the patchwork nature of western land forms a unique part of our history. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979). At the same time, however, the intermingled nature of these lands raises a host of property law issues, including questions about reciprocal access and rights-of-way between adjoining landowners.

For example, BLM has the authority to require any applicant for a federal right-of-way across public lands to provide the United States with a reciprocal right of access. See 43 C.F.R. 2901.1-2. In addition, like private landowners, BLM has the authority to deny an application for a federal right-of-way where BLM determines that a reciprocal right-of-way is in the public interest, and the applicant refuses to agree to such reciprocal access. BLM has without incident negotiated thousands of such reciprocal rights-of-way across private lands intermingled with public lands. Such reciprocal rights are a longstanding and indispensable feature of the federal land management scheme given the patchwork nature of public and private lands in large tracts of the West. Reciprocal rights are vital to the government's ability to maintain public

lands and facilities, such as the South Fork, Owl Creek Road at issue in this case, engage in resource and wildlife management, and conduct other important government functions.

In addition, the BLM administers over 21,000 grazing permits nationwide, including nearly 3500 permits in Wyoming alone. The great majority of those permits involve circumstances similar to that involved in this case where private land is intermixed with federal lands. BLM is statutorily required to administer such public lands under, *inter alia*, the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701. Where a grazing permit involves intermingled lands, BLM's authority to enter private land to the extent necessary to administer the terms and conditions of the permit is an implied condition of the permit. See p. 3, *supra*.

The court of appeals' decision in this case subjects federal officials to damages actions and threat of personal liability for carrying out their regulatory duties in attempting to secure reciprocal rights-of-way. The very nature of reciprocal easements means that the refusal to agree to a mutually beneficial easement will result in a denial of a one-sided easement. Insistence on reciprocity cannot be viewed as unconstitutional retaliation without undermining the government's ability to deal with its interlocking parcels. What is more, the decision subjects such employees to the threat of civil RICO damages if a jury finds that they had an "extortionate" intent in seeking to secure reciprocal rights through the exercise of lawful regulatory authority. The decision below therefore could severely disrupt the administration of critical land management responsibilities by the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-8016

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

v.

CHARLES WILKIE, DARRELL BARNES, TERYL SHRYACK, MICHAEL MILLER, GENE LEONE, DAVID WALLACE, DEFENDANTS-APPELLANTS

PACIFIC LEGAL FOUNDATION, NEW MEXICO CATTLE GROWERS ASSOCIATION, WASHINGTON; FARM BUREAU, IDAHO FARM BUREAU, IDAHO COUNTY FARM BUREAU, OWYHEE COUNTY FARM BUREAU, WASHINGTON STATE GRANGE, AND NEW MEXICO FEDERAL LANDS COUNCIL, AMICI CURIAE

Jan. 10, 2006

Before: KELLY, HENRY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

Plaintiff-Appellee Harvey Frank Robbins filed suit pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed. 2d 619 (1971). Robbins al-

leges employees of the Bureau of Land Management ("BLM"), including Defendants-Appellants Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller, Gene Leone, and David Wallace, attempted to extort a right-of-way across Robbins' property in violation of RICO and the Fifth Amendment. Defendants filed a motion for summary judgment on qualified immunity. The district court denied the motion concluding, *inter alia*, that Robbins had sufficiently alleged violations of his clearly established rights under RICO and the Fifth Amendment. Defendants appealed. This court has jurisdiction pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L.Ed. 2d 411 (1985). Because the right to be free from retaliation for the exercise of Fifth Amendment rights is clearly established and Defendants' alleged wrongful use of otherwise lawful authority to obtain a right-of-way from Robbins violates clearly established law under the Hobbs Act and Wyo. Stat. Ann. § 6-2-402, we **affirm**.

II. Background

Robbins owns High Island Ranch in Hot Springs County, Wyoming where he engages in cattle ranching and operates a commercial guest ranch. Robbins purchased the ranch from George Nelson who had granted to BLM a non-exclusive access easement along a road on the ranch. BLM failed to record the easement, however, and Robbins had no notice of it when he purchased and recorded his interest in the ranch. Thus, under Wyoming's recording statute, Robbins took ownership of the ranch unencumbered by the easement. Robbins also had various BLM preference rights, livestock grazing permits, and a special-recreation use permit allowing him to use federal lands adjacent to his property.

When BLM learned its easement had been extinguished, it contacted Robbins to discuss obtaining a right-of-way

across the ranch. Robbins refused. Robbins alleges that in retaliation for his refusal to grant the right-of-way, Defendants attempted to extort the right-of-way from him. Specifically, Robbins alleges Defendants refused to maintain the road providing access to his property; threatened to cancel, and then cancelled, his right-of-way across federal lands; stated they would "bury Frank Robbins"; cancelled his special recreation use permit and grazing privileges; brought unfounded criminal charges against him; trespassed on his property; and interfered with his guest cattle drives.

Robbins brought claims pursuant to *Bivens* and RICO. Defendants filed a motion to dismiss both claims. The district court granted the motion, reasoning that Robbins had failed to adequately plead damages under RICO, and that the Administrative Procedures Act ("APA") and Federal Tort Claims Act ("FTCA") were alternative, equally effective remedies precluding Robbins' *Bivens* claim. This court reversed. *Robbins v. Wilkie*, 300 F.3d 1208 (10th Cir. 2002) (hereinafter *Robbins I*). We held that damages under RICO need not be pled with particularity. *Id.* at 1211. Moreover, the APA and FTCA did not preclude Robbins' *Bivens* claims because the APA does not provide a remedy when an official's intentional acts unrelated to agency action violate a party's constitutional rights, and the FTCA is a separate and distinct remedy from *Bivens*. *Id.* at 1212-13.

Subsequently, Defendants filed a second motion to dismiss on the grounds of qualified immunity. The district court granted the motion in part and denied it in part. *See generally Robbins v. Wilkie*, 252 F. Supp. 2d 1286 (D. Wyo. 2003). The district court determined Robbins had sufficiently alleged violations of his clearly established statutory rights under RICO and constitutional right to exclude others from his property under the Fifth Amendment. *Id.* at 1294-95, 1301-02. The district court dismissed Robbins' *Bivens* claims

for malicious prosecution under the Fourth Amendment and procedural and substantive due process under the Fifth and Fourteenth Amendments. *Id.* at 1298-1301. Defendants did not appeal this order.

Defendants then filed a motion for summary judgment on qualified immunity. Relevant to this appeal, Defendants argued there was not a clearly established constitutional right to exclude others from one's property, and that they could not be held liable under RICO for actions authorized by BLM regulations because those actions are not "wrongful." The district court denied summary judgment on both grounds. With regard to Robbins' *Bivens* claim, the district court concluded Robbins had a clearly established right to be free from retaliation for exercising his right to exclude others from his property under the Fifth Amendment. Further, the district court determined Robbins had submitted sufficient evidence to support his complaint and Defendants failed to establish there were no issues of material fact. As to Robbins' RICO claim, the district court agreed that predicate acts under RICO must be otherwise wrongful to be actionable. The district court concluded, however, that actions taken by Defendants pursuant to BLM regulations can be wrongful if done with the intent of extorting. Because the district court determined there was an issue of material fact regarding Defendants' motive, summary judgment was denied.

III. Discussion

A. Jurisdiction

As a preliminary matter, this court ordered the parties to brief the appealability of the district court's order denying summary judgment. This court has appellate jurisdiction over "final decisions" of district courts. 28 U.S.C. § 1291. Under the "collateral order" doctrine, however, some district

court orders are considered "final" even though they are entered before a case has ended. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). One such collateral order permitting interlocutory appeal is a denial of qualified immunity. *Mitchell*, 472 U.S. at 530, 105 S. Ct. 2806. A denial of qualified immunity is only immediately appealable, however, to the extent the district court's decision turns on an abstract issue of law. *Id.* at 530, 105 S. Ct. 2806; *Johnson v. Jones*, 515 U.S. 304, 313-14, 317, 115 S. Ct. 2151, 132 L.Ed. 2d 238 (1995). Thus, an appellate court may examine on interlocutory appeal the purely legal question of whether the facts alleged by plaintiff support a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 528 n. 9, 105 S. Ct. 2806. An appellate court may not, however, review questions of evidentiary sufficiency on interlocutory appeal. Therefore, a portion of a district court order denying qualified immunity is not immediately appealable insofar as the order determines plaintiff's claims are supported by sufficient evidence in the record or disputed issues of material fact exist which preclude summary judgment. *Johnson*, 515 U.S. at 313, 115 S. Ct. 2151; *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997).

The district court's denial of qualified immunity in the present case turned on both issues of abstract law and evidentiary sufficiency. The district court determined Robbins had submitted sufficient evidence to support his *Bivens* claim and there was a disputed issue of material fact regarding Defendants' motive precluding summary judgment on Robbins' RICO claim. We do not have jurisdiction to examine these determinations of evidentiary sufficiency on interlocutory appeal. *Johnson*, 515 U.S. at 319-20, 115 S. Ct. 2151; Foote, 118 F.3d at 1422. The district court, however, also concluded Robbins sufficiently alleged a violation of his clearly established Fifth Amendment right, and the wrong-

ful use of otherwise lawful authority violates clearly established law under RICO. These abstract issues of law regarding whether a particular law was clearly established are immediately appealable. *Mitchell*, 472 U.S. at 530, 105 S. Ct. 2806; *Foote*, 118 F.3d at 1422.

Robbins also contends Defendants' failure to appeal the district court's order denying dismissal on qualified immunity precludes Defendants from appealing an order denying summary judgment on the same qualified immunity issues. Robbins reasons that allowing Defendants to appeal a second denial of qualified immunity after failing to appeal the first denial would be an end-run around the timeliness requirements of the notice of appeal provision of the Federal Rules of Appellate Procedure. Fed. R. App. P. 4(a)(1)(B).

Although this issue is one of first impression in this circuit, the Supreme Court and several other circuits have addressed the issue. In *Behrens v. Pelletier*, defendant filed a motion to dismiss on qualified immunity, which the district court denied after dismissing some of plaintiff's claims as time-barred. 516 U.S. 299, 303, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). Defendant appealed the denial of qualified immunity and the Ninth Circuit affirmed. *Id.* at 303-04, 116 S. Ct. 834. Subsequently, the district court reversed course on the statute-of-limitations question, concluding none of the plaintiff's claims were time-barred. *Id.* at 304, 116 S. Ct. 834. In response, the defendant filed a motion for summary judgment on qualified immunity, including the claims that were previously dismissed as time-barred. *Id.* The district court denied this motion and the Ninth Circuit dismissed defendant's appeal for lack of jurisdiction. *Id.* at 304-05, 116 S. Ct. 834.

The Supreme Court reversed, concluding there was jurisdiction over the second interlocutory appeal. *Id.* at 309-311, 116 S. Ct. 834. In so doing, the Court surmised that resolu-

tion of the immunity question may "require more than one judiciously timed appeal." *Id.* at 309, 116 S. Ct. 834 (quotation omitted). The Court reasoned that a defendant should be permitted to raise the qualified immunity defense at successive stages of litigation because different legal factors are relevant at various stages. *Id.* In particular, in a motion to dismiss, courts are limited to reviewing conduct alleged in the complaint, whereas in a motion for summary judgment, courts examine evidence accumulated during discovery. *Id.*

Several circuits have interpreted and applied *Behrens* in cases postured similar to the case before us. In *Grant v. City of Pittsburgh*, the Third Circuit held that a defendant's failure to appeal an order denying dismissal on qualified immunity does not preclude him from appealing a subsequent denial of the same legal arguments in a motion for summary judgment on qualified immunity. 98 F.3d 116, 120-21 (3d Cir. 1996). The court adopted the reasoning of *Behrens* by noting that although defendant's two motions raised the same legal theory, the second motion differed because it relied on matters developed during discovery. *Id.; see also Vega v. Miller*, 273 F.3d 460, 466 (2d Cir. 2001).

The Ninth Circuit went further in *Knox v. Southwest Airlines* by asserting jurisdiction over an appeal of an order denying a second motion for summary judgment after defendants failed to appeal the denial of their first summary judgment motion. 124 F.3d 1103, 1105-06 (9th Cir.1997). Defendants' first motion for summary judgment on qualified immunity was denied by the district court because of a disputed issue of fact. *Id.* at 1105. Defendants filed a second summary judgment motion making the same legal arguments, but providing additional evidence. *Id.* Citing *Behrens*, the Ninth Circuit asserted jurisdiction over defendants' second motion for summary judgment. *Id.* at 1106.

Robbins attempts to distinguish *Grant*, *Vega*, and *Knox* and instead argues that the District of Columbia Circuit's decision in *Kimberlin v. Quinlan* should guide our analysis. 199 F.3d 496 (D.C. Cir. 1999). In *Kimberlin*, Defendants moved for dismissal or summary judgment arguing, *inter alia*, that prison inmates do not have a clearly established First Amendment right to contact the press, and plaintiff failed to meet the heightened pleading standard applied to motive-based civil rights claims. *Id.* at 499. The district court denied the motion and defendants appealed only the heightened pleading standard ruling. *Id.* After discovery, defendants again moved for dismissal or summary judgment claiming the law was not clearly established. *Id.* The district court denied the motion concluding that its prior ruling that the law was clearly established was law of the case, and the appellate court affirmed. *Id.* at 499, 502.

Although *Kimberlin*, like *Grant* and *Vega*, is factually similar to the case presently before this court, Robbins' argument that *Kimberlin* supports the assertion we lack jurisdiction to consider Defendants' appeal is erroneous. The court in *Kimberlin* did not dispose of the case by asserting a lack of jurisdiction. Rather, it examined the merits by reviewing the propriety of the district court's application of the law of the case doctrine. *Id.* at 500-02. The court determined that the district court had correctly applied the law of the case doctrine because the same legal question had been decided in a prior stage of litigation and no prudential reasons existed for revisiting the prior decision. *Id.* In any event, the court proceeded to actually examine the underlying law of the case concluding that the First Amendment right at issue was "without doubt [ ] clearly established." *Id.* at 502.

Therefore, after *Behrens*, no circuit has held that an appellate court lacks jurisdiction over denial of a motion for

summary judgment when the motion raises the same legal arguments as a prior un-appealed motion to dismiss but relies on evidence developed during discovery.[1] Similarly, we decline to adopt such a rule. In carving out an exception to the finality requirement for appeals involving qualified immunity, the Supreme Court recognized that qualified immunity is both a right to avoid standing trial and a right to avoid the burdens of pretrial matters such as discovery. *Behrens*, 516 U.S. at 308, 116 S. Ct. 834. Requiring public officials to choose at which stage of litigation to raise a qualified immunity defense is inconsistent with these purposes. If public officials can avoid discovery by success on a motion to dismiss based on qualified immunity, they should not be prevented from filing the motion because of a fear that denial of the motion will prevent them from raising the defense again once their evidence is strengthened through discovery. Additionally, public officials should not be forced to appeal an order denying dismissal on qualified immunity to preserve appeal of a potential subsequent order denying summary judgment on the same issue. Such a rule would dramatically increase the number of interlocutory appeals at the dismissal stage. *Vega*, 273 F.3d at 465*; Grant*, 98 F.3d at 121. Thus, in the present case, Defendants' failure to appeal the district court's denial of dismissal on qualified immunity does not divest this court of jurisdiction to consider Defendants' current appeal because Defendants' summary judgment motion relies in part on evidence developed during discovery.

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[1] Prior to *Behrens*, two circuits dismissed appeals involving a second denial of qualified immunity because the second motion was substantially the same as the first. *Armstrong v. Tex. State Bd. of Barber Exam'rs*, 30 F.3d 643, 644 (5th Cir. 1994); *Taylor v. Carter*, 960 F.2d 763, 764 (8th Cir. 1992). *But see Grant v. City of Pittsburgh*, 98 F.3d 116, 120 (3d Cir.1996) (distinguishing *Armstrong* and *Taylor* in a case where defendant's second motion relied on material developed during discovery).

B. Qualified Immunity

We review a district court's denial of summary judgment based on qualified immunity *de novo*. *Perez v. Ellington*, 421 F.3d 1128, 1131 (10th Cir. 2005). "Under the doctrine of qualified immunity, government officials performing discretionary functions, generally 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." *Douglas v. Dobbs*, 419 F.3d 1097, 1100 (10th Cir. 2005) (quotation omitted). When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to immunity. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). To overcome a qualified immunity defense, a plaintiff must first assert a violation of a constitutional or statutory right and then show that the right was clearly established. *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996). A right is clearly established if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). To show that a right is clearly established, a plaintiff does not have to produce a factually identical case. Rather, plaintiff may produce a Supreme Court or Tenth Circuit opinion on point, or demonstrate that the right is supported by the weight of authority from other courts. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004). Once the plaintiff satisfies this initial two-part burden, the burden shifts to the defendant to show that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. *Id.*

1. Fifth Amendment

Robbins' *Bivens* claim alleges Defendants' conduct violated his right to be free from retaliation for exercise of his

Fifth Amendment right to exclude others from his property. Robbins argues that the district court relied solely on the law of the case doctrine in denying Defendants' motion for summary judgment on his *Bivens* claim. The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). A district court's decision denying a defendant's motion to dismiss on qualified immunity is not law of the case for purposes of a subsequent motion for summary judgment on qualified immunity. Law of the case does not apply because a motion to dismiss and a motion for summary judgment do not raise the "same issues." Different "legally relevant factors" are under consideration on a motion to dismiss and a motion for summary judgment. *Behrens*, 516 U.S. at 309, 116 S. Ct. 834. On a motion to dismiss, a court examines the conduct alleged in the complaint to determine if plaintiff has alleged a violation of clearly established law, whereas, on a motion for summary judgment, a court examines the evidence gathered during discovery. *Id.* Thus, reliance on law of the case in dismissing Defendants' motion for summary judgment in this case would be erroneous.[2]

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[2] In *Kimberlin v. Quinlan*, the Court of Appeals for the District of Columbia upheld a district court's reliance on law of the case in dismissing defendant's motion to dismiss or for summary judgment on qualified immunity when the district court had previously determined on a prior motion to dismiss or for summary judgment that plaintiff had alleged a violation of clearly established law. 199 F.3d 496, 500-01 (D.C. Cir. 1999). *Kimberlin* is distinguishable from the present case, however, because, in *Kimberlin*, "the relevant facts [had not] changed" between the denial of dismissal and summary judgment. *Id.* at 501. Thus, the same facts and same issues were under consideration in both motions, making law of the case applicable. Here, the relevant facts are different. As the district court noted, Robbins' motion in opposition to summary judgment included

The district court, however, did not rely on law of the case. The district court did discuss law of the case in noting that it had already concluded in its denial of dismissal that Robbins alleged a violation of his clearly established Fifth Amendment rights. Nevertheless, in light of *Behrens*, the district court continued by examining the evidence gathered during discovery. The court determined Robbins' had provided ample evidence to support his allegation of a violation of clearly established law and Defendants failed to show the absence of an issue of material fact. Therefore, the district court actually examined the legally relevant factors involved in determining whether summary judgment was appropriate and did not merely rely on law of the case. Because the district court reached the question of whether Robbins met his burden of providing evidence supporting his allegation of a violation of clearly established law, we now review the district court's decision.

a. Constitutional Right

We first examine whether there is a Fifth Amendment right to exclude the government from one's private property and then inquire whether the Constitution proscribes retaliation for the exercise of that right. "The right to exclude [is] universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The right has long been recognized as one of the main rights attaching to property. *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) (citing Blackstone Commentaries).

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248 exhibits supporting his claim that were not available at the motion to dismiss stage.

Defendants nevertheless argue Robbins has no constitutional right to exclude the government under the Fifth Amendment; rather, he is only entitled to just compensation if the government takes his property for public use. Because the government has not effected a taking in this case, Defendants contend Robbins has not alleged a constitutional violation. This argument is unpersuasive.

A property owner's right to exclude extends to private individuals as well as the government. *See United States v. Lyons*, 992 F.2d 1029, 1031 (10th Cir. 1993) (the expectations of privacy that are the cornerstone of Fourth Amendment protection against governmental search and seizure derive in part from the right to exclude others, including government officials, from one's property). "The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of [property] rights than if he sneaks in in the night wearing a burglar's mask." *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991). Defendants' assertion that BLM could have taken Robbins' property for public use after providing just compensation is correct. BLM, however, did not exercise or attempt to exercise its eminent domain power in this case. Instead, Robbins alleges, Defendants attempted to extort a right-of-way to avoid the requirement of just compensation. If the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause.

Defendants also argue that because BLM regulations permit access to and regulation of Robbins' property for certain purposes, Robbins has no right to exclude the BLM. The Supreme Court, however, rejected this argument in *Kaiser*, 44 U.S. 164, 100 S. Ct. 383. The government claimed a public right of access under the Rivers and Harbors Act to what was once a private pond. *Id.* at 168, 100 S. Ct. 383. The

owner had developed the pond into a private marina by dredging a channel and connecting the pond to a bay. *Id.* at 165- 67, 100 S. Ct. 383. The government claimed that these improvements converted the pond into "navigable water," and thus, by statute, the government was entitled to a public right of access. *Id.* at 168, 100 S. Ct. 383. The Court disagreed. It noted that while the marina may be subject to regulation by the Corps of Engineers as a navigable water, it did not follow that Congress could require a public right of access without invoking its eminent domain power and paying just compensation. *Id.* at 172-73, 100 S. Ct. 383. Thus, Robbins has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power.

This court has never explicitly recognized a constitutional right to be free from retaliation for the exercise of Fifth Amendment rights. Nevertheless, the right to be free from retaliation in the context of the First Amendment has long been recognized. Although the First Amendment does not expressly forbid retaliation, retaliation by government officials is prohibited under the Amendment because it "tends to chill citizens' exercise of their" rights to speech and association. *Perez*, 421 F.3d at 1131. This chilling effect applies to the Fifth Amendment right to exclude the government from one's property as well. It is clear that the right to exclude the government is not unlimited. Under the Takings Clause, the government may take private property for public use so long as it provides just compensation. U.S. Const. amend. V. When the government has chosen not to exercise its eminent domain power, however, citizens remain free to exclude even the government from their private property. *Kaiser*, 444 U.S. at 179-80, 100 S. Ct. 383. If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government,

and government officials will be more inclined to obtain private property by means outside the Takings Clause. The constitutional right to just compensation, in turn, would become meaningless. Because retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful.

b. Clearly Established

As evidenced by the citations above, the right to exclude others from one's property has long been recognized by the courts of this country. *See, e.g.*, *Rakas*, 439 U.S. at 143 n. 12, 99 S. Ct. 421. Nevertheless, Defendants argue there is no authority specifically recognizing the right to be free from retaliation for the exercise of Fifth Amendment rights. That is, even if the right to exclude is clearly established, they are still entitled to qualified immunity because the right to be free from retaliation in the private property context is not clearly established. While this assertion is true, it does not follow that the right is not clearly established such that a reasonable official would understand that his actions violate the law. Although alleged rights violations must be analyzed at the proper level of generality, "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). No objectively reasonable government official would think he can retaliate against a citizen for that citizen's exercise of a clearly established constitutional right.

In *DeLoach v. Bevers*, this court examined whether the right to be free from retaliation for the exercise of First Amendment rights was clearly established. 922 F.2d 618, 620 (10th Cir. 1990). We stated that "[a]n act taken in re-

taliation for the exercise of a constitutionally protected right is actionable. . . . The unlawful intent inherent in such a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established." *Id.* (citations and quotations omitted); *cf. United States v. Murphy*, 65 F.3d 758, 762-63 (9th Cir. 1995) (government cannot retaliate against defendant by refusing to file a motion for downward departure under the Federal Sentencing Guidelines because of defendant's failure to waive his Sixth Amendment right to a jury trial). Therefore, although no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights, *DeLoach* requires only that the right retaliated against be clearly established. As we noted above, the right to exclude others from one's property is well established. Robbins has thus sufficiently alleged a violation of his clearly established Fifth Amendment rights, and Defendants are not entitled to qualified immunity on Robbins' *Bivens* claim.

2. RICO

Robbins also alleges Defendants' conduct violated RICO. RICO provides civil remedies for "[a]ny person injured in his business or property by reason of a violation of 18 U.S.C. § 1962." 18 U.S.C. § 1964(c). Section 1962 in turn makes it unlawful for, *inter alia*, "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). Racketeering activity includes, among other predicate acts, any act indictable under the Hobbs Act and any act or threat involving extortion chargeable under state law. *Id.* § 1961(1)(A) & (B). Robbins alleges Defendants' actions amount to extortion under color of official right and by

wrongful use of fear in violation of the Hobbs Act and blackmail under Wyo. Stat. Ann. § 6-2-402.

The district court determined that Robbins sufficiently alleged Defendants engaged in a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402. Defendants do not contest this conclusion. Instead, Defendants argue that to be actionable under the Hobbs Act and Wyoming law, Defendants' attempts to obtain a right-of-way from Robbins must be independently wrongful. Defendants further contend that their actions were not wrongful because BLM regulations permit the BLM to require an applicant for a right-of-way across federal lands to grant the United States an equivalent right-of-way. 43 C.F.R. § 2801.1-2. Because Defendants had legal authority to require Robbins to grant the BLM a right-of-way in exchange for his right-of-way on federal lands, Defendants contend their conduct in seeking the right-of-way does not constitute a clearly established predicate act under either the Hobbs Act or Wyoming law. Defendants, however, apparently misunderstand Robbins' allegations. Robbins does not allege that Defendants committed extortion by attempting to obtain a right-of-way. Rather, he alleges Defendants' other actions, including refusing to maintain the road providing access to Robbins' property, cancelling Robbins' special recreation use permit and grazing privileges, bringing unfounded criminal charges against Robbins, trespassing on Robbins' private property, and interfering with Robbins' guest cattle drives, were all committed in an attempt to coerce Robbins into granting BLM a right-of-way. Thus, it is Defendants' actions other than seeking the right-of-way that Robbins alleges are extortionate. Although Defendants do not enumerate specific regulatory provisions permitting each of their actions, the

regulatory authority may exist.[3] Nevertheless, we conclude that if Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO.

a. *Hobbs Act*

(1) Statutory Right

The Hobbs Act prohibits interference with interstate commerce by extortion, attempted extortion, or conspiracy to commit extortion. 18 U.S.C. § 1951(a). Extortion is defined in the Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

Although they do not phrase it as such, Defendants essentially assert a claim of right or good faith defense to Robbins' allegations that they violated the Hobbs Act. The claim of right defense provides that a person with a lawful claim of right to property cannot be liable for wrongfully acquiring it. *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991). The Supreme Court first recognized the defense in the context of the Hobbs Act in *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973). In *Enmons*, labor leaders who used violence during collective bargaining

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[3] Defendants do provide regulatory authority for some of their alleged conduct. Specifically, Defendants reference a BLM regulation which permits BLM to include in grazing permits "a statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." 43 C.F.R. § 4130.3-2(h). Additionally, Defendants cite 43 C.F.R. § 2801.3(a) which states that the use of public lands requiring a right-of-way without authorization is a trespass.

were charged with extortion. *Id.* at 397-98, 93 S. Ct. 1007. The Court reversed the labor leaders' convictions, holding that the Hobbs Act did not prohibit the use of violence to achieve lawful labor union objectives, such as higher wages; rather, the Act only prohibits violence as a means of achieving illegal objectives, such as the exaction of personal payoffs. *Id.* at 400, 407, 93 S. Ct. 1007.

Several courts of appeals, including this court, however, have held that the claim of right defense should be limited to the facts of *Enmons*, specifically the use of force, violence, or fear in the context of a labor dispute. *Castor*, 937 F.2d at 299; *United States v. Zappola*, 677 F.2d 264, 268-69 (2d Cir. 1982); *United States v. French*, 628 F.2d 1069, 1074-75 (8th Cir. 1980); *United States v. Cerilli*, 603 F.2d 415, 419-20 (3d Cir. 1979); *United States v. Warledo*, 557 F.2d 721, 729-30 (10th Cir. 1977). As the Second Circuit explained in *Zappola*, Congress meant to define extortion in the Hobbs Act as it was defined under New York state law. 677 F.2d at 268*; see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Moreover, at the time the Hobbs Act was enacted, it was clear under New York law that a claim of right to property that one obtains by violence, force, or threats was not a defense to extortion. *Zappola*, 677 F.2d at 268. Thus, outside the context of labor disputes, in passing the Hobbs Act, "Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force or criminal prosecution, regardless of the defendant's claim of right to the property." *Id.* at 269.

The claim of right defense has been rejected both in the context of extortion by actual or threatened physical violence and extortion under color of official right. For example, in *Warledo*, this court considered a case in which defendants, who were charged under the Hobbs Act for violence commit-

ted against various railroads, argued that they were not guilty of extortion because their violence was aimed at obtaining money the railroad allegedly owed them pursuant to a lawful claim. 557 F.2d at 728-29. We rejected defendants' argument, reasoning that pursuit of an allegedly valid claim by threatened and actual physical violence was not a defense to Hobbs Act extortion. *Id.* at 730.

The claim of right defense was similarly rejected in a case involving extortion under color of official right in *Cerilli*. 603 F.2d at 418-21. Defendants in *Cerilli* were employees of the Pennsylvania Department of Transportation and were responsible for leasing equipment from private businesses to repair and maintain public roads. *Id.* at 418. Defendants sought payment from the individual business owners as a condition of their equipment being used and were charged with extortion under the Hobbs Act. *Id.* Defendants claimed, and the court accepted, that the payments they received were political contributions. *Id.* Defendants argued that because solicitation of political contributions is lawful, they were not guilty of extortion under color of official right for seeking the payments. *Id.* The Third Circuit rejected defendants' argument concluding that while "[t]he receipt of money [ ] by a political party . . . is generally not inherently wrongful. . . ., [t]he wrong under the Hobbs Act is the manner in which it is obtained." *Id.* at 419-20. These cases rejecting the claim of right defense establish that a lawful right to property or lawful authority to obtain property is not a defense to extortion; rather, if an official obtains property that he has lawful authority to obtain, but does so in a wrongful manner, his conduct constitutes extortion under the Hobbs Act.

Defendants nevertheless argue that their conduct was not extortionate, but merely the zealous exercise of regulatory authority. Defendants cite *Sinclair v. Hawke*, in which the

owner of a bank sued employees of the Office of the Comptroller of the Currency under RICO alleging they engaged in a pattern of racketeering activity. 314 F.3d 934, 939 (8th Cir. 2003). The court dismissed the RICO claim concluding that federal employees do not become racketeers by taking regulatory action consistent with their statutory powers. *Id.* at 943-44. In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from Robbins. The district court specifically determined there was a question of material fact regarding Defendants' intent.[4] If the trier of fact finds Defendants in fact intended to extort a right-of-way from Robbins, then Defendants' conduct was not merely the zealous exercise of regulatory authority; it was extortion and is actionable under the Hobbs Act.

(2) Clearly Established

The five circuits that have addressed the claim of right defense outside the labor context have rejected the defense. Although no court has rejected the claim of right defense under circumstances identical to the ones presented by this case, it is not necessary for the precise conduct of Defendants to have been previously held unlawful to defeat a claim of qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). It is sufficient if preexisting law put Defendants on fair notice that their conduct violated the law. *Id.; United States v. Lanier*, 520 U.S. 259, 270-71, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Moreover, although we must analyze alleged rights violations at the proper level of generality, "the degree of specificity required

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[4] We do not have jurisdiction to examine the district court's determination regarding evidentiary sufficiency on interlocutory appeal. *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997).

from prior case law depends in part on the character of the challenged conduct." *Pierce*, 359 F.3d at 1298. "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Id.* Each of the five circuits that have addressed the issue have held that a lawful right to property or lawful authority to obtain property does not permit a defendant to use any means necessary to obtain the property. Thus, the weight of authority clearly prohibits Defendants' alleged conduct. *See Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 594 (10th Cir. 1999) (law was clearly established when six circuits, not including the Tenth Circuit, that had addressed the issue all came to the same conclusion). Further, in light of the egregious nature of Defendants' alleged conduct,[5] authority rejecting the claim of right defense generally and in cases involving extortion under color of official right specifically were sufficient to put Defendants on notice that their conduct violated the law. Viewing the facts in the light most favorable to Robbins, as we must, we conclude that Robbins has sufficiently alleged a violation of his clearly established statutory rights under the Hobbs Act.

b. *Wyoming law*

(1) Statutory Right

Robbins also alleges Defendants' violations of Wyo. Stat. Ann. § 6-2-402 qualify as predicate acts of racketeering activity under RICO. 18 U.S.C. § 1961(1)(A). Wyo. Stat. Ann. § 6-2-402 provides:

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[5] The district court noted that Robbins submitted "evidence of Defendants' alleged motive and intent, threats, lies, trespass, disparate treatment and harassment in the form of various depositions, including [the] deposition of a former BLM [employee], various letters, criminal trial transcript and trespass notices."

> (a) A person commits blackmail if, with the intent to obtain property of another or to compel action or inaction by any person against his will, the person:
>
> . . . .
>
> (ii) Accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society.[6]

Robbins alleges Defendants violated this provision by accusing and threatening to accuse him of various crimes to coerce him into granting BLM a right-of-way. Defendants once again argue that their conduct must be wrongful to constitute a violation of Wyoming law actionable under RICO. Specifically, Defendants note that the Supreme Court has held that because RICO defines racketeering activity as an "act or threat involving . . . extortion, . . . which is chargeable under State law," the conduct proscribed under the state law relied on must be capable of being generically classified as extortionate. *Scheidler*, 537 U.S. at 409, 123 S. Ct. 1057. Moreover, "generic extortion is defined as obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Id.* (quotations omitted). Therefore, Defendants urge "for the same reasons that Robbins' claims are not extortion under

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[6] Although the statute defines the crime as blackmail, it also notes that "[c]onduct denoted blackmail in this section constitutes a single offense embracing the separate crimes formerly known as blackmail and extortion." Wyo. Stat. Ann. § 6-2-402(e); *cf. United States v. Nardello*, 393 U.S. 286, 296, 89 S.Ct. 534, 21 L. Ed. 2d 487 (1969) (Travel Act's prohibition against extortion under state law applies to extortionate conduct classified by a state penal code as blackmail rather than extortion).

the Hobbs Act," they are not extortionate under Wyoming law.

Defendants argument is, once again, unavailing. We agree that conduct proscribed under state law must be generically classified as extortionate to qualify as a predicate act under RICO. Nevertheless, for the same reasons Defendants' alleged lawful authority to require a reciprocal right-of-way from Robbins did not give them authority to use any means necessary to extort the right-of-way under the Hobbs Act, that authority does not provide a defense under Wyoming law.

(2) Clearly Established

The parties have not cited, and this court cannot find, any authority from Wyoming state courts addressing the applicability of the claim of right defense under Wyo. Stat. Ann. § 6-2-402. It is clear from the language of the statute, however, that Defendants' claim of lawful authority to require Robbins to grant BLM a right-of-way does not allow Defendants to accuse Robbins of a crime with the intent to obtain the right-of-way.

In *Lanier*, the Supreme Court noted that "the qualified immunity test is simply the adaptation of the fair warning standard [of criminal law]" to government officials facing civil liability. 520 U.S. at 270-71, 117 S. Ct. 1219. The fair warning standard requires the statute under which a defendant is charged, "either *standing alone* or as construed by the courts," make it reasonably clear that the defendant's conduct was criminal. *Id.* at 267, 117 S. Ct. 1219 (emphasis added). Thus, it follows that if the text of a statute clearly establishes the contours of a right, the statute alone is sufficient to put an objectively reasonable official on notice that conduct within the plain text of the statute violates that right for purposes of qualified immunity. *See Greene v. Bar-*

rett, 174 F.3d 1136, 1142-43 (10th Cir. 1999) (property right was not clearly established, in part, because state statute was ambiguous).

The language of the Wyoming statute is unambiguous. The statute clearly establishes that it is unlawful to accuse or threaten to accuse a person of a crime with the intent to obtain that person's property or compel some other action or inaction. BLM regulations requiring a reciprocal right-of-way may be relevant to demonstrate that Defendants did not accuse Robbins of crimes with the intent to obtain a right-of-way because Defendants already had legal authority to require a right-of-way, and thus, did not need to extort one. BLM regulations, however cannot serve as a defense if the trier of fact finds that Defendants accused Robbins of crimes with the intent to obtain a right-of-way or to compel Robbins to grant a right-of-way, because the text of the statute clearly establishes that this conduct violates the statute. Because Robbins adduced sufficient evidence Defendants accused and threatened to accuse him of various crimes to obtain a right-of-way in clear violation of the text of the statute, Robbins has sufficiently alleged a violation of clearly established statutory rights under Wyoming law.

C. Administrative Procedure Act

Defendants also argue that Robbins' *Bivens* claim is precluded by the Administrative Procedure Act ("APA"). Specifically, this court previously held that the APA provides an alternative, equally effective remedy for individual action leading to a final agency decision. *Robbins I*, 300 F.3d at 1212-13. Therefore, we reasoned, only Robbins' allegations involving individual action unrelated to final agency action are permitted under *Bivens*. *Id.* Defendants claim the district court never examined Robbins' complaint to determine which allegations remain and which are precluded, and ask us to do so now.

The district court did not address whether any conduct alleged in Robbins' complaint is precluded by the APA because Defendants did not raise this issue in their motion for summary judgment. Because we generally do not consider issues not raised below, we decline to address Defendants' argument. *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992).

IV. Conclusion

For the foregoing reasons, this court affirms the district court's denial of defendants' motion for summary judgment on qualified immunity.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NO. 98-CV-201-B

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

v.

CHARLES WILKIE, DARRELL BARNES, TERYL SHRYACK, MICHAEL MILLER, GENE LEONE, DAVID WALLACE, DEFENDANTS-APPELLANTS

Jan. 20, 2004

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BRIMMER, J.

The matter is before the Court on Defendants' Motion for Summary Judgment. Upon reading the briefs, hearing oral argument, and being fully advised in the premises, the Court FINDS and ORDERS as follows:

Statement of the Parties and Jurisdiction

Plaintiff Harvey Frank Robbins, is a resident of the State of Wyoming, residing in Hot Springs County, Wyoming. Defendant Charles Wilkie was an employee of the United States Bureau of Land Management ("BLM") as the Worland area manager. Defendant Wilkie was a BLM line officer. Defendant Darrell Barnes is an employee of the United States and the BLM. Defendant Barnes is the Worland

BLM District Manager. Defendant Michael Miller is an employee of the United States and the BLM. Defendant Miller is a BLM investigative and law enforcement officer. Defendant Gene Leone was an employee of the United States and the Worland BLM office. Defendant Teryl Shryack is an employee of the United States and the Worland BLM office. Defendant David Wallace is an employee of the United States and the Worland BLM office.

Jurisdiction is proper in the United States District Court under 28 U.S.C. § 1331 pursuant to the action being brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 28 U.S.C. § 1346(b)(1) and a *Bivens* claim. Venue is proper under 28 U.S.C. § 1391(e).

Background

In 1994, George Nelson owned the High Island Ranch in Hot Springs County, Wyoming. On April 5, 1994, Mr. Nelson granted a non-exclusive access easement to the Bureau of Land Management ("BLM") across his ranch. This easement ran along a private ranch road known as the Rock Creek Road. The BLM, however, failed to record this easement as required by Wyoming's recording statute. *See* Wyo. Stat. Ann. § 34-1-120 (providing that an unrecorded conveyance is void against a subsequent purchaser for value who, without notice, first records).

On May 31, 1994, Plaintiff purchased the High Island Ranch from Mr. Nelson. Plaintiff took the High Island Ranch without notice of the BLM's easement and recorded his interest in said ranch in Hot Springs County. Under Wyoming law, when Plaintiff recorded his deed the BLM's easement across Rock Creek Road was rendered void.

At the High Island Ranch, Plaintiff runs a commercial guest ranch operation and engages in cattle ranching. Plaintiff's ranch included a number of BLM livestock grazing

permits and preference rights. Pursuant to the grazing permits, livestock from Plaintiff's ranch were allowed to graze on federal land. Additionally, Plaintiff had a Special Recreational Use Permit ("SRUP") which allowed him to operate his commercial guest ranch activities on federal land. Among other things, Plaintiff would permit ranch guests to participate in cattle drives which occurred on federal land.

The BLM contacted Plaintiff to discuss the possibility of obtaining a new easement after it learned that its easement was no longer in effect. Plaintiff alleges that Defendants made a non-negotiable demand that he grant the BLM an easement across Rock Creek Road. Plaintiff refused to grant the BLM the easement.

Thereafter, Plaintiff alleges Defendants Wilkie, Barnes, Leone, Shryack, Miller and Wallace each engaged in a conspiracy to commit and/or committed two or more acts of attempted extortion under color of official right; attempted extortion by the wrongful use of fear under 18 U.S.C. § 1951 and/or extortion under Wyo. Stat. Ann. § 6-2-402 and abused their discretion. Specifically, Plaintiff alleges: (1) Defendants refused to maintain the road necessary for Plaintiff to access his private property in an effort to coerce Plaintiff to grant the BLM an easement; (2) Defendants Barnes and Wilkie threatened to cancel Plaintiff's right-of-way unless he granted the BLM an easement; (3) On July 21, 1995, Defendant Wilkie actually cancelled Plaintiff's right-of-way to coerce him to grant the BLM an easement; (4) Defendant Leone stated to fellow BLM employees that he was going to "bury Frank Robbins"; (5) Following an accident with Mrs. Pennoyer, Defendants used the incident as an excuse to cancel Plaintiff's SRUP; (6) On July 21, 1997, Defendants falsely conspired to accuse Plaintiff of a federal crime for the purpose of coercing him to grant the BLM an easement; (7) Defendants attempted to coerce Plaintiff to grant the BLM an

easement by interfering with Plaintiff's guest ranch operations by following guest cattle drives and trespassing on private property; (8) Defendants instigated a pattern of disparate enforcement of trespass regulations against Plaintiff in an effort to convince Plaintiff that they would "bury him"; (9) On November 6, 1995, the BLM employees revoked Plaintiff's SRUP to force Plaintiff to give the BLM an easement; and (10) Defendants Barnes, Shryack, Wallace, and Wilkie used frivolous allegations and decisions to take away Plaintiff's grazing privileges for the High Island, HD and Owl Creek ranches and to have Plaintiff's settlement agreement revoked by bringing false accusations before the Department of Interior, soliciting the help of various environmental anti-grazing organizations, and by publishing false statements to the press.

In sum, Plaintiff alleges that Defendants conspired to deny Plaintiff his clearly established constitutional rights by depriving Plaintiff of his property, subjecting him to financial harm, and harming his ranching and guest ranching businesses. Plaintiff has alleged civil rights violations of retaliation under *Bivens* and a RICO claim.

In 2002, Plaintiff began settlement negotiations with the Washington BLM Office. Defendants allegedly reacted by issuing six adverse decisions against Plaintiff in two days and actively contemplating impoundment of his cattle. Due to the ongoing settlement negotiations with Plaintiff, the Wyoming State BLM office told Defendant Barnes to back off.

On January 20, 2003, the BLM entered into a Settlement Agreement with Mr. Robbins. As part of the settlement, Defendants can still levy charges against Plaintiff but all such charges are first subject to an "informal dispute resolution" via the Director of the BLM. Plaintiff's RICO and *Bivens*

claims currently before this Court were not part of Mr. Robbins' settlement agreement.

Plaintiff prays for judgment against Defendants as follows: (1) Declaratory judgment that the Fence Easement provides Defendants only the limited right to use the Rock Creek Road for the specific purpose of repair and maintenance of the 276 feet of fencing; (2) Declaratory judgment that the Defendants have no right to enter onto the Plaintiff's private property other than that provided by the Fence Easement; (3) Declaratory judgment that the Fence Easement terminated by virtue of the Defendants' misuse; (4) Declaratory judgment that the alleged ability of Plaintiff's livestock to access BLM property, without actual evidence of trespass, is insufficient to permit the BLM to presume that Plaintiff's livestock have trespassed on BLM land; (5) Injunctive relief prohibiting Defendants from instigating further trespass actions against Plaintiff when they have no evidence that Plaintiff's livestock have actually entered onto BLM lands where they are not permitted; (6) Compensatory damages; (7) Damages for emotional distress; (8) Treble damages pursuant to 18 U.S.C. § 1964(c); (9) Costs of suit; (10) Actual attorneys' fees; (11) Prejudgment interest; and (12) Punitive damages.

On November 4, 2003, Plaintiff filed a Third Amended Complaint which added one Defendant, David L. Wallace, but did not expand on the legal issues presented by Plaintiff in his Second Amended Complaint. Therefore, this Order on Defendants' Motion for Summary Judgment will apply to the legal issues and pleadings in Plaintiff's Third Amended Complaint.

Legal Standards

I. *Motion for Summary Judgment.*

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. Fed. R. Civ. P. 56(c*)*; *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 123 L. Ed. 2d 317 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996*)*. The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When the non-moving party bears burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. *Id.* To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 10 6 S. Ct. 2505, 91 L. Ed. 2d 202 (1986*)*; *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

II. *Qualified Immunity.*

Defendants have, on two prior occasions, filed motions to dismiss seeking dismissal of Plaintiff's complaint on the basis of qualified immunity. On Defendants' first Motion to Dismiss, this Court issued a decision in May, 2001, dismissing Plaintiff's second amended complaint in its entirety based on qualified immunity. The order was reversed by the Tenth Circuit Court of Appeals in August, 2002. *See Robbins v. Wilkie*, 300 F.3d 1208 (10th Cir. 2002). As a result of the Tenth Circuit's reversal, Defendants subsequently filed a second motion to dismiss which this Court granted in part and denied in part in March, 2003.[7] *See Robbins v. BLM*, 252 F. Supp. 2d 1286 (D. Wy. 2003). Defendants are now before the Court upon Defendants' Motion for Summary Judgment, requesting the Court dismiss the second amended complaint based on qualified immunity.[8]

Defendants argue that the doctrine of qualified immunity protects them for any liability due to the "objective legal reasonableness of an official's acts." (Br. in Supp. of Defs.' Mot. for Summ. Judgment ("Defs.' Br."), at p. 14). Plaintiff responds that qualified immunity does not shield Defendants from suit if the statutory or constitutional right which was violated was clearly established such that a reasonable pub-

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[7] This Court Denied Defendants' Motion to Dismiss Plaintiff's Second Amended Claim as to Plaintiff's: (1) First claim for Relief, violation of RICO; and (2) unconstitutional retaliation claim under *Bivens*. This Court Granted Defendants' Motion to Dismiss Plaintiff's Second Amended Claim as to Plaintiff's: (1) alleging a violation of the Fourth Amendment; and (2) alleging a violation of procedural and substantive components of the Due Process Clauses of the Fifth and Fourteenth Amendments.

[8] On November 4, 2003, this Court granted Plaintiff leave to file a Third Amended Complaint which did not add any legal issues, but only additional facts and Defendant David Wallace. Both parties have been allowed to supplement their original briefs to the Court.

lic official would have known that their actions were violating that right. (Pl.'s Opp'n to Defs.' Mot. for Summ. Judgment ("Pl.'s Opp'n. Br.") at p. 16).

Qualified immunity protects federal officials from individual liability unless the officials violated a clearly established constitutional or statutory right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). The purpose of qualified immunity is to encourage "public officials to act independently and without fear of consequences if there is no violation of a clearly established right." *Garrett v. Stratman*, 254 F.3d 946, 950-51 (10th Cir. 2001) (internal quotations and citations omitted).

The Tenth Circuit has explained the framework a district court should follow when considering an assertion of qualified immunity:

> The plaintiff bears a heavy two-part burden when defendant pleads the defense of qualified immunity . . . The plaintiff must show: (1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue. Unless the plaintiff carries its twofold burden, the defendant prevails.

Brewer, 76 F.3d at 1134. "To be clearly established, 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed. 2d 523 (1987)).

This Court has already held that the alleged violation of the RICO statute (Plaintiff's First Claim in the Third

Amended Complaint) was a "clearly established right" which an objectively reasonable BLM employee would know of:

> [t]aking Plaintiff's well-pleaded allegations as true, Defendants Vessels, Barnes, Wilkie, Leone, Shyrack, Merrill, Stimson, and Miller engaged in a pattern of racketeering activity, *i.e.*, extortion, under the color of official right in an attempt to force Plaintiff to grant the BLM an easement. An objectively reasonable BLM employee performing his discretionary functions, in light of the clearly established laws prohibiting extortion, would not have engaged in the activity alleged in Plaintiff's Second Amended Complaint. In other words, assuming Plaintiff's allegations are true, Defendants' actions violated the objective legal reasonableness standard because the unlawfulness of these actions would have been apparent in light of pre-existing law.

Robbins, 252 F. Supp. 2d at 1295. Therefore, this Court has already held that Plaintiff has carried the two-fold burden set out in *Brewer* in regards to Plaintiff's RICO claim.

This Court has also addressed the "clearly established" issue regarding Plaintiff's *Bivens* claim for unlawful retaliation under the Fifth Amendment (Plaintiff's second claim in the Third Amended Complaint). This Court held:

> The Court concludes that the universally accepted "right to exclude" is a clearly established right protected by the Constitution. Plaintiff has alleged that he attempted to exclude the defendants from his property on numerous occasions and that in response, Defendants retaliated against him for exercising that property right. As a result, because this Court concludes that the "right to exclude" is [sic] was clearly established, the "unlawful intent inherent in such retaliatory action places it beyond

> the scope of a [federal] officer's qualified immunity . . . " *DeLoach*, 922 F.2d at 620.

Robbins, 252 F. Supp. 2d at 1301-02. Again, this Court has already held that Plaintiff carried the two-fold burden in regard to the *Bevins* claim.

The "law of the case" doctrine states that a court "should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912)). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)). This Court is convinced that its prior ruling that the RICO claim and the unlawful retaliation *Bivens* claim were clearly established at the time of the alleged violation and survive the *Brewer* two-fold burden test. Defendants have spent a large portion of their Motion for Summary Judgment in regards to qualified immunity but this Court was not erroneous and believes that adherence to its previous decision would not work a "manifest injustice."

Defendants contend that this Court should reconsider its previous ruling on the RICO and *Bivens* claims since a motion of summary judgment is a different standard than a motion to dismiss. (Defs'. Br., at p. 14). Defendants cite the United States Supreme Court which recognized a motion to dismiss and a motion for summary judgment considered different legally relevant factors. (*Id.*).

> [T]he legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct as alleged in the complaint that is scruti-

nized for "objective legal reasonableness." On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. R. Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry.

Behrens v. Pelletier, 516 U.S. 299, 309, 116 S. Ct 834, 133 L. Ed. 2d 773 (1996). This Court has reviewed the Plaintiff's Proposed Findings of Fact, Conclusions of Law and the 248 exhibits attached to the Plaintiff's Opposition to Defendant's Motion for Summary Judgment. Taken in the light most favorable to the plaintiff, Robbins has provided ample evidence to support the allegations in his third amended complaint and has not solely rested on his pleadings.

The burden then shifts to Defendants since Plaintiff carried his two-part burden. *Albright*, 51 F.3d at 1535. Defendants bear the burden, as an ordinary movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity. *Id.; see also* Fed. R. Civ. P. 56(c).

Defendants argue that there is no material issue of fact in question since a fact-finding team was appointed by the BLM Deputy Director Fran Cherry in February, 2002. (Defs'. Br., at p. 6). The team consisted of Tom Walker, Deputy Assistant Director, Business and Fiscal Resources, BLM, Washington Office; Tim Reuwsaat, Group Manager, Rangelands, Soil, Water and Air, BLM, Washington office; and John Silence, Special Agent in Charge, Colorado Office, BLM. (*Id.*). The team, on April 16, 2002, issued a document entitled "Fact-Finding Review-Frank Robbins" which sets forth Plaintiff's allegations, the BLM responses, and the team's recommendations. Defendants claim that the report vindicates the BLM and the actions of Defendants. (*Id.*). Defendants state that the fact-finding review was completed by disinterested parties and the report clearly undercuts all

assertions by Plaintiff that the acts of the defendants somehow rose to the level of extortion or retaliation. (*Id.*, at p. 7).

If the fact-finding report was taken as completely true, Defendants would have grounds for summary judgment since there would be no issue of material fact dealing with qualified immunity or the RICO or *Bivens* claims. Defendants have attached to their Brief in Support of Summary Judgment, a "briefing paper" completed by Defendant Barnes for the review and use of the fact-finding team. (Defs'. Br., Bates 3273-3303). The fact-finding team used this information to compile the fact-finding report.

However, a review of the fact-finding report does not provide an uncontroverted factual basis which proves that Plaintiff cannot prevail under any circumstance. In addition, the report does not address all of the factual issues presented by the Plaintiff in his Third Amended Complaint or his 248 attached exhibits. Plaintiff provides a significant amount of evidence which could lead a jury to conclude that Defendants did intend and agreed to extort and punish Plaintiff.[9] *See* (Pl.'s Opp'n. Br., at pp. 33-48).

Plaintiff's evidence includes multiple letters, depositions and trial transcripts which provide enough evidence, especially taken in a light most favorable to Plaintiff, "such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be be-

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[9] Plaintiff has submitted evidence of Defendants' alleged motive and intent, threats, lies, trespass, disparate treatment and harassment in the form of various depositions, including a deposition of a former BLM Edward Parodi, various letters, criminal trial transcript and trespass notices.

lieved, and all justifiable inferences are to be drawn in his favor." *Id.*, at 255; *First Security Bank of New Mexico v. Pan American Bank*, 215 F.3d 1147, 1154 (10th Cir. 2000). Therefore, Defendants failed to show no material issues of fact remained that would defeat the claim of qualified immunity at the Summary Judgment level. This Court will make a final ruling on the issue of qualified immunity after hearing all of the evidence provided in trial and after the jury has decided the RICO and *Bivens* claims.

III. *Summary Judgment under RICO.*

Plaintiff argues this case involves two separate provisions of RICO, 18 U.S.C. § § 1962(c) and 1962(d).[10] (Pl.'s Opp'n. Br., at p. 3). To establish a civil RICO claim under 18 U.S.C. § 1962(c), the plaintiff must show that the defendants: (1) participated in the conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). Racketeering activity includes, among other predicate acts, activity that is indictable under the Hobbs Act and any act involving extortion chargeable under state law. 18 U.S.C. § 1961(1)(A)-(B). A pattern of racketeering activity consists of two or more acts of racketeering activity. *Id.*

The Hobbs Act provides that whoever affects commerce in any way by extortion, or attempts or conspires to do so, may be fined or imprisoned, or both. 18 U.S.C. 1951(a). Extortion is "the obtaining of property from another, with his

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[10] 18 U.S.C. § 1962(c) states: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b) (2). At common law, a public official who obtained the property of another, to which neither the official nor the government office was entitled, was guilty of extortion. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402-03, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Further, Congress has explicitly recognized that agents of the United States can be liable for the crime of extortion under the color of official right. 18 U.S.C. § 872; *United States v. Culbert*, 435 U.S. 371, 373 n. 3, 98 S. Ct. 1112, 55 L. Ed. 2d 349 (1978).[11]

In Wyoming "[a] person commits blackmail if, with the intent to obtain property of another or compel action or inaction by any person against his will, the person: (i) Threatens . . . injury to the property of another person; or (ii) Accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society." Wyo. Stat. § 6-2-402 (2003).

A. *"Obtaining" of Property under The Hobbs Act.*

Defendants further argue that Plaintiff cannot bring the RICO claim under the Hobbs Act. Defendants argue that the Supreme Court in *Scheidler* limited RICO relief under the Hobbs Act to those circumstances where property is actually "obtained," and that Plaintiff cannot prove extortion because Defendants never actually "obtained" an easement from Plaintiff. (Defs'. Br., at 31-32). Plaintiff counters by arguing *Scheidler* did not hold that Defendant must first "obtain" the property to be found liable but simply held that interference with an *intangible business interest* could not be a property

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[11] The Court in *Culbert* cites 18 U.S.C. § 1951(b) which provides: "Extortion means the obtaining of property from another, . . . under color of official right."

interest capable of being "obtained" for purposes of the Hobbs Act. (Pl's. Opp'n. Br., at 24).

The plaintiff, in *Scheidler*, asserted that the defendants violated the Hobbs Act by "seeking to get control of the use and disposition of respondents' property." *Id.*, 537 U.S. at 401. Plaintiff argued that because the "right to control the use and disposition of an asset is property, petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property." *Id.* The United States, in an *Amicus Curiae* brief stated "where the property at issue is a business's *intangible* right to exercise exclusive control over the use of its assets, [a] defendant obtains that property by obtaining control over the use of those assets." *Id.*

The Supreme Court indicated that, in the context of a civil RICO action, property must be "obtained" before there can be a violation of the Hobbs Act:

> While the Hobbs Act expanded the scope of common law-extortion to include private individuals the statutory language retained the requirement that property must be "obtained." See 18 U.S.C. § 1952(b)(2). . . . Most importantly, we have construed the extortion provision of the Hobbs Act at issue in this case to require not only the deprivation but also the acquisition of property. *See e.g. Emmons*, *supra* at 400, 93 S.C. 1007 . . . With this understanding of the Hobbs Act's requirement that a person must "obtain" property from another party to commit extortion, we turn to the facts of these cases.

Scheidler, 537 U.S. at 402.

In *Scheidler*, there was no dispute that the defendants interfered with, disrupted, and in some instances completely deprived plaintiffs of their ability to exercise their property rights. *Id.*, at 404. However, the Court held that "even

when their acts of interference and disruption achieved their ultimate goal of 'shutting down' a clinic that performed abortions, such acts did not constitute extortion because petitioners did not 'obtain' respondents' property . . . Petitioners neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell." *Id.*, at 404-05 (citing *United States v. Nardello*, 393 U.S. 286, 89 S. Ct 534, 21 L. Ed. 2d 487 (1969)).

Plaintiff argues that all that is required to be held liable under the Hobbs Act, is the property that is the subject of extortion must be capable of being "obtained" and that in *Scheidler* the interference with intangible interests are not capable of being "obtained." (Pl's. Opp'n. Br., at 24). In the case at hand, it is true that Defendants never obtained Plaintiff's property. However, Defendants did pursue something of value, an easement, from Plaintiff that they could have "exercised, transferred or sold." Unlike the intangible interests in *Scheidler*, the case at hand involves property that is capable of being "obtained."

In addition, the Hobbs Act states that attempted extortion or conspiracy to commit extortion are equal to crimes of extortion.[12] 18 U.S.C. § 1951(a). Therefore, the focus is whether the property could be obtained not whether it was actually obtained. The property in this case, an easement, could have been obtained by Defendants. Plaintiff has provided enough evidence to show a material question of fact as to whether Defendants attempted to extort or conspired to commit extortion, in order to obtain the said easement.

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[12] "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. 1951(a) (emphasis added).

B. *Predicate Acts of Racketeering.*

Defendants argue that the alleged "overt acts" asserted by Plaintiff are not independently wrongful under RICO as Defendants were merely acting to enforce federal statutes and regulations and therefore cannot give rise to racketeering. (Defs'. Br., at 33). Defendants cite *Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000) in support of their argument that the underlying acts which allegedly give rise to the "racketeering" component of a RICO violation must themselves be acts of racketeering. (Defs'. Br., at 32-33). The Supreme Court held that:

> [We] conclude that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO, (citation omitted) is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by any "act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an act of tortious character" (citation omitted), meaning an act that is independently wrongful under RICO. The specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed.

Beck, 529 U.S. at 505.

This Court agrees with Defendants that the overt acts must be acts of racketeering or otherwise wrongful under RICO. However, this Court disagrees with Defendants that the acts of giving citations, trespass notices and other actions taken within the scope of their employment are not independently wrongful under RICO. Plaintiff has supported

with evidence his claim that Defendants' acts were independently wrongful under RICO by virtue of their intended use by Defendants. Plaintiff claims that Defendants intended to use their otherwise lawful authority to extort Plaintiff. This Court has already held that Defendants could have taken certain actions within the scope of their employment which are independently wrongful under RICO if it is proven that those acts were done for the purpose or intent of extorting Plaintiff. Therefore, there is a question of material fact whether the individual Defendants intended to extort Plaintiff through the individual Defendant's acts which gives rise to the racketeering component.

C. *"Operation and Management" Test.*

Defendants argue that the United States Supreme Court in construing 18 U.S.C. § 1962(c), and particularly the terms "conduct and participate", clearly conclude that both terms require an element of direction in the affair of the alleged enterprise. (Defs.' Br., at 33). Defendants state that Defendants Shryack, Leone and Miller are not involved in the direction of the enterprise (the Worland BLM office) and therefore are not liable under RICO.

The Supreme Court in *Reves v. Ernst and Young*, developed the "operation or management" test to determine whether alleged activities were sufficient to come within the scope of "conduct and participate." 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). The Court stated:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO li-

> ability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" make clear that RICO liability is not limited to those with a formal position in the enterprise but some part in directing the enterprise's affairs is required.

Reves, 507 U.S. at 179. The Supreme Court further stated that "liability under § 1962(c) is not limited to upper management, . . . [a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.*, at 184. "In so holding the Court [in *Reves*] made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." *United States v. Parise*, 159 F.3d 790, 796 (3rd Cir. 1998).

Defendants Shryack, Leone and Miller point out they had no management authority nor directly dealt with the BLM agency. However, how much, if any, management authority or how they may have knowingly furthered the illegal acts of the enterprise is a question of fact:

> [T]he commission of crimes by lower level em ployees of a RICO enterprise may be found to indicate participation in the operation or management of the enterprise . . . Unless a civil RICO defendant is indisputably directing the affairs of the enterprise, his commission of crimes that advance its objectives must be assessed by a fact-finder to determine whether or not his criminal activity, assessed in the context of all the relevant circumstances, constitutes participation in the operation or management of the enterprise's affairs.

United States v. Pagano, 155 F.3d 35, 42 (2nd Cir. 1998). Therefore, as a question of fact, the issue must proceed to a

trier of fact and summary judgment is not appropriate, even though this Court cannot anticipate that a Wyoming jury would ever award damages to the Plaintiff against the Defendant hard-working, faithful employees of the BLM.

IV. *Unlawful Retaliation Bivens claim under the Fifth Amendment.*

Plaintiff has alleged that he was retaliated against for exercising his constitutional right to the quiet use and enjoyment of private property, control of private property, the right to exclude others from private property, and the right to be free from extortion by government officials in the exercise of these rights. Plaintiff alleges that he was retaliated against for exercising his constitutional right to control, and exclude others, from his private property.

The Tenth Circuit has held that an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983, and hence in a *Bivens* action. *Deloach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). To state a claim for unconstitutional retaliation, a plaintiff must allege: (1) exercise of a constitutionally protected right; (2) retaliatory actions by government officials in response to the exercise of such constitutional right; and (3) more than a "theoretical" injury. *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).

Defendants agree that the exclusion of others from private property is a constitutional right. (Defs.' Br., at 37). However, Defendants contend that Plaintiff did not have the right to exclude BLM employees from his private property pursuant to an Interior Board of Land Appeals ("IBLA") decisions with regards to administrative access. (*Id.*). The IBLA has stated that the BLM and its employees have at a minimum an implied if not an express right of administrative access to enter Plaintiff's private property in order to carry

out their statutorily mandated duties of supervising grazing permits and protecting public lands. (*Id.*).

This Court agrees with Defendants and the IBLA that the BLM and its employees have a right to administrative access to Plaintiff's property in order to carry out certain duties. However, this does not give Defendants carte blanche access to enter Plaintiff's private property. Plaintiff still has the right to refuse the BLM an easement and can exercise his right to exclude others, including BLM employees, when they are not on mandated duties.

Plaintiff continues to have a constitutionally protected property right to exclude others from his private property and to refuse to grant the BLM an easement. A question of fact for a jury is whether Defendants' actions were retaliatory in response to the exercise of such constitutional right. Therefore, Summary Judgment is not appropriate on the issue of Plaintiff's *Bivens* claim for unlawful retaliation under the Fifth Amendment.

V. *Individual Defendants Involvement.*

Defendants list and explain how each Defendant should be dismissed on the basis of qualified immunity and on the basis that there is no admissible evidence to support any RICO or *Bivens* violations. (Defs'. Br., at 42-46). Defendants state that they "clearly and affirmatively state they did not conspire or agree with anyone at anytime for any purpose with regards to Plaintiff, particularly to commit any alleged predicate acts of extortion or retaliation, and Plaintiff can present no admissible evidence to the contrary." (*Id.*). However, this Court will not solely rely upon the statements of the individual Defendants and will view all of the material facts presented by all parties, in the light most favorable to Plaintiff. Plaintiff has presented a multitude of material facts which demonstrate that Defendants potentially en-

gaged in a pattern of racketeering activity. *See* (Pl's. Opp'n Br., pp. 51-63). Whether each individual Defendant substantially engaged in racketeering activity is a question of fact which should be submitted to a jury.

Conclusion

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment is to isolate, and then terminate, claims and defenses that are factually unsupported. *Celotex*, 477 U.S. at 323-24. A "genuine" issue exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202. Considering that Plaintiff has provided evidence in the form of depositions, trial transcripts, letters, affidavits and e-mails, which if believed, and all justifiable inferences are to be drawn in his favor, has met his burden that genuine issues of material fact remain for the fact finder to resolve.

For the aforementioned reasons, it is hereby ORDERED that Defendants' Motion for Summary Judgment is DENIED.

DATED THIS 16TH DAY OF JANUARY, 2004.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

v.

BUREAU OF LAND MANAGEMENT ("BLM"), DEPARTMENT OF THE INTERIOR, THE UNITED STATES OF AMERICA; CHARLES WILKIE, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; DARRELL BARNES, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; TERYL SHRYACK, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; PATRICK MERRILL, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; DAVID STIMSON, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; MICHAEL MILLER, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; GENE LEONE, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; AND JOHN DOES 1 THROUGH 20, DEFENDANTS

Mar. 21, 2003

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

BRIMMER, District Judge.

This case arises out of a dispute between a Wyoming rancher and the federal government over a property interest in a small strip of land known locally as Rock Creek Road. The matter is currently before the Court on Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. Upon reading the briefs, hearing oral argument, and being

fully advised of the premises, the Court FINDS and ORDERS as follows:

Statement of the Parties and Jurisdiction

Plaintiff, Harvey Frank Williams, is a resident of Wyoming. Plaintiff is the owner of the High Island Ranch in Hamilton Dome, Wyoming, which is located in Hot Springs County.

Defendant Department of the Interior is an agency of the United States headed by the Secretary of the Interior. Defendant Bureau of Land Management ("BLM") is a subordinate agency of the Department of Interior. Among other things, the BLM is charged with the administration of public lands in the United States. Defendant Joe Vessels is a BLM assistant manager and line officer. Defendant Charles Wilkie is a BLM area manager and line officer. Defendant Darrell Barnes is a BLM district manager. Defendants Michael Miller and David Stimson are BLM investigative and law enforcement officers whose duties include investigating criminal offenses and making recommendations regarding prosecution. Defendants Gene Leone, Patrick Merrill, and Teryl Shryack are employees of the BLM. Defendants John Does 1 through 20 are unknown federal officers who participated in the wrongful conduct alleged in Plaintiff's Complaint.

The Court has exclusive jurisdiction over this matter. 28 U.S.C. § 1346(b)(1). Venue is proper in the District of Wyoming. 28 U.S.C. § 1391(e)(1), (2).

Background

In 1994, George Nelson owned the High Island Ranch in Hamilton Dome, Wyoming. (Second Am. Compl., at ¶ 16). On April 5, 1994, Mr. Nelson granted a non-exclusive access easement to the BLM across his ranch. (*Id.* at ¶ 21). The easement ran along a private ranch road known as the Rock Creek Road. (*Id.*). The BLM, however, failed to record this easement as required by Wyoming's recording statute. (*Id.* at ¶ 21; *See also* Wyo. Stat. Ann. § 34-1-120 (providing that an unrecorded conveyance is void against a subsequent purchaser for value who, without notice, first records)).

On May 31, 1994, Plaintiff purchased the High Island Ranch from Mr. Nelson. (*Id.* at ¶ 16). Plaintiff took the High Island Ranch without notice of the BLM's easement and recorded his interest in Hot Springs County. (*Id.* at ¶ 23). Under Wyoming law, when Plaintiff recorded his deed, the BLM's easement across Rock Creek Road was extinguished. Wyo. Stat. Ann. § 34-1-120.

At the High Island Ranch, Plaintiff runs a commercial guest ranch and engages in cattle ranching. (*Id.* at ¶ 17). Plaintiff's ranch includes a number of BLM livestock grazing permits and preference rights. (*Id.* at ¶ 18). Pursuant to the grazing permits, livestock from Plaintiff's ranch may graze on federal land. (*Id.*). Additionally, Plaintiff had a Special Recreational Use Permit, which allowed him to operate his commercial guest ranch activities on federal land. (*Id.* at ¶ 19).

Defendant Vessels contacted Plaintiff to discuss the possibility of obtaining a new easement after he learned that the BLM's easement was extinguished. (*Id.* at ¶ 26). Defendant Vessels made a non-negotiable demand that Plaintiff grant the BLM an easement across Rock Creek Road. (*Id.*). Plaintiff refused to grant the BLM an easement. (*Id.* at ¶ 30).

Thereafter, Defendants engaged in a pattern of behavior and conduct in an attempt to persuade Plaintiff to re-grant the BLM an easement across Rock Creek Road. (*Id.* at ¶ 31). In June 1994, Defendant Vessels wrote to Plaintiff requesting permission to enter his land to perform a survey for the proposed easement. (*Id.* at ¶ 32). Plaintiff denied the BLM access to his property to conduct the survey. (*Id.* at ¶ 33). Nevertheless, the BLM entered Plaintiff's property without his permission and conducted the survey. (*Id.* at ¶ 34).

On February 23, 1995, Defendant Vessels informed Plaintiff that his right-of-way across federal lands to reach some of his landlocked property would be terminated if he did not grant the BLM an easement across Rock Creek Road. (*Id.* at ¶ 39). Again, Plaintiff declined the BLM's request to grant it an easement. (*Id.* at ¶¶ 30, 36). After this last denial, the BLM allegedly developed an internal policy aimed at coercing Plaintiff into granting the BLM an easement. (*Id.* at ¶ 39). Pursuant to this policy, Defendant Vessels and his subordinate employees began harassing Plaintiff. (*Id.*).

Specifically, Plaintiff alleges that pursuant to this internal policy: (1) the BLM refused to follow the terms and conditions of the High Island Ranch Allotment Management Plan in good faith, which resulted in Plaintiff not being able to obtain any flexibility in grazing operations, (*id.* at ¶ 39); (2) Defendant Vessels cancelled Plaintiff's right-of-way across federal land, (*id.* at ¶ 40); (3) BLM officers urged Plaintiff's neighbors to file a criminal complaint against him and provoked disputes between Plaintiff and his neighbors, (*id.* at ¶¶ 41, 43); (4) the BLM frivolously prosecuted Plaintiff for livestock trespass, (*id.* at ¶ 45); (5) BLM employee Ed Parodi informed Plaintiff that if he kept butting heads with the BLM, the dispute would "get ugly," "come to war," and that the BLM would give Plaintiff a "hardball education," (*id.* at ¶

46); (6) the BLM trespassed on Plaintiff's property by representing that a fence easement was a general right of way easement, (*id.*, at ¶¶ 48-56);[1] (7) Defendants Barnes and Vessels enticed Plaintiff to come to the BLM office by telling him they wanted to discuss his grazing allotment and instead subjected him to a surprise interrogation by BLM law enforcement officers David Stimson and Michael Miller, (*id.* at ¶¶ 70-73); and (8) after the interrogation, the BLM convinced the United States Attorney's Office to prosecute Plaintiff for interfering with federal employees engaged in the performance of their official duties, (*id.* at ¶¶ 90(s)-(t)).

On August 12, 1998, Plaintiff filed suit in federal district court. Plaintiff's Second Amended Complaint: (1) alleges that Defendants, in their individual capacities, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968; and (2) asserts a *Bivens* claim based on allegations that Defendants violated Plaintiff's federal constitutional rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that an individual has a cause of action against a federal official in his individual capacity for damages arising out of the official's violation of the Constitution under the color of federal authority).

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[1] In July 1997, Plaintiff encountered Defendants Teryl Shryack and Patrick Merrill traveling in a pickup truck along Rock Creek Road. Plaintiff informed these BLM employees that they did not have permission to trespass across his property. In response, Defendants Shryack and Merrill provided Plaintiff a copy of the fence easement. Plaintiff tore up the easement and told the BLM employees to leave, which they did. As a result of this incident, Plaintiff was charged with forcibly impeding or interfering with a BLM officer in violation 18 U.S.C. § 111. Plaintiff was acquitted of that charge after a three-day jury trial. (*See* Pl.'s Second Am. Compl. at ¶¶ 60-69, 160-169).

Legal Standards

A. *Fed. R. Civ. P. 12(b)(1).*

A motion to dismiss based on qualified immunity is treated as a motion to dismiss for lack of subject matter jurisdiction. *Meyers v. Colo. Dep't of Human Services*, No. 02-1054, 2003 WL 1826166, 2003 U.S. App. LEXIS 199, *2-3 (10th Cir. Jan. 6, 2003). The party invoking federal jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists. *United States ex. rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245, 1249 (10th Cir. 2002). A motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1*)* may take two forms. When a defendant makes a facial attack on the complaint's allegations, which challenges the sufficiency of the complaint, the district court will accept the plaintiff's allegations as true. *Cal. Cas. & Fire Ins. Co. v. Brinkman*, 50 F. Supp. 2d 1157, 1161 (D. Wyo. 1999). If, however, the defendant goes beyond the allegations contained in the complaint and challenges the facts upon which subject matter jurisdiction depends, the district court will not presume the truthfulness of the plaintiff's allegations and has wide discretion to consider other documents to resolve the jurisdictional question. *Id.*

B. *Fed. R. Civ. P. 12(b)(6)*

A federal district court may dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) only when it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Yousef v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). The district court must assume the plaintiff's allegations are true and construe them liberally in the light most favorable to him. *Conley*, 355 U.S. at 45-46, 78 S. Ct. 99; *Grossman v.*

Novell, Inc., 120 F.3d 1112, 1118 (10th Cir. 1997). However, the district need only accept the well-pleaded allegations in the complaint as true and is not required to accept "conclusory allegations, unwarranted inferences, or legal conclusions in a complaint." *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000) (internal quotation marks omitted).

Qualified immunity is an affirmative defense that must be pleaded by governmental officials. *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). The qualified immunity defense may be asserted in a Rule 12(b)(6) motion. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir.1988). The district court must accept as true all well-pleaded factual allegations in the complaint when reviewing a Rule 12(b)(6) motion in which qualified immunity is asserted as a defense. *Neiberger v. Hawkins*, 70 F. Supp.2d 1177, 1181 (D. Colo. 1999). However, the determination of whether a federal law "was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'" *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 127 L.Ed. 2d 344 (1994); *Medina v. Cram*, 252 F.3d 1124, 1127-28 (10th Cir. 2001).

Analysis

Defendants argue the doctrine of qualified immunity protects them from any liability under Plaintiff's Second Amended Complaint. (Br. in Supp. of Defs.' Mot. to Dismiss Second Am. Compl. of Pl. ("Defs.' Br."), at p. 13). Plaintiff responds that qualified immunity does not shield Defendants from suit because the allegations in the Second Amended Complaint establish violations of clearly established federal law. (Pl.'s Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Opp'n Br."), at p. 20).

A. Qualified Immunity

Qualified immunity protects federal officials from individual liability unless the officials violated a clearly established constitutional or statutory right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). The purpose of qualified immunity is to encourage "public officials to act independently and without fear of consequences if there is no violation of a clearly established right." *Garrett v. Stratman*, 254 F.3d 946, 950-51 (10th Cir. 2001) (internal quotations and citations omitted).

The Tenth Circuit has explained the framework a district court should follow when considering an assertion of qualified immunity: The plaintiff initially bears a heavy two-part burden when defendant pleads the defense of qualified immunity. . . . The plaintiff must show: (1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue. Unless the plaintiff carries its twofold burden, the defendant prevails.

Brewer, 76 F.3d at 1134 (internal quotation marks, citations, and brackets omitted). In the context of a Rule 12(b)(6) motion, if the plaintiff carries this burden then the motion to dismiss must be denied. *See Hawkins*, 70 F. Supp. 2d at 1191.[2]

A constitutional or statutory right is "clearly established" when the contours of the right are sufficiently evident that a reasonable official would understand that what he was doing

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[2] In the context of a motion for summary judgment, the burden would shift back to the defendant to prove there were no material issues of fact that would defeat the claim of qualified immunity. *Brewer*, 76 F.3d at 1134.

violated that right. *Cram*, 252 F.3d at 1128. The Tenth Circuit has explained:

> Although the very action in question does not have to have previously been held unlawful, in light of the pre-existing law the unlawfulness must be apparent. . . . Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains.

Brewer, 76 F.3d at 1134 (internal quotation marks and citations omitted); *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987); *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

The Supreme Court has held that an opinion on point from a particular court is not required for the law to be clearly established. *United States v. Lanier*, 520 U.S. 259, 271-72, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Rather, the dispositive issue is whether the state of the law at the time of the lawsuit gave the federal officials "fair warning" that their alleged treatment of the plaintiff was in violation of his constitutional or statutory rights. *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002). A general statement of the law, such as in a criminal statute, is capable giving federal officials "fair warning." *Id.; Lanier*, 520 U.S. at 271, 117 S. Ct. 1219. Additionally, "[i]f the law is clearly established, the [qualified] immunity defense will ordinarily fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

In sum, the "general rule is that a qualified immunity defense fails once a plaintiff has alleged that defendants have

violated the plaintiff's clearly established rights." *Roska v. Peterson*, 304 F.3d 982, 1000 (10th Cir. 2002). In practice, this means that whether a governmental official performing discretionary functions is entitled to qualified immunity turns on the "objective legal reasonableness" of the official's actions in light of the clearly established law at the time the actions were taken. *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

B. Plaintiff's RICO Claim

Plaintiff argues he has a statutory right to be free from extortion. (Pl.'s Br. in Opp'n, at p. 28). Therefore, Plaintiff contends that Defendants are not shielded by qualified immunity because they knowingly violated the clearly established Hobbs Act, 18 U.S.C. § 1951, and the Wyoming Blackmail (extortion) statute, Wyo. Stat. Ann. § 6-2-402(a). (*Id.* at pp. 20-21). At the hearing, Defendants responded that generally applicable criminal laws cannot provide the basis for a general assertion of "statutory right" under the Supreme Court's qualified immunity analysis.

1. The Statutory Rights at Issue

RICO "creates a civil cause of action for 'any person injured in his business or property by reason of a violation of section 1962.'" *Beck v. Prupis*, 529 U.S. 494, 495, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000) (quoting 18 U.S.C. § 1964(c)).[3]

[3] Any person found liable for a civil RICO violation is liable for treble damages, costs, and attorneys' fees. 18 U.S.C. § 1964(c); *Bacchus Indus. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). Plaintiff's Second Amended Complaint also seeks injunctive relief for the alleged civil RICO violations. (Second Am. Compl., at p. 36). Recently, the Supreme Court granted certiorari to resolve the Circuit split on whether private litigants can obtain injunctive relief pursuant to 18 U.S.C. § 1964(c). *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). However, because of the Supreme Court's

In turn, section 1962 makes it unlawful for any person to engage in "a pattern of racketeering activity" that affects interstate commerce. 18 U.S.C. §§ 1962(c), 1961(4).[4] Racketeering activity includes, among other predicate acts, activity that is indictable under the Hobbs Act and any act involving extortion chargeable under state law. 18 U.S.C. § 1961(1)(A)-(B). A "pattern of racketeering activity" consists of two or more acts of racketeering activity. *Id.* § 1961(5).

The Hobbs Act provides that whoever affects commerce in any way by extortion, or attempts or conspires to do so, may be fined or imprisoned, or both. 18 U.S.C. 1951(a). Extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

The Supreme Court has held that the Hobbs Act adopted the common law definition of extortion under color of official right. *Evans v. United States*, 504 U.S. 255, 263-64, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992). At common law, a public official who obtained the property of another, to which neither the official nor the government office was entitled, was guilty of extortion. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057, 154 L.Ed. 2d 991 (2003); *United States v. Nardello*, 393 U.S. 286, 289, 89 S.Ct. 534, 21 L. Ed.

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disposition of another issue in the case, it did not reach the merits of this issue.

[4] To establish a civil RICO claim under 18 U.S.C. § 1962(c), the plaintiff must show that the defendants: (1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). Defendants' Motion to Dismiss does not address whether these elements have been satisfied; therefore, the Court will assume, without deciding, that these elements have been satisfied for purposes of this motion.

2d 487 (1969). Further, Congress has explicitly recognized that agents of the United States can be liable for the crime of extortion under the color of official right. 18 U.S.C. § 872; *United States v. Culbert*, 435 U.S. 371, 373, 98 S. Ct. 1112, 55 L. Ed. 2d 349 (1978).

Under Wyoming law, blackmail constitutes a single offense embracing the separate crimes formerly known as blackmail and extortion. Wyo. Stat. Ann. § 6-2-402(e). A person commits "blackmail if, with the intent to obtain the property of another or to compel action or inaction of any person against his will, the person . . . accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society." Wyo. Stat. Ann. § 6-2-402(a).

2. The Hobbs Act and the Wyoming Blackmail Statute as Clearly Established Law

Although it has been unlawful for a person to commit extortion for centuries, Congress first provided individual persons with the right to be free from extortion when it enacted RICO in 1970.[5] RICO defines extortion as a predicate act for which a person engaged in a pattern of racketeering activity may be held liable. 18 U.S.C. §§ 1861, 1862. The Hobbs Act, in turn, defines extortion and makes it unlawful. 18 U.S.C. §

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[5] The first English statute prohibiting extortion, the "First Statute of Westminster," was enacted in 1275. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. Rev. 845, 841 (1988). The Hobbs Act, which was enacted in 1946, prohibited extortion under the color of official right. *Id.* at 889. When Congress enacted RICO as Title IX to the Organized Crime Control Act of 1970, it provided, for the first time, a statutory mechanism by which a private person injured in "his business or property" could seek redress for extortion committed under the color of official right. *See Prupis*, 529 U.S. at 496-97, 120 S. Ct. 1608.

1951. The Supreme Court has, on numerous occasions, set forth the common law definition of extortion. *See e.g. Nardello*, 393 U.S. at 289, 89 S. Ct. 534. Similarly, the Wyoming Blackmail statute sets forth what constitutes extortion/blackmail and makes it unlawful. Wyo. Stat. Ann. § 6-2-402.

These general statements of law are capable of giving federal officials fair warning that extortion is unlawful. Therefore, the Court finds that a person's right to be free from extortion is clearly established because the contours of that right are sufficiently evident that a reasonable official would understand that extorting property from a person under the color of official authority would violate that person's rights.

3. Application

A federal employee is entitled to qualified immunity if his conduct was objectively reasonable in light of the clearly established rights at issue. Taking Plaintiff's well-pleaded allegations as true, Defendants Vessels, Barnes, Wilkie, Leone, Shryack, Merrill, Stimson, and Miller engaged in a pattern of racketeering activity, *i.e.*, extortion, under the color of official right in an attempt to force Plaintiff to grant the BLM an easement. (*See* Second Am. Compl., at ¶¶ 26, 32-34, 37, 43, 63-66, 69, 90). An objectively reasonable BLM employee performing his discretionary functions, in light of the clearly established laws prohibiting extortion, would not have engaged in the activity alleged in Plaintiff's Second Amended Complaint. In other words, assuming Plaintiff's allegations are true, Defendants' actions violated the objective legal reasonableness standard because the unlawfulness of these actions would have been apparent in light of preexisting law.

4. Conclusion

For the aforementioned reasons, Defendants' Motion to Dismiss Plaintiff's First Claim for Relief, violation of RICO, on the basis of qualified immunity is **DENIED**.

C. Plaintiff's Fourth Amendment *Bivens* Claim.

Plaintiff argues he has a constitutional right to be free from malicious prosecution and abuse of process, which is grounded in the Fourth Amendment right to be free from unreasonable seizures. (Pl.'s Br. in Opp'n, at pp. 39, 43). Therefore, Plaintiff contends that Defendants are not shielded by qualified immunity because they knowingly violated these clearly established constitutional rights. (*Id.* at pp. 39-49). Defendants respond that Plaintiff is attempting to improperly constitutionalize common law torts and that even if these common law torts could be artfully pled as constitutional claims in a *Bivens* action, such constitutional rights are not clearly established. (Defs.' Br., at pp. 28-37).

1. The Constitutional Rights at Issue

Plaintiff argues that he was seized in violation of the Fourth Amendment and therefore may assert a claim for malicious prosecution and abuse of process to redress this constitutional deprivation. (Pl.'s Opp'n Br., at pp. 39-40, 48). Plaintiff, relying primarily on Justice Ginsburg's concurrence in *Albright v. Oliver*, 510 U.S. 266, 276-81, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), argues that for purposes of the Fourth Amendment a person is seized from the initiation of criminal proceedings against him until those claims are fully adjudicated.[6] (Pl.'s Opp'n Br., at pp. 39-40). This Court disagrees.

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[6] The Fourth Circuit has described this as the "continuing seizure" theory. *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997).

In *Albright*, a plurality of the Supreme Court expressed no view on whether the Constitution permits an assertion of a § 1983 claim for malicious prosecution on the basis of an alleged illegal seizure. 510 U.S. at 275, 114 S. Ct. 807. The Tenth Circuit has, however, recognized the viability of a malicious prosecution claim under § 1983. *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1996).[7] In *Meacham*, the Tenth Circuit held that in order to maintain a malicious prosecution claim pursuant to § 1983, a plaintiff must demonstrate a violation of his constitutional right to be free from unreasonable seizures. *Id.* at 1561. However, in *Meacham*, the "seizure issue" was fairly straightforward because the Plaintiff was detained for seven weeks. *Id.* at 1561 n. 5, 1560.[8]

The Tenth Circuit has not, in a published opinion, addressed the issue of whether a seizure has occurred for purposes of the Fourth Amendment when a plaintiff asserting a malicious prosecution claim has not been restrained in his

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[7] Although *Albright* and *Meacham* arose in the context of a § 1983 action, the reasoning in those cases are applicable to a *Bivens* claim because in both a § 1983 action against a state officer and a *Bivens* claim against a federal officer, the plaintiff must prove a violation of a underlying constitutional right. *See Daniels v. Williams*, 474 U.S. 327, 330, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) ("in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right . . . ."); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) ("*Bivens* claims allow plaintiffs to recover from individual federal agents for constitutional violations these agents commit against plaintiffs."). Additionally, immunities under § 1983 and *Bivens* claims are identical. *Harlow v. Fitzgerald*, 457 U.S. 800, 809, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

[8] Plaintiff also relies on *Garcia v. Johnson*, No. 94-1360, 1995 WL 492879, 1995 U.S. App. LEXIS 23282 (10th Cir. Aug. 18, 1995) in support of his continuing seizure argument. However, in that case, as in *Meacham*, the "seizure issue" was relatively straightforward because the plaintiff was detained in solitary confinement for approximately nine months. *Id.* at *7.

liberty by detention. However, in affirming a dismissal of a malicious prosecution claim, the Tenth Circuit has explained:

> [Plaintiffs] failed to set forth sufficient evidence showing they were seized for purposes of the Fourth Amendment. Specifically, the only deprivations of liberty sustained by [Plaintiff] Lewis was that he had to attend two trials; and he was fingerprinted in connection with one of the summons. Similarly, the only deprivation of liberty sustained by [Plaintiff] Woodman is that she had to make one, and possibly two, court appearances before the . . . charge was dismissed. Because Lewis and Woodman have not shown they sustained any other deprivations of liberty in connection with their receipt of summonses, they have failed to show they were seized in violation of the Fourth Amendment. *See Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999).

Lewis v. Rock, 48 Fed.Appx. 291, 294 (10th Cir. 2002). Hence, it appears the Tenth Circuit has rejected Justice Ginsburg's "continuing seizure" theory.

While the Tenth Circuit did not elaborate on its holding in *Lewis*, its reliance on the First Circuit's decision in *Britton* is instructive. In *Britton*, the First Circuit held that a criminal defendant's voluntary compliance with a summons to appear in court without being arrested, detained, restricted in his travel, or otherwise subject to a deprivation liberty did not constitute a seizure under the Fourth Amendment. 196 F.3d at 30.[9] Similarly, in *Nieves v. McSweeney*, the First Circuit

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[9] The First Circuit also noted "the Second, Third, and Fifth Circuits have concluded that something less than forcible detention will suffice to constitute a seizure." 196 F.3d at 29 (citing *Evans v. Ball*, 168 F.3d 856, 860-61 (5th Cir. 1999); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997)). However, three other Circuits, in addition to the First Circuit, have rejected

held that a plaintiff could not maintain a malicious prosecution action because he was not seized for purposes of the Fourth Amendment when the plaintiff was released on his own recognizance, had to appear before the court on a number of occasions, and ultimately endured a trial. 241 F.3d 46, 54-55. The First Circuit reasoned:

> The very idea of defining commonplace conditions of pretrial release as a "seizure" for Fourth Amendment purposes seems to stretch the accepted meaning of the term. After all, a seizure for Fourth Amendment purposes is generally a discrete event, quintessentially an arrest . . . or at least a physical detention. . . . Thus, seizure jurisprudence traditionally has centered on the initial deprivation of liberty that a seizure of a person entails. Since a seizure is a single act, and not a continuous fact, run-of-the-mill conditions of pretrial release do not fit comfortably within the recognized parameters of the term.

Id. at 55 (internal quotation marks, citations, and brackets omitted).

Moreover, the "continuing seizure" theory constitutionalizes the tort of malicious prosecution because every criminal defendant is seized during the pendency of the criminal action against him. *See Daniels v. Williams*, 474 U.S. 327, 332-33, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (warning against constitutionalizing common law torts). If acquitted, a *Bivens* claim or § 1983 action provides the vehicle for every such criminal defendant to assert a cause of action for malicious prosecution against the law enforcement officers who as-

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Justice Ginsburg's "continuing seizure" theory. *See Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997) (en banc); *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n. 3 (7th Cir. 1996); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996).

sisted in levying the charges against him. While the Fourth Amendment was drafted to restrict the exercise of arbitrary government action in particular circumstances, *see Albright*, 510 U.S. at 273, 114 S. Ct. 807, it would be inconceivable to assert that the Amendment's drafters contemplated that an accused free on personal recognizance and unrestrained in his liberty was "seized" by the government. *See California v. Hodari D.*, 499 U.S. 621, 624, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (stating that "[f]rom the time of founding to the present, the word 'seizure' has meant a 'taking possession.' ").

2. Application

Plaintiff's Second Amended Complaint alleges that the BLM, through the various individual Defendants, convinced the United States Attorney's Office to prosecute him for intentionally interfering with federal employees engaged in the performance of their official duties. (Second Am. Compl. at ¶ 90(s)-(t)). Plaintiff alleges that the he was charged without probable cause for forcibly impeding or interfering with a BLM officer in violation of 18 U.S.C. § 111. (*Id.* at ¶¶ 160-164).

On August 18, 1997, the government issued a summons for Plaintiff. Plaintiff voluntarily responded to that summons and was never placed under arrest. In responding to the summons, Plaintiff was "fingerprinted and booked." (*Id.* at ¶ 141). On September 8, 1997, Plaintiff was released on his own recognizance. Plaintiff was not required to post bond nor were any other restrictions placed on his liberty, other than being required to appear for court. Plaintiff made several court appearances before trial. Plaintiff then had a three-day jury trial and was acquitted. (*Id.* at ¶ 167).

Importantly, Plaintiff has not alleged that he was restrained in his liberty in any manner other than being sum-

moned, charged, fingerprinted, booked, and taken to trial. After being fingerprinted and booked, Plaintiff was released on his own recognizance without any restrictions on his liberty. The Tenth Circuit, along with other courts, has held that this is insufficient to constitute a seizure for purposes of the Fourth Amendment. *See Lewis*, 48 Fed. Appx. at 294; *McSweeney*, 241 F.3d at 54-56. Thus, because Plaintiff has not alleged any other deprivation of liberty in connection with his receipt of the summons, he has failed to allege that he was seized in violation of the Fourth Amendment. This Court, like the Supreme Court, does "not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words . . . as [Plaintiff] urges." *Hodari D.*, 499 U.S. at 627, 111 S. Ct. 1547. Hence, Plaintiff has no basis to maintain his malicious prosecution or abuse of process claims under *Bivens* because he was not illegally seized in violation of the Fourth Amendment.

3. Conclusion

Having concluded that Plaintiff's constitutional right to be free from illegal seizure was not violated, the Court need not address the qualified immunity issue. *Taylor*, 82 F.3d at 1564; *McSweeney*, 241 F.3d at 53. However, as the discussion above makes clear, even if the Court adopted Plaintiff's "continuing seizure" theory, that theory of a constitutional seizure is not clearly established. For the aforementioned reasons, Defendants' Motion to Dismiss Plaintiff's Fourth Amendment *Bivens* claim is **GRANTED**.

D. Plaintiff's Fifth and Fourteenth Amendment *Bivens* Claims

Plaintiff argues he has a constitutional right to control and dispose of his property, which is guaranteed by the Due Process Clause of the Fifth Amendment. (Second Am. Compl. at 176-79). Plaintiff contends that these rights are

clearly established and therefore Defendants are not entitled to qualified immunity. (Pl.'s Br. in Opp'n, at pp. 46-48). Defendants respond that Plaintiff cannot base his *Bivens* claims on conclusory, vague, and general allegations of a constitutional deprivation. (Defs.' Br., at pp. 35-36).

1. The Constitutional Rights at Issue

Plaintiff argues that he has a Fifth Amendment right to the quiet use and enjoyment of his property, to control his property, and to exclude persons from his property. (Pl.'s Br. in Opp'n, at p. 43-44). Plaintiff argues that Defendants violated this right by: (1) denying him procedural due process; (2) violating his substantive due process rights; and (3) retaliating against him for exercising his right not to grant the BLM an easement. (Pl.'s Opp'n Br., at pp. 43-44).

In relevant part, the Fifth Amendment provides that no person shall be deprived of property without due process of law. U.S. Const. amend. V. The Supreme Court has held that the "right to exclude" others from private property is a "fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979). The Supreme Court has also hinted that this property right includes the concomitant right to be free from extortion by governmental officials. *See Dolan v. Tigard*, 512 U.S. 374, 388, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

a. Plaintiff's Procedural Due Process Claim

Plaintiff argues that the alleged extortion by Defendants violated his procedural due process rights under the Fifth Amendment. (Pl.'s Opp'n Br., at p. 43; Second Am. Compl., at ¶ 176). In the context of a *Bivens* claim, to state a claim for a procedural due process violation, a plaintiff must allege that

the government officials: (1) intentionally or recklessly, (2) deprived plaintiff of his property, and (3) there is no adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); *Burton-Bey v. United States*, 100 F.3d 967, 1996 WL 654457, (10th Cir. 1996).

Plaintiff's procedural due process claim fails for two reasons. First, Plaintiff has not alleged that he was deprived of his property. Although the definition of deprivation under the Due Process Clause is somewhat elastic, at a minimum it connotes a loss. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-79, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Plaintiff is arguing that Defendants, through various extortionate tactics, attempted to deprive him of his right to exclude others (*i.e.*, the BLM and its employees) from his property. However, as Plaintiff's Second Amended Complaint makes clear, he succeeded in excluding Defendants from his property. (*See* Second Am. Compl., at ¶ 66). At most, Plaintiff has alleged a state law trespass to land cause of action. However, trespass does not become a violation of the Fifth Amendment simply because it was committed by a federal official. *See Daniels v. Williams*, 474 U.S. 327, 332-33, 106 S.Ct. 662, 88 L. Ed. 2d 662 (1986). Absent a deprivation of a property interest, no procedure is required by the Due Process Clause. *Watson v. Univ. of Utah Med. Center*, 75 F.3d 569, 578 (10th Cir. 1996).

Second, even if Plaintiff was deprived of a property interest, he has not alleged the absence of an adequate post-deprivation remedy. Plaintiff argues that the deprivation and absence of procedural due process occurred because of the alleged extortionate acts committed by Defendants. (Pl.'s Br. in Opp'n, at p. 43). However, as outlined above, RICO provides a private cause of action to remedy extortionate acts committed under the color of law. 18 U.S.C. §

1964. Alternatively, Plaintiff could have brought an action under Wyoming law for damages to his property arising out of the alleged trespasses. *See Hudson*, 468 U.S. at 535, 104 S. Ct. 3194; *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 859 (2002) (outlining requirements to state a claim for trespass to land).

Plaintiff has failed to show that he was deprived of a protected property interest or that he did not have an adequate post-deprivation remedy. Thus, Plaintiff failed to carry his burden of demonstrating that Defendants violated a clearly established right for purposes of qualified immunity. *Watson*, 75 F.3d at 578.

b. Substantive Due Process Claim

Plaintiff argues that his substantive due process rights were violated because the alleged extortion by Defendants constituted a deliberate on-going abuse of executive discretion that shocks the conscience. (Pl.'s Br. in Opp'n, at p. 44). As noted above, the Fifth Amendment prohibits deliberate decisions by governmental officials to deprive a person of property without due process of law. U.S. Const. amend. V; *Williams*, 474 U.S. at 330, 106 S. Ct. 662.

The Supreme Court has repeatedly emphasized that the touchstone of due process is to protect against arbitrary government action. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). The substantive due process guarantee protects against government power being used for purposes of oppression. *Williams*, 474 U.S. at 331, 106 S. Ct. 662. In a case challenging executive action on substantive due process grounds, "the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n. 8, 118 S. Ct. 1708. Conduct by an executive officer can be

said to shock the contemporary conscience when it is deliberately inflicted for the purpose of causing injury without any justifiable governmental interest. *Id.* at 849, 118 S. Ct. 1708; *see also Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (holding that the involuntary pumping of an individual's stomach to obtain evidence shocks the conscience). The Supreme Court has explained that the ultimate determination of whether executive action shocks the conscience is determined by the totality of the circumstances; however, the Court has repeatedly adhered to *Rochin* 's benchmark. *Id.* at 847, 850, 118 S. Ct. 1708.

Turning to the circumstances of this case, and keeping in mind the Supreme Court's reluctance to expand the concept of substantive due process and desire to preserve the constitutional proportions of constitutional claims, this Court is unable to conclude that any of the alleged conduct by Defendants violated Plaintiff's substantive due process rights. *See id.* at 842, 847 n. 8, 118 S. Ct. 1708. Stripping the verbiage from Plaintiff's Second Amended Complaint, he has alleged that Defendants: (1) failed to grant him flexibility in his grazing operations by not following the High Island Ranch Allotment Management Plan; (2) cancelled a right-of-way across federal land; (3) instigated disputes between Plaintiff and his neighbors; (4) frivolously prosecuted Plaintiff for livestock trespass; (5) threatened Plaintiff by telling him not to butt heads with the BLM or things would get ugly and come to war; (6) trespassed on his property; (7) subjected Plaintiff to a surprise interrogation; and (8) convinced the United States Attorney's Office to prosecute Plaintiff. (Second Am. Compl., at ¶¶ 39, 40, 41, 43, 45-56, 70-73, 90).

These allegations are not of conduct that is "arbitrary in the constitutional sense." *Lewis*, 523 U.S. at 846, 118 S. Ct. 1708 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L.Ed. 2d 261 (1992)) (internal quotation

marks omitted). Plaintiff's allegations, viewed in the light most favorable to him, indicate that he was inconvenienced and suffered minimal harm by Defendants' conduct; however, the Supreme Court has "made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state [or federal] authority causes harm." *Id.* Rather, the alleged executive actions must violate the decencies of civilized conduct and interfere with rights implicit in the concept of ordered liberty. *Id.* at 847, 118 S. Ct. 1708. Plaintiff's allegations, while unfortunate, do not involve acts that constitute an abuse of power that can be condemned as conscience shocking. *Id.* at 850, 118 S. Ct. 1708.

Plaintiff has failed to allege facts that demonstrate he was deprived of his substantive due process guarantees. Thus, Plaintiff failed to carry his burden of demonstrating that Defendants violated a clearly established right for purposes of qualified immunity. *Watson*, 75 F.3d at 578.

c. Plaintiff's Unconstitutional Retaliation Claim

Plaintiff has alleged that he was retaliated against for exercising his constitutional right to control, and exclude others from, his private property. (Second Am. Compl., at ¶¶ 171, 177). Defendants did not address this allegation.

The Constitution protects the right to exclude others from private property. *See Kaiser Aetna*, 444 U.S. at 179-80, 100 S. Ct. 383. The Tenth Circuit has held that an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983, and hence in a *Bivens* action. *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). Although retaliation is not expressly referenced in the Constitution, it is nonetheless actionable because retaliatory actions may tend to chill the exercise of constitutional rights. *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).

To state a claim for unconstitutional retaliation, a plaintiff must allege: (1) exercise of a constitutionally protected right; (2) retaliatory actions by governmental officials in response to the exercise of that constitutional right; and (3) more than a "theoretical injury." *Id.* at 960-61. With respect to the third element, the plaintiff need not allege "actual injury" resulting from the retaliation; rather, it is sufficient that the plaintiff allege that the retaliatory acts would chill a person of ordinary firmness from continuing to engage in the constitutionally protected activity. *Id.*

Plaintiff has alleged that several actions were taken against him after he refused to grant the BLM an easement and exercised his right to exclude others from his property. (*See* Second Am. Compl., at ¶¶ 39, 40, 41, 43, 45-56, 70-73, 90). For example, Plaintiff alleges that Defendant Vessels cancelled his right-of-way across federal land after he refused to grant the BLM an easement. (*Id.* at ¶ 40). If true, these allegations indicate that Defendants took action against Plaintiff in retaliation for exercising his property rights. Although it does not appear that Plaintiff suffered any actual injury from the allegations, that does not preclude Plaintiff's retaliation claim. *See Poole*, 271 F.3d at 961.

2. Whether the Right to Be Free From Unconstitutional Retaliation was Clearly Established.

Plaintiff argues that the right to be free from unconstitutional retaliation based upon the exercise of a fundamental property right, such as the right to exclude, is clearly established. (Pl.'s Opp'n Br., at p. 47). In *DeLoach*, the Tenth Circuit held that the unlawful intent inherent in retaliation for the exercise of a constitutional right places the retaliatory action "beyond the scope of qualified immunity if the right retaliated against was clearly established." 922 F.2d at 620.

As noted above, the Supreme Court has held that the right to exclude others from private property has universally been held to be a fundamental element of the property right. *Kaiser Aetna*, 444 U.S. at 179-180, 100 S. Ct. 383. Property interests, although drawn from state law, are protected by the Constitution. *Chavez v. City of Santa Fe Housing Auth.*, 606 F.2d 282, 284 (10th Cir. 1979). These property interests are not limited to a few rigid technical forms; rather, "property denotes a broad range of interests that are secured by existing rules or understandings." *Id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)) (internal quotation marks omitted). The Court concludes that the universally accepted "right to exclude" is a clearly established right protected by the Constitution.

3. Application

Plaintiff has alleged that he attempted to exclude Defendants from his property on numerous occasions and that in response, Defendants retaliated against him for exercising that property right. (Second Am. Compl. at ¶¶ 26, 34, 37, 40, 90, 150, 171). As a result, because this Court concludes that the "right to exclude" is was clearly established, the "unlawful intent inherent in such retaliatory action places it beyond the scope of a [federal] officer's qualified immunity . . . ." *DeLoach*, 922 F.2d at 620.

4. Conclusion

Defendants' Motion to Dismiss Plaintiff's procedural and substantive due process *Bivens* claims under the Fourteenth Amendment is **GRANTED**. Defendant's Motion to Dismiss Plaintiff's unlawful retaliation *Bivens* claim under the Fifth Amendment is **DENIED**.

Conclusion

The necessity of federal officials working to protect the Nation's land and resources is self-evident. In performing those functions, federal officials must be given substantial latitude and discretion to protect the government's interests. *See Lewis*, 523 U.S. at 857-58, 118 S. Ct. 1708. These discretionary functions are, however, subject to the primacy of interest in property which the Constitution and Acts of Congress seek to protect. *Id.* And therein lies the perennial tension that arises under our Constitution in a suit such as this between the governed and the governors. *See Williams*, 474 U.S. at 332, 106 S. Ct. 662.

This Rule 12(b)(1) and 12(b)(6) Motion has tested the formal sufficiency of Plaintiff's claim for relief. As such, this Court has limited its analysis to the pleadings, which contain facts the Plaintiff may or may not be able to prove at trial. This case, which has been on the docket for nearly five years now, should go forward. As discussed at the hearing, Defendants shall file an Answer in accordance with Fed. R. Civ. P. 12(a). In further motions before the Court, the parties should set forth the facts and claims as to each Defendant sued in his individual capacity.

For the aforementioned reasons, Defendants' Motion to Dismiss Plaintiff's Second Amended Claim is **DENIED** as to Plaintiff's: (1) First Claim for Relief, violation of RICO; and (2) unconstitutional retaliation claim under *Bivens*. Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint is **GRANTED** as to Plaintiff's *Bivens* claims: (1) alleging a violation of the Fourth Amendment; and (2) alleging a violation of procedural and substantive components of the Due Process Clauses of the Fifth and Fourteenth Amendments.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-8037

HARVEY FRANK ROBBINS, PLAINTIFF-APPELLANT

v.

CHARLES WILKIE, JOE VESSELS, DARRELL BARNES, TERYL SHRYACK, PATRICK MERRILL, DAVID STIMSON, MICHAEL MILLER, GENE LEONE, AND JOHN DOES 1 THROUGH 20, DEFENDANTS-APPELLEES

Aug. 21, 2002

Before EBEL and MCKAY, Circuit Judges, and SAM,[1] Senior District Judge.

MCKAY, Circuit Judge.

Appellant Robbins appeals the District of Wyoming's grant of Defendants' Rule 12(b)(6) Motion to Dismiss Appellant's RICO and *Bivens* claims. We review a Rule 12(b)(6) dismissal *de novo*, accepting as true all allegations in the complaint and construing them in a manner favorable to the non-moving party. *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001).

[1] Honorable David Sam, United States Senior District Judge for the District of Utah, sitting by designation.

I. Background

Appellant owns real property, Bureau of Land Management preference rights, and livestock grazing permits. As owner of the High Island Ranch, Appellant operates a guest ranching operation in conjunction with his cattle ranching activities. Before Appellant purchased the ranch in 1994, his predecessor-in-interest granted a non-exclusive easement to the BLM. However, the BLM failed to properly record the easement and Appellant was unaware of its existence at the time of purchase. Thus, when Appellant recorded his title to the ranch, the BLM's easement was extinguished.

Appellant alleges that BLM employees indulged in various forms of extortion in an attempt to force Appellant to regrant the easement BLM had lost. He also alleges that Defendants conspired to bring criminal charges they knew were without merit against him. Appellant was acquitted of the criminal charges after a jury trial. He also alleges that one of the Defendants threatened to cancel Appellant's right-of-way across BLM land. Without this right-of-way, Appellant would experience significant difficulties operating his guest ranch.

Appellant brought RICO and *Bivens* claims against Defendants. The district court granted Defendants' Rule 12(b)(6) motion on Appellant's RICO claims based on its holding that Appellant failed to adequately plead damages. The court also dismissed Appellant's *Bivens* claim pursuant to Rule 12(b)(6) holding that other available remedies precluded that claim. Because the court held that Appellant was without standing to bring a RICO claim and had not made a cognizable *Bivens* claim, it failed to reach the issue of qualified immunity. However, it opined that it was "inclined to believe that the Defendants" were protected by qualified immunity. Aplt. App. at 118.

In reviewing a district court's grant of a Rule 12(b)(6) motion, "all well-pleaded factual allegations in the . . . complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (citation omitted). We recognize that "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999) (quotation omitted).

II. RICO claim

To successfully state a RICO claim, a plaintiff must allege four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985); *BancOklahoma Mortgage Corp. v. Capital Title Co. Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). The district court specifically held that for purposes of a Rule 12(b)(6) motion Appellant sufficiently pled all four RICO elements.

However, the district court granted Defendants' Rule 12(b)(6) motion on Appellant's RICO claim based on Appellant's failure to prove standing. Plaintiffs who bring civil RICO claims pursuant to 18 U.S.C. § 1962 must show damage to their business or property as a result of defendants' conduct. *See Sedima,* 473 U.S. at 496 (RICO plaintiff only has standing if "he has been injured in his business or property by the conduct constituting the violation"). Because Appellant failed to allege any tangible harm to his business or strict court held his RICO claim "nonviable." Aplt. App. at 116.

We cannot agree with the district court that Appellant "absolutely failed to carry his burden of pleading any harm to business or property as a result of the alleged RICO viola-

tion." *Id.* There are several references to business or property damage which allegedly resulted from Defendants' activities. Examples include allegations that various Defendants took actions that adversely affected his business, caused resource damage, interfered with guest ranch operations, caused grievous economic injury, economic loss, and property damage. *See id.* at 33-34, 37, 48. Such allegations are sufficient to show standing, especially at this stage of the litigation.

In *NOW v. Scheidler*, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), the Supreme Court stated, "We have held that at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) In *NOW*, the plaintiffs alleged that the RICO conspiracy "ha[d] injured the [plaintiffs'] business and/or property interests. . . ." *Id.* (internal quotations omitted). The Court concluded that "[n]othing more is needed to confer standing on [plaintiffs] at the pleading stage." *Id.*

Defendants insist that RICO plaintiffs must plead damages with particularity. Both Supreme Court precedent and the Federal Rules of Civil Procedure foreclose the adoption of Defendants' position. *See id.;* Fed.R.Civ.P. 8 (pleading requires short and plain statements meant to give notice to defendants); *see also* Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 Harv. J. on Legis. 1, 18-22 (1993) (criticizing several attempts at RICO reform through judicial revisionism including improper heightened pleading requirements). Defendants confuse the requirement to plead with particularity RICO acts predicated upon fraud pursuant to Rule 9(b) with

Rule 8's more general notice pleading typically required of all litigants. *See, e.g., Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989-90 (10th Cir. 1992) (predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) requires particularity in pleading the predicate RICO acts of mail and wire fraud).

Following the direction of the Supreme Court, we hold that at the pleading stage of civil RICO actions, a plaintiff must plead damages to business or property in a manner consistent with Rule 8 to show standing and is not required to plead with the particularity required by Rule 9(b). *See NOW*, 510 U.S. at 256. Accordingly, we reverse the district court's grant of Defendants' Motion to Dismiss Appellant's RICO claim.

III. *Bivens* claim

The district court granted Defendants' Motion to Dismiss Appellant's *Bivens* claim holding that the availability of remedies under the Administrative Procedures Act and the Federal Tort Claims Act precluded Appellant's *Bivens* cause of action. Aplt.App. at 117-18. *Bivens* claims allow plaintiffs to recover from individual federal agents for constitutional violations these agents commit against plaintiffs. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

The Supreme Court has held that a plaintiff's ability to pursue a *Bivens* claim is precluded in two specific instances. *See Carlson v. Green*, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). *Bivens* claims are precluded when defendants can demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress," or when defendants can prove "that Congress has provided an alter-

native remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id*. (quotations omitted) (emphasis in original).

The district court's grant of Defendants' Motion to Dismiss is apparently predicated upon the second exception-the existence of alternative remedies that Congress has explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. Specifically, the district court held that the APA and the FTCA precluded Appellant's *Bivens* claim. However, Appellant is not claiming injury resulting from agency action or an agency decision. Nor is Appellant claiming that Defendants violated his constitutional rights while implementing agency action. Appellant claims instead that the individual Defendants' intentional acts unrelated to any agency decision violated his constitutional rights.

The APA is the proper avenue for reviewing an agency's action or decision. If Appellant attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a *Bivens* action would not be available. *See e.g., Schweiker v. Chilicky,* 487 U.S. 412, 414, 429, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988) (*Bivens* action unavailable to contest alleged constitutional violations committed by individual agency employees in deciding to terminate Social Security disability benefits); *Zephyr Aviation, L.L.C. v. Dailey,* 247 F.3d 565, 572 (5th Cir. 2001) ("[P]arties may not avoid administrative review simply by fashioning their attack on an [agency] decision as a constitutional tort claim against individual [agency] officers."); *Nat. Commodity & Barter Ass'n v. Archer,* 31 F.3d 1521, 1532 (10th Cir. 1994) (*Bivens* claim unavailable for alleged constitutional violations of individual agency officers in making wrongful jeopardy tax assessments). However, the

APA contains no remedy whatsoever for constitutional violations committed by individual federal employees unrelated to final agency action. Because Appellant cannot hold Defendants personally liable for allegedly violating his constitutional rights under the APA, the APA is an ineffective remedy. In this case, the APA does not preclude Appellant's *Bivens* claim.

The district court's reliance on *Chilicky*, *supra*, is unfounded. *Chilicky* is distinguishable because it involved a challenge to the method in which various officials implemented the Social Security Benefits Program for disabled individuals. In that case, the Supreme Court held that the proper remedy was the administrative appeals system. *Chilicky*, 487 U.S. at 423-29. The appeals system had been set up specifically to deal with a dispute over an individual's entitlement to disability benefits. *See id.* at 424-26.

Not all of Appellant's allegations serving as a basis for his *Bivens* claim involve individual action leading to final agency decisions reviewable pursuant to the APA. For example, Appellant's allegations that some Defendants denied him certain rights pursuant to his management plan is properly challenged in an administrative proceeding. Therefore, a *Bivens* claim for that particular allegation is precluded. However, several of Appellant's allegations of Defendants' intentional misconduct are unrelated to any final agency action and are therefore properly within the scope of a *Bivens* claim. *See, e.g., Zephyr Aviation*, 247 F.3d at 572-573 (recognizing potential of *Bivens* action for "extra-procedural and unconstitutional actions by FAA inspectors," while acknowledging that a *Bivens* action would be unavailable to challenge the FAA's attachment of condition notice to company's airplane); *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1158-59 (9th Cir. 2000) (Reinhardt, J., concurring) (*Bivens* remedy not available when result of individual

agency employees' constitutional violations is an erroneous tax assessment, but permitting *Bivens* remedy for First Amendment cases involving IRS harassment); *Collins v. Bender*, 195 F.3d 1076, 1079-80 (9th Cir. 1999) (permitting *Bivens* action for improper search of plaintiff's home by individual government agents while recognizing that *Bivens* action generally unavailable for constitutional violations committed by agency employees in taking personnel actions pursuant to the Civil Service Reform Act).

Neither can Appellant's *Bivens* claim be precluded by potential claims under the FTCA. We have specifically held that the FTCA and a *Bivens* claim are alternative remedies.

When a federal law enforcement officer commits an intentional tort, the victim has two avenues of redress: 1) he may bring a *Bivens* claim against the individual officer based on the constitutional violation, or 2) he may bring a common law tort action against the United States pursuant to the FTCA. These are *separate and distinct causes of action arising out of the same transaction.*

Engle v. Mecke, 24 F.3d 133, 135 (10th Cir. 1994) (citation omitted) (emphasis added). This statement is also consistent with Supreme Court holdings. "Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [plaintiffs] exclusively to the FTCA remedy." *Carlson*, 446 U.S. at 23. Thus, the existence of a potential FTCA claim is an insufficient basis for the district court to preclude Appellant's *Bivens* claim.

We hold that Appellant's allegations that Defendants violated his constitutional rights through conduct unrelated to final agency decisions appealable pursuant to the APA are sufficient to state a cognizable *Bivens* claim. Because some of Appellant's *Bivens* claims are not precluded by either the

APA or the FTCA, we reverse the district court's grant of Defendants' Rule 12(b)(6) Motion to Dismiss Appellant's *Bivens* claim.

IV. Conclusion

We REVERSE and REMAND to the district court for further disposition in a manner consistent with this opinion.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-8016

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

v.

CHARLES WILKIE, ET AL., DEFENDANTS-APPELLANTS

PACIFIC LEGAL FOUNDATION, ET AL.,
AMICI CURIAE

Filed: Mar. 14, 2006

ORDER

Before: KELLY, HENRY, and MURPHY, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

The Motion to File Brief of Amici Curiae National Wildlife Federation, Public Lands Foundation and Wyoming Wildlife Federation is denied.

Entered for this Court
ELISABETH A. SCHUMAKER, Clerk

By: L. FABRIZIO
L. FABRIZIO
Deputy Clerk