NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM F. HOLDNER, DBA Holdner Farms, Plaintiff-Appellant, v. KATY COBA, Director of the Oregon Department of Agriculture, in her individual and official capacity; DICK PEDERSON, Director of the Oregon Department of Environmental Quality, in his individual and his official capacity, Defendants-Appellees.	No. 18-35605 D.C. No. 3:15-cv-02039-AC MEMORANDUM* (Filed Apr. 24, 2019)

Appeal from the United States District Court
for the District of Oregon
John V. Acosta, Magistrate Judge, Presiding**

Submitted April 17, 2019***

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

William F. Holdner, DBA Holdner Farms, appeals pro se from the district court's judgment dismissing without prejudice his 42 U.S.C. § 1983 action arising from the alleged improper regulation of Holdner's former cattle ranch. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's compliance with a mandate. *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). We affirm.

We previously remanded this case to the district court for it to dismiss Holdner's action without prejudice. *Holdner v. Coba*, 693 F. App'x 613 (9th Cir. July 6, 2017). Under the rule of mandate, the district court lacked authority to consider any other arguments raised by Holdner. *See Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016). Holdner repeats these other arguments in this appeal, but our prior ruling constitutes the law of the case. *See id.* at 567.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

WILLIAM F. HOLDNER dba HOLDNER FARMS,

Plaintiff,

v.

KATY COBA, in her individual capacity; ALEXIS TAYLOR, DIRECTOR OF OREGON DEPARTMENT OF AGRICULTURE, in her official capacity; DICK PEDERSON, in his individual capacity; and RICHARD WHITMAN, DIRECTOR OF THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, in his official capacity,

Defendants.[1]

Case No. 3:15-cv-2039-AC

OPINION AND ORDER

(Filed Jul. 2, 2018)

ACOSTA, Magistrate Judge:

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[1] Alexis Taylor and Richard Whitman have been substituted as successors for Katy Coba and Dick Pederson, respectively, under FED. R. CIV. P. 25(d), but only to the extent they were named in their official capacities.

Introduction

Plaintiff William Holdner ("Holdner"), appearing *pro se*, filed a civil rights action against Katy Coba, Director of Oregon's Department of Agriculture, and Dick Peterson, Director of Oregon's Department of Environmental Quality (collectively "Defendants"), challenging their authority to regulate livestock operations on his land. The court granted Defendants' motion to dismiss finding Holdner lacked standing; the claims are barred by claim preclusion, issue preclusion; and Eleventh Amendment immunity; and Defendants are entitled to qualified immunity, and dismissed the complaint with prejudice. Holder appealed and the Ninth Circuit affirmed the court's dismissal of the complaint but remanded with directions to dismiss the action without prejudice.

On March 27, 2018, Holdner filed a First Amended Complaint (the "Amended Complaint") in which he asserts the same claims but incorporates additional factual allegations. Defendants move to dismiss the Amended Complaint asserting it does not remedy the defects found in the original complaint. The court finds the Amended Complaint fails to state a claim upon which relief may be granted and Defendants are entitled, once again, to the dismissal of this action. Consequently, Defendants' motion to dismiss is granted.

Background

This is the third action initiated in this court by Holdner asserting claims based on Oregon's enforcement

of water quality standards against his livestock operation. In 2006, the Oregon Department of Agriculture (the "Department") became concerned Holdner was discharging animal waste from his property in a manner likely to send it into a nearby creek. *Holdner v. Coba*, Civ. No. 09-979-AC, 2011 WL 2633165, at *3 (D. Or. July 5, 2011) ("*Holdner I*"). As a result, the Department issued a civil citation for pollution violations against Holdner on three separate occasions – March 9, 2007, February 10, 2009, and June 15, 2009. *Id.* Additionally, in 2010, the Oregon Department of Justice indicted Holdner on three felony and twenty-five misdemeanor counts of water pollution. *Id.* at *3. Holdner requested administrative review of the civil citations, arguing his ranch was exempt from state and federal regulation, and moved to dismiss the criminal charges on the ground the Department exceeded its authority in enforcing the federal statute. *Id.* at *3; *see also Holdner v. Kroger*, No. 3:12-cv-01159-PK, 2012 WL 6131637, at *2 (D. Or. Nov. 6, 2012) ("*Holdner II*"). The administrative healing resulted in final orders in the agency's favor and the court denied Holdner's motion in the criminal proceedings, *Holdner I*, 2011 WL 2633165, at *3; *Holdner II*, 2012 WL 6131637, at *3.

On August 20, 2009, Holdner filed an action against the Department complaining about the issuance of the civil citations. *Holdner I*, 2011 WL 2633165, at *1. Holdner again asserted the Department exceeded its authority under federal statues and sought to enjoin it from taking further enforcement actions against him. *Id.* at *4. After directing Holdner to amend his

complaint twice, the court determined Holdner was alleging a claim under 42 § 1983 ("Section 1983") for violation of his rights to procedural due process. *Id.* It then granted summary judgment to the Department on the Section 1983 claim, finding Holdner failed to allege a violation of a fundamental right or offer evidence of the Department's involvement in the conduct comprising such violation.[2] *Id.* at *7-*8.

Holdner filed a second action on June 28, 2012, once again alleging various Oregon agencies lacked authority to regulate water quality and asserting a single claim for declaratory relief under a slightly different theory than alleged in *Holdner I. Holdner II*, 2012 WL 6131637, at *2. Specifically, Holdner alleged the United States Environmental Protection Agency never granted authority to the State of Oregon to administer the National Pollution Discharge Elimination System and, absent such authority, Oregon's regulatory and permitting scheme governing animal feeding operations was *ultra vires. Id.* at *3. Judge Papak denied the defendants' motion to dismiss on the grounds of mootness and the *Rooker-Feldman* doctrine, but granted the motion finding Holdner's claims barred by the *Younger* abstention doctrine and claim preclusion. *Id.* at *3-*7.

Judge Papak set forth the elements of the claim preclusion doctrine – identity of claims, final judgment on the merits, and identity or privity between the

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[2] The court also granted summary judgment on Holdner's claim for injunctive relief finding it barred by the *Younger* abstention doctrine. *Id.* at *6.

parties – and described the doctrine as "[barring] litigation of any claims that were raised or could have been raised in the prior action" where these elements are present. *Id.* at *7. He then reasoned:

> Looking for the moment only at Holdner's prior state administrative and criminal proceedings, it is clear that Holdner could easily have raised his current theory that the ODA lacks authority to enforce the Clean Water Act in either of those proceedings, but only now attempts to pursue further litigation on that "theory of relief." Similarly, Holdner could have raised his *ultra vires* theory in the prior federal case, in which he contended that the ODA exceeded its regulatory authority for other reasons. Moreover, there is no doubt that Holdner's prior proceedings were litigated to final judgment on the merits. Finally, the current defendants in this action are surely in privity with the State of Oregon, a party to Holdner's criminal proceeding, since they are all departments or agents of the state.
>
> Holdner's single argument against the application of claim preclusion is that the legal theory central to his case – that Oregon's entire water pollution control scheme is *ultra vires* – was not previously litigated in any other proceeding. But Holdner misunderstands the nature of federal and Oregon claim preclusion doctrines, both of which recognize preclusion where a claim or theory *could have been* raised in an earlier proceeding, but nevertheless was not. Consequently, even though

> Holdner has now discovered a new legal theory explaining why he was not subject to the Oregon NPDES permitting requirement for CAFO's, he is precluded from advancing it here because he could have raised it in any number of earlier proceedings.

Id. at *7 (internal quotations omitted).

Holdner filed the instant action, the third in this court, on October 29, 2015, once again complaining about Defendants' regulation of the livestock operations on Holdner's property. (Compl. ECF No. 1.) The court interpreted the complaint filed on October 29, 2015 (the "Complaint") to allege three claims: 1) deprivation of Holdner's constitutional due process rights under Section 1983; 2) Defendants acted outside their enforcement authority under the Clean Water Act; and 3) Holdner's land patent bars the state from regulating water quality on his land. *Holdner v. Coba*, Civ. No. 3:15-cv-2039-AC, 2016 WL 3102053 (D. Or. June 1, 2016) ("*Holdner III*")[3]. However, the court later noted "the allegations of the Complaint universally support a single claim under Section 1983." *Holdner, v. Coba*, Case No. 3:15-cv-2039-AC, 2016 WL 6662687, at *5 (D. Or. Nov. 9, 2016).

The court granted Defendants' motion to dismiss on several grounds. First, the court found Holdner lacked standing based on the absence of a injury-in-fact.

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[3] Holdner's motion for reconsideration of this Opinion was denied in *Holdner v. Coba*, Civ No. 3:15-cv-2039-AC, 2016 WL 4210776 (D. Or. Aug. 5, 2016).

Holdner III, 2016 WL 3102053, at *3. The court reasoned "[b]ecause plaintiff cannot legally possess livestock until December 8, 2019, he has no legally protected interest in livestock as required for standing to bring his claims, and can show no 'actual or imminent' injury sufficient to meet the standing requirement in federal court." *Id.*

Next, the court found Holdner's claims barred by claim preclusion. *Id.* The court found *Holdner III* to be substantially similar to *Holdner I* and *Holdner II*, and to allege "claims which were raised or should have been raised in prior administrative and criminal proceedings." *Holdner III*, 2016 WL 3102053, at *3. It then noted "Judge Papak clearly stated that plaintiff's claims would be barred by claim preclusion" and "[a]s plaintiff's prior proceedings were litigated to final judgment on the merits and the defendants in this action are in privity with the State of Oregon, a party to plaintiffs' criminal proceeding, plaintiffs claims are barred by claim preclusion." *Id.* Similarly, issue preclusion prevented Holdner from pursuing his claims "because issues raised in plaintiff's complaint were fully litigated to a final judgment on the merits in plaintiffs first federal court lawsuit, the criminal proceedings, and the prior state court administrative proceedings. *Id.* at *4. Additionally, the court found Holdner unable prosecute a citizen suit under the Clean Water Act. *Id.* at *5-*6.

Assuming Holdner had stated a viable claim, the court determined Defendants were protected by Eleventh Amendment immunity and qualified immunity.

Id. at *5. Holdner sued Defendants in their official capacities and Oregon did not waive its Eleventh Amendment immunity. Consequently, Defendants were shielded by such immunity. *Id.* Additionally, Holdner failed to allege a viable claim for violation of his constitutional rights, providing qualified immunity to Defendants. *Id.*

The court considered allowing Holdner leave to amend the Complaint. However, it determined Holdner could not cure the defects in the Complaint in amended pleading. Specifically, claim preclusion barred Holdner from pursuing any claim that was, or should have been, raised in his prior federal lawsuits or state administrative and criminal proceedings. *Id.* at *6. Moreover, Holdner could not bring a private action under Clean Water Act or sue Defendants in their official capacity. *Id.* Finally, Defendants would be afforded qualified immunity on any claims based on constitutional violations alleged in his prior actions. Consequently, the court dismissed Holdner's action with prejudice.

Holdner appealed the opinion and the Ninth Circuit "affirm[ed] the district court's dismissal of Holdner's action but vacate[d] the judgment in part and remand[ed] for the district court to dismiss Holdner's action without prejudice." *Holdner v. Coba*, 693 Fed. Appx. 613, 613 (2017). The court based its ruling on Holdner's failure to challenge this court's grounds for dismissing the complaint, resulting in the wavier of any such challenge. *Id.* The Ninth Circuit did not provide any direction on whether Holdner could file an

amended complaint in this case or what deficiencies should be remedied in the new filing.

Holder filed the Amended Complaint asserting the same claims with additional factual allegations. The new allegations relate solely to his conviction for water pollution in the state court under an allegedly unconstitutional statute. (Am. Compl., ECF No. 62, ¶¶ 22-29.) They describe testimony and evidence offered at his criminal trial, and assert the penalty and fine issued against him violated his due process rights. (Am. Compl. ¶¶ 23-29.) Defendants move to dismiss the Amend Complaint.

Legal Standard

A well-pleaded complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (2018). A federal claimant is not required to detail all factual allegations; however, the complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* While the court must assume that all facts alleged in a complaint are true and view them in a light most favorable to the nonmoving party, it need not accept as true any legal conclusion set forth in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Additionally, a plaintiff must set forth a plausible

claim for relief a possible claim for relief will not do. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678); *Sheppard v. David Evans and Assoc.*, No. 11-35164, 2012 WL 3983909 at *4 (9th Cir. Sept. 12, 2012) (quoting *Iqbal*, 556 U.S. at 679) ("The Supreme Court has emphasized that analyzing the sufficiency of a complaint's allegations is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'").

Discussion

The Amended Complaint asserts the same claims as those asserted by Holdner in the Complaint. The only difference in the Amended Complaint is the addition of allegations related to Holdner's state criminal proceedings. All of these allegations, and any new claims deriving therefrom, could have been asserted in Holdner's prior legal proceedings and are barred by claim preclusion. Holdner has failed to successfully cure the deficiencies identified by this court, which findings were affirmed by the Ninth Circuit. Consequently, the Amended Complaint fails to state a claim upon which relief may be granted and Defendants are entitled, once again, to the dismissal of this action.

At oral argument, Holdner expressed, for the first time, his intent to rely on Rule 60 of the Federal Rules of Civil Procedure ("Rule 60") to set aside Oregon's enforcement of water quality standards against Holdner and his livestock operation. Rule 60 allows the court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for various reasons. FED. R. CIV. P. 60(b) (2018). However, a motion for relief under Rule 60 must be brought in the court which rendered the original judgment. *Veltze v. Bucyrus-Eire Co.*, 154 F.R.D. 214, 216 (E.D. Wis. 1994). Rule 60 does not authorize this court to relieve Holdner from a judgment issued by the Oregon courts.

The failure of the Ninth Circuit to instruct Holdner, or the court, on the purpose of dismissing this action without prejudice is problematic. As Defendants surmise, it is possible the Ninth Circuit intended to allow Holdner to refile his action after the prohibition on his ability to legally possess livestock expired, thereby eliminating the obstacle to establishing standing. Additionally, the Ninth Circuit could have opened the door to Holdner reasserting his claim in a court of competent jurisdiction to resolve the Eleventh Amendment immunity issue. While such filings would remain subject to the prior conclusion by this court and the Ninth Circuit that any claim based on Defendants' regulation of Holdner's livestock operation and resulting administrative proceedings and criminal prosecution are barred by claim preclusion, the court must follow the direction of the Ninth Circuit and dismiss this action without prejudice. However, Holdner may not refile

this action in this court prior to the expiration of the prohibition on his ability to legally possess livestock on December 8, 2019, and may not assert claims related to Defendants' previous regulation of Holdner's livestock operation, and resulting administrative proceedings and criminal prosecution.

Conclusion

Defendants' motion (ECF No. 63) to dismiss is GRANTED and this action is dismissed without prejudice.

DATED this 2nd day of July, 2018.

/s/ John V. Acosta
JOHN V. ACOSTA
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

WILLIAM F. HOLDNER dba HOLDNER FARMS,

Plaintiff,

v.

KATY COBA, in her individual capacity; ALEXIS TAYLOR, DIRECTOR OF OREGON DEPARTMENT OF AGRICULTURE, in her official capacity; DICK PEDERSON, in his individual capacity; and RICHARD WHITMAN, DIRECTOR OF THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, in his official capacity,

Defendants.[1]

Case No. 3:15-cv-2039-AC

JUDGMENT

(Filed Jul. 2, 2018)

ACOSTA, Magistrate Judge:

Based on the Opinion and Order entered July 2, 2018,

[1] Alexis Taylor and Richard Whitman have been substituted as successors for Katy Coba and Dick Pederson, respectively, under FED. R. CIV. P. 25(d), but only to the extent they were named in their official capacities.

IT IS HEREBY ORDERED and ADJUDGED that this action is DISMISSED without prejudice.

DATED this 2nd day of July, 2018.

/s/ John V. Acosta
JOHN V. ACOSTA
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM F. HOLDNER, Plaintiff - Appellant, v. KATY COBA, Director of the Oregon Department of Agriculture, in her individual and official capacityi and DICK PEDERSON, Director of the Oregon Department of Envionmental Quality, in his individual and his official capacity, Defendants - Appellees.	No. 16-35723 D.C. No. 3:15-cv-02039-AC U.S. District Court for Oregon, Portland **MANDATE** (Filed Jan. 22, 2018)

The judgment of this Court, entered July 06, 2017, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM F. HOLDNER, DBA Holdner Farms, Plaintiff-Appellant, v. KATY COBA, Director of the Oregon Department of Agriculture, in her individual and official capacity; DICK PEDERSON, Director of the Oregon Department of Environmental Quality, in his individual and his official capacity, Defendants-Appellees.	No. 18-35605 D.C. No. 3:15-cv-02039-AC MEMORANDUM* (Filed Jul. 6, 2017)

Appeal from the United States District Court
for the District of Oregon
John V. Acosta, Magistrate Judge, Presiding**

Submitted June 26, 2017***

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: PAEZ, BEA, and MURGUIA, Circuit Judges.

William F. Holdner appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action arising from the alleged improper regulation of Holdner's former cattle ranch. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, vacate in part, and remand.

In his opening brief, Holdner failed to challenge the district court's grounds for dismissal of his complaint, and therefore Holdner waived any such challenge. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."). We affirm the district court's dismissal of Holdner's action but vacate the judgment in part and remand for the district court to dismiss Holdner's action without prejudice.

The magistrate judge properly denied Holdner's motion requesting review by a district court judge because the parties consented to a magistrate judge. *See* 28 U.S.C. § 636(c)(3) (when parties provide consent to magistrate jurisdiction, aggrieved party may appeal directly to court of appeals).

We reject as without merit Holdner's contentions that his action qualifies as a citizen suit under 33 U.S.C. § 1365(a), and that the district court erred in denying discovery, the right to introduce additional evidence, and a requested hearing.

Appellees' motion to take judicial notice (Docket Entry No. 11) is denied as unnecessary.

AFFIRMED in part, VACATED in part, and REMANDED.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

WILLIAM F. HOLDNER, D.B.A. HOLDNER FARMS

Plaintiff,

v.

KATY COBA, DIRECTOR OF OREGON DEPT. OF AGRICULTURE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; DICK PEDERSON, DIRECTOR OF THE OREGON DEPT. OF ENVIRONMENTAL QUALITY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants.

Civ. No. 3:15-cv-2039-AC

OPINION AND ORDER

(Filed Jun. 1, 2016)

ACOSTA, Magistrate Judge:

Plaintiff William Holdner ("plaintiff") brings this civil rights and declaratory judgment lawsuit arising from the Oregon Department of Agriculture's regulation of plaintiff's cattle ranch and plaintiff's subsequent criminal prosecution for violation of state water pollution statues, Defendants Katy Coba and Dick Pederson ("defendants") move to dismiss plaintiff's lawsuit for lack of standing and for failure to state a claim (ECF No. 12). For the reasons discussed below,

defendants' motion is GRANTED and the complaint (ECF no. 1) is DISMISSED with prejudice.[1]

Background

Since 2007, State of Oregon authorities ("state authorities") have attempted to prevent plaintiff from discharging animal wastes from his cattle ranching operation into state waters, and to bring his beef facility operation under a state Confined Animal Feeding Operation ("CAFO") permit, as required by state law. These efforts culminated in civil administrate proceedings, a criminal prosecution, and two civil suits plaintiff filed in this court in an attempt to enjoin the State authorities from bringing enforcement actions against him. In every forum, the issues were adjudicated in favor of the state authorities.

I. Civil Suits

On August 20, 2009, plaintiff filed a civil action in the U.S. District Court, District of Oregon against the Oregon Department of Agriculture ("ODA"), entitled *Holdner v. Oregon Department of Agriculture*, Case No. 3:09-979-AC, challenging ODA's regulatory authority and the evidence supporting its administrative enforcement actions against him. 2009 WL 5149264 (D. Or. Dec. 23, 2009). The court granted summary judgment in favor of the ODA, stating that plaintiff "failed

[1] Defendants requested oral argument on their motion. The court finds this motion appropriate for disposition without oral argument, pursuant to Local Rule 7-1(d)(1).

to provide any evidence, or even to allege specific factual allegations, in support of his claim," and that he relied "exclusively on the allegation in his complaint and unsupported conclusory statements." *Id.* at *14.

Plaintiff filed a second civil action in this district on June 28, 2012, again alleging that the state authorities lacked authority to regulate water quality and asserting constitutional claims. *Holdner v. John Kroger, et al*, Case No. 3:12-cv-1159-PK, 2012 WL 6131637 (D. Or. Nov. 6, 2012). Plaintiff alleged that the state's water quality program was *ultra vires* and that the State generally, and ODA in particular, lacked authority to administer the NPDES program or to enforce any state law governing water quality. *Id.* at *14-*15. He alleged violations of his constitutional rights, including substantive due process. The court dismissed this action, stating that plaintiff's claims were barred by claim preclusion and the *Younger* abstention doctrine, and noting that plaintiff could have raised his *ultra vires claim* in any of his prior proceedings. *Id.* at *12-*14. The second civil action was thus dismissed on December 10, 2012. The Ninth Circuit affirmed the district court's decision on April 15, 2015, and the Supreme Court denied certiorari on October 5, 2015.

II. State Criminal Proceedings

On May 19, 2010, plaintiff was indicted on three felony and twenty-five misdemeanor counts of water pollution under state law. Plaintiff filed a motion to dismiss, arguing that the state lacks authority to regulate

his livestock operations, and that the criminal enforcement action violated his constitutional rights. He also alleged that his land patent barred any criminal enforcement action, and that ODA did not have authority to administer the NPDES program. Plaintiff's motion was denied on July 19, 2011. Plaintiffs motions for reconsideration, as well as his "Motion to Renew Dismissal of Animal Pollution Charges," also were denied.

On February 24, 2012, plaintiff was found guilty on 27 counts of water pollution. Judgment was entered May 21, 2012. Plaintiff's motion for arrested judgment and new trial motion were denied on June 22, 2012, and his conviction was upheld on appeal without opinion by the Oregon Court of Appeals on February 5, 2014. *State of Oregon v. Holdner*, CA No. A151760 (Feb. 5, 2014). The Oregon Supreme Court denied review on June 12, 2014. *State of Oregon v. William Frederick Holdner*, 355 Or. 668, 330 P.3d 27 (Table).

On October 3, 2014, plaintiff was convicted of 95 counts of animal neglect. *State of Oregon v. William F. Holdner*, Columbia County Circuit Court Case No. 12-6240. Plaintiff's probationary conditions bar him from possessing livestock for a period of five years, until December 8, 2019. Plaintiff's appeal of this conviction is pending as of the date of this Opinion.

III. Plaintiff's Complaint

Plaintiff filed this lawsuit on October 29, 2015, alleging violations under 42 U.S.C. § 1983 and requesting a declaratory judgment. Plaintiff's complaint disputes

the state's authority to regulate livestock operations on his land. Plaintiff's complaint appears to allege three claims: (1) a § 1983 claim for deprivation of constitutional due process rights; (2) a claim that the Department of Environmental Quality ("DEQ") and ODA acted outside their enforcement authority; and (3) a claim that plaintiff's land patent bars the state from regulating water quality on plaintiff's land.

Defendants now move to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). They argue that plaintiff lacks standing to bring this action, that claim preclusion and issue preclusion bar his lawsuit, that Eleventh Amendment immunity bars his § 1983 claim, that defendants are entitled to qualified immunity, that he may not bring a private action under the Clean Water Act ("CWA"), and that he fails to state a claim on which relief can be granted.

Legal Standards

I. The Court's Review of Pro Se Filings

A court must liberally construe the filings of a pro se plaintiff and afford the plaintiff the benefit of any reasonable doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). When dismissing the complaint of a pro se litigant, the litigant "must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Karim–Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (quoting *Noll v.*

Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987), superseded on other grounds by statute as stated in *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (*en banc*).

II. Motion to Dismiss

A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court. *See, e.g.*, *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). Under Article III of the Constitution, federal judicial power extends only to "Cases" and "Controversies." U.S. CONST., art. III, § 2, cl. 1. Article III standing thus is a threshold requirement for federal court jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). At a constitutional minimum, standing requires the party invoking federal jurisdiction to establish three elements: (1) injury in the form of an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's conduct; and (3) the likelihood, not mere speculation, that a favorable decision will redress the injury. *Id.* at 560-61.

Discussion

I. Standing

Because it is a threshold requirement for establishing federal court jurisdiction, the court first addresses defendants' standing argument. *Lujan*, 504 U.S. at 559-60. The three elements of standing are

(1) injury-in-fact; (2) causation; and (3) redressability. *Id.* at 560. It is the burden of the party invoking federal jurisdiction to establish that he has standing. *Id.* at 561. To provide standing, an alleged injury must be a "concrete and particularized" invasion of a "legally protected interest." *Id.* at 560. The injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.*

Defendants argue that plaintiff lacks standing to bring these claims because he has not alleged an injury-in-fact sufficient to meet the standard set forth by in *Lujan.* Here, because of probationary conditions imposed after his criminal convictions, plaintiff is prohibited from possessing livestock, ECF No. 12, Ex. 23, pp. 2; *see also State of Oregon v. William F. Holdner*, Columbia County Circuit Court Case No. 12-6240. Indeed, plaintiff does not allege that he possesses a cattle operation. *See* ECF No. 1. Because plaintiff cannot legally possess livestock until December 8, 2019, he has no legally protected interest in livestock as required for standing to bring his claims, and can show no "actual or imminent" injury sufficient to meet the standing requirement in federal court.

Plaintiff's pending appeal of his state court criminal conviction for 95 counts of animal neglect[2] does not affect the court's standing analysis because plaintiff has failed to show that a reversal on all 95 counts is sufficiently plausible to meet the "actual or imminent"

[2] To the extent that plaintiff asks the court to review his state court criminal conviction, his request is denied because the court lacks jurisdiction to review a state court criminal conviction unless by habeas petition.

standard set forth in *Lujan*. 504 U.S. at 560. Further, while plaintiff contends that he plans to lease his property to his son to raise cattle, plaintiff does not allege sufficient facts that would establish standing to bring claims on behalf of his son. In sum, plaintiff has not met his burden to show standing, and therefore fails to establish federal court jurisdiction.

II. Claim Preclusion

Equally dispositive of plaintiff's claims is that claim preclusion bars his lawsuit, which is substantially similar to the two lawsuits plaintiff previously filed in this court and involves claims which were raised or should have been raised in prior administrative and criminal proceedings. In Oregon, "[t]he doctrine of claim preclusion . . . generally prohibits a party from relitigating the same claim or splitting a claim into multiple actions against the same opponent." *Bloomfield v. Weakland*, 339 Or. 504, 510 (2005) (en banc). The claim-splitting rule "forecloses a party that has litigated a claim against another from further litigation on that same claim on any ground or theory of relief that the party could have litigated in the first instance." *Id.* at 511. Moreover, the Ninth Circuit's claim preclusion doctrine bars litigation of any claims that were raised or could have been raised in the prior action, and applies when there is: "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

Plaintiff misquotes Judge Papak's 2012 Recommendation as stating that "claim preclusion does not bar Plaintiffs claim."[3] On the contrary, Judge Papak clearly stated that plaintiff's claims would be barred by claim preclusion. In *Holdner v. Kroger, et al*, Case No. 3:12-cv-01159-PK, 2012 WL 6131637 (D. Or. Nov, 6, 2012), plaintiff's second civil action filed in this court, Judge Papak stated that claim preclusion barred plaintiff's claims that the ODA exceeded its regulatory authority and lacked authority to enforce the CWA because he could have raised these claims "in any number of earlier proceedings."[4] *Id.* at *7. The claims raised in this case are substantially similar to the claims plaintiff alleged in *Holdner v. Kroger.* As plaintiff's prior proceedings were litigated to final judgment on the merits and the defendants in this action are in privity with the State of Oregon, a party to plaintiff's criminal proceeding, plaintiff's claims are barred by claim preclusion. *Owens*, 244 F.3d at 713.

Plaintiff also contends his claims are not precluded, citing *Doug Decker v. Northwest Environmental Defense Centers*, 133 S.Ct. 1326 (2013). Plaintiff misreads *Decker.* In that case, respondents invoked federal jurisdiction under 33 U.S.C. 1356(a), which authorizes private enforcement of the provisions of the

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[3] Plaintiff elsewhere acknowledges that the claims alleged in his complaint have been "raised" in previous court proceedings. Compl. ¶ 4.

[4] As noted, Judge Simon adopted Judge Papak's recommendation and dismissed plaintiff's case on December 10, 2012; the Ninth Circuit affirmed the decision, and the Supreme Court denied certiorari on October 5, 2015.

CWA and its implementing regulations. *Id.* at 1334. Petitioners argued that the NEDC's suit was barred by Section 1369(b), which provides for "judicial review in the United States courts of appeals of various particular actions by the [EPA] Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants." *Id.*

The Court agreed with respondents and held that Section 1369(b) did not bar respondents' suit, which originated as a citizen suit brought under Section 1365. That Section, the Court held, allows citizen suits against alleged violators of the CWA that seek to enforce an obligation imposed by the CWA or its regulations. *Decker*, 113 S.Ct. at 1334. Here, plaintiff's complaint is not brought to enforce any provision of the CWA, and defendants do not allege his complaint is barred under Section 1369(b).[5]

Because the claims raised in plaintiff's complaint are substantially similar to those contained in plaintiffs prior civil suits, the court finds that plaintiff's claims are barred by claim preclusion.

III. Issue Preclusion

Issue preclusion also bars plaintiff's claims because the issues raised in plaintiff's complaint were

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[5] Plaintiff also argues that the *Decker* holding entails that "claim preclusion . . . [E]leventh [A]mendment and qualified immunity issues do not bar [his] claims. The court also rejects this contention as it appears to be based on a misreading of *Decker*.

fully litigated to a final judgment on the merits in plaintiff's first federal court lawsuit, the state criminal proceedings, and the prior state administrative proceedings. "If one tribunal has decided an issue, the decision on that issue may preclude relitigation of the issue in another proceeding if five requirements are met." *Nelson v. Emerald People's Util. District*, 318 Or. 99 104 (1993), First, the issue in the proceedings must be "identical." *Id.* at 104. Here, plaintiff may not relitigate whether the State of Oregon has the authority to regulate plaintiff's operations; plaintiff raised this issue as a defense in prior administrative and criminal proceedings, Plaintiff also raised the issue of his land patent and his *ultra vires* claim that the ODA lacks authority to enforce the CWA in prior proceedings. The first requirement is therefore met.

Second, the issue must have been "actually litigated" and "essential to a final decision on the merits in the prior proceeding" *Nelson*, 318 Or. at 104. This requirement is met because the state criminal and administrative proceedings resulted in judgments for the state. Thus, there has been a previous finding that the state and its agents did not act outside their federal and statutory authority or in violation of an alleged exemption created by plaintiff's land patent.

Third, the party to be precluded must have "had a full and fair opportunity to be heard" on the issue. *Nelson*, 318 Or. at 104. Plaintiff had a full and fair opportunity to be heard on these issues in his four prior proceedings. In the prior proceedings, plaintiff presented extensive evidence and filed motions in an

attempt to prove that the state and its agents acted outside their federal statutory authority. Plaintiff thus had ample opportunity to be heard on the issues raised in his complaint, and this requirement is met.

Fourth, the party to be precluded must have been a party to or "in privity with" a party to the prior proceeding. *Id.* Plaintiff is the party against whom preclusion is sought, and he was a party in each of the prior civil lawsuits, and the administrative proceeding, and the defendant in the criminal proceeding. This requirement is also met.

Finally, the prior proceeding must have been "the type of proceeding to which [the] court will give preclusive effect." *Id.* The rules of preclusion apply "where both actions are criminal, where the prior action is criminal and the later action is civil, and where the prior adjudication is administrative in nature." *Shuler v. Distribution Trucking Co.*, 164 Or. App, 615, 624 (1999). The prior proceedings meet these requirements. Because this requirement is also met, plaintiff is prohibited by issue preclusion from relitigating the issues raised in this lawsuit.

IV. Eleventh Amendment Immunity and Qualified Immunity

Plaintiff's claims are also barred by Eleventh Amendment immunity and qualified immunity. The Eleventh Amendment bars a citizen from bringing suit in federal court against the citizen's own state regardless of the relief sought. *Pennhurst State Sch. & Hosp.*

v. Halderman, 465 U.S. 89, 100 (1984). A state agency is immune from suit under the Eleventh Amendment because the State is the real party in interest. *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991); similarly, state officials acting in their official capacity are immune from suit. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Because plaintiff has sued both agency directors in their official capacities, and the state has not waived immunity, defendants are shielded by the state's Eleventh Amendment immunity.

To the extent that plaintiff's complaint can be interpreted as asserting a claim under 42 § 1983, defendants are entitled to qualified immunity from such a claim. To avoid qualified immunity, plaintiff's complaint must (1) state a claim for civil rights violations; and (2) establish that the constitutional right violated was so clearly established that it would have been clear to a reasonable person that the conduct he complains of was unlawful. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (plaintiff must plead a violation of his constitutional rights); *Sweaney v. Ada County, Idaho*, 119 F.3d 1385 (9th Cir. 1997) (plaintiff initially bears the burden of showing the violation of a clearly established federal right).

As discussed in Sections V and VI below, the court has examined plaintiff's entire complaint and finds that he has failed to state a claim for relief under § 1983 for a violation of his constitutional rights, or under any other provision of federal law. Therefore, qualified immunity also bars his suit.

V. CWA Claims

Plaintiff's complaint appears to allege (1) that the state lakes the authority to enforce the CWA, and (2) a claim or "citizen suit" brought under the CWA. Plaintiffs allegations fail to state a claim for relief First, as set forth in the Federal Register, the EPA has affirmatively determined that Oregon meets the criteria under the CWA to administer the NPDES permit program in lieu of the EPA. "The contents of the Federal Register shall be judicially noticed." 44 U.S.C. § 1507. Thus, while plaintiff alleges that the state lacks authority to implement the CWA permit program, the court need not accept as true allegations that contradict matters properly subject to judicial notice in a motion to dismiss. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, opinion amended on denial of rehearing, 275 F.3d 1187 (9th Cir. 2001).

Second, the private action provision in the CWA does not contemplate a lawsuit against a state regarding either its authority to enforce its own environmental protection laws or to manage its NPDES permitting program. 33 U.S.C. § 1365. Plaintiffs claim that this action is a citizen suit under the CWA therefore lacks merit. Furthermore, plaintiff does not seek to enforce effluent standards; rather, he seeks to nullify Oregon's ability to enforce water quality standard. Insofar as plaintiff challenges the state's decision to issue, or refuse to issue, a water quality permit as not compliant with the CWA, such challenge fails to state a claim because the CWA does not provide a federal cause of action to challenge a state agency's issuance of a NPDFS

permit.[6] *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980). For these reasons, plaintiff has not stated a claim for relief under the CWA.

VI. Failure to Allege Facts

The court also finds that plaintiff fails to meet the standard for adequate pleadings set forth in Fed. R. Civ. P. 12(b)(6), As articulated in *Bell Atlantic Corp. v. Twombly*, recitation of mere labels, conclusions, and elements is insufficient to state a claim for relief. 550 U.S. 544, 555 (2007). Here, plaintiff's complaint fails to allege any actions taken by either of the named defendants. Plaintiff does not allege that he applied for a water quality permit, that a permit was denied, or that he currently holds a permit. He does not allege that he owns any cattle or livestock, or that he currently operates a CAFO. He alleges no financial loss imposed by the State's permitting process, nor any injury caused by any state actor or resulting from a state decision. He does not allege or describe any injury caused by the relationship between the EPA, the DEQ, or the ODA. In sum, the complaint before the court is a series of legal conclusions lacking any allegations which connect either defendant to any specific violation of law.

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[6] Nor does plaintiff have an implied cause of action under the CWA; the Supreme Court has held that the CWA's "unusually elaborate enforcement provisions" contain no implied cause of action for private citizens. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-15, 17-18 (1981). Further, the remedies provided by Congress in the CWA foreclose a private remedy under § 1983. *Id.* at 19-21.

Accordingly, plaintiff fails to meet the requirements of Fed. R. Civ. P. 12(b)(6).

VII. Leave to Amend

If the court, dismisses a complaint, it must decide whether to grant leave to amend. *See* 28 U.S.C. § 1653. The Ninth Circuit has repeatedly held that dismissal without leave to amend is improper, even if no request to amend the pleading was made, unless it is clear that the defective pleading cannot possibly be cured by the allegation of additional facts. *Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 n. 6 (9th Cir. 2002) (*citing Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9th Cir. 2001)); *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). Here, plaintiff's complaint is substantially similar to the two civil complaints he previously filed in this court, and it contains claims that were or should have been raised in prior administrative and criminal proceedings in state court. *See Holdner v. ODA*, U.S. District Court Case No. 3:09-979-AC; *Holdner v. John Kroger, et al*, U.S. Dist. Court Case No. 3:12-cv-1159-PK. Further, his claims are barred by Eleventh Amendment immunity and qualified immunity, fail to comply with Fed. R. Civ. P. 12(b)(6), and fail to state a claim under the CWA. It is clear that plaintiffs' claims cannot be cured by the allegation of additional facts. The court thus finds plaintiff should not be granted leave to amend and the complaint is dismissed with prejudice.

Conclusion

After careful consideration of plaintiff's complaint in light of the Rule 12(b) standard, defendants' motions to dismiss (#12) is GRANTED and the complaint (#1) DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 1st day of June, 2016.

/s/ John V. Acosta
JOHN ACOSTA
United States
Magistrate Judge