A. Barry Cappello (SBN 037835)
abc@cappellonoel.com
Lawrence J. Conlan (SBN 221350)
lconlan@cappellonoel.com
Wendy D. Welkom (SBN 156345)
wwelkom@cappellonoel.com
CAPPELLO & NOËL LLP
831 State Street
Santa Barbara, California 93101
Telephone: (805) 564-2444
Facsimile: (805) 965-5950

Attorneys for Plaintiffs
Anne Crawford-Hall, San Lucas Ranch, LLC,
And Holy Cow Performance Horses, LLC

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANNE CRAWFORD-HALL; SAN LUCAS RANCH, LLC; HOLY COW PERFORMANCE HORSES, LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF THE INTERIOR; U.S. BUREAU OF INDIAN AFFAIRS, a division of the United States Department of the Interior; RYAN ZINKE, in his official capacity as Secretary of the Interior; MICHAEL BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs; JOHN TAHSUDA III, in his official capacity as Principal Deputy Assistant Secretary; AMY DUTSCHKE, in her official capacity as Director, Pacific Region, Bureau of Indian Affairs; and DOES 1 through 100,

Defendants.

Case No.: 2:17-cv-1616-SVW

PLAINTIFFS' RESPONSIVE SUPPLEMENTAL BRIEF REGARDING CONSTITUTIONAL DUE PROCESS ISSUES

Table of Contents

Table of Authorities

Cases

Regulations

I. INTRODUCTION

This is not a case of Plaintiffs "choosing" to stay on the sidelines when they knew they had to appeal. And this is not a case where the regulations or case law "could not be more clear." Dkt. 29, Def. Br. at 4:14. This case is the opposite. Defendants, not Plaintiffs, sat on the sidelines, and did not send Plaintiff Crawford-Hall direct notice of the 6.9 Acre NOD, despite knowing of the *Journal*'s reporting. Defendants, not Plaintiffs, then bided their time, waiting to exploit 25 C.F.R., Section 2.2's ("Section 2.2") speculative definition to Plaintiffs' detriment, arguing Plaintiffs failed to exhaust in the 6.9 Acre case when they "could" have been adversely affected. Here, Plaintiffs' property is not near the 6.9 Acres and was not affected by BIA's decision on the 6.9 Acres. Plaintiffs had no opportunity to be heard in the 6.9 Acre Case and did not know they had to appeal from it. The fact that Ms. Crawford-Hall encouraged conduct by those who *had* been involved demonstrates she thought she could not, and was not obligated to do so.

What is surprising here is how completely Defendants have ignored the critical question whether Section 2.2's definition of "interested party" as "any person whose interests *could* be adversely affected" was constitutionally defective. Defendants *never* quote Section 2.2's full definition, or discuss the "could" problem which this Court highlighted. Instead, they pivot to a general argument that the exhaustion requirement (not the "could be" language) is constitutional. The Defendants' silence on Section 2.2 speaks volumes. In fact, Defendants' argument that Plaintiffs were presumed to know the law founders on the constitutional vagueness of the "could be" language, which does not tell persons what is required.

Defendants ask this Court to strike the wrong balance. They argue that a speculative provision passes constitutional muster as applied here, to bar Plaintiffs from asserting important property rights. But *none* of Defendants' cases find Section 2.2 appropriate in circumstances like these: *none* bars a party who did *not* litigate a

prior case from litigating a subsequent case and seeking review of that subsequent case. *None* of Defendants' cases have considered the constitutional infirmities presented by the misleading NOD and ambiguous regulations in context, the speculative "could" in Section 2.2, and the open door these regulations afford for abuse in enforcement. The Defendants' argument should be rejected.

II. LEGAL DISCUSSION

A. The 6.9 Acre NOD Did Not Give Plaintiffs Clear Notice and Plaintiffs Did Not "Choose" Not to Appeal

Defendants' main argument is that Ms. Crawford-Hall knew she had to appeal from the 6.9 Acre case, and made an affirmative "choice" not to appeal. This argument mischaracterizes the evidence. Ms. Crawford-Hall's *Santa Ynez Valley Journal* properly reported on news of interest to the local community. The *Journal's* editor (not Ms. Crawford-Hall) thus approved publishing letters from citizens' groups such as POLO, which was intimately involved in the 6.9 Acre case. Staff comments or analysis of the 6.9 Acre proceeding were also published. See Dkt. 39, p. ID # 661, fns. 3, 6, 7. And, Ms. Crawford-Hall commented on the proceedings in her own column, stating that the "residents have had to file an appeal because our government won't." Dkt. 29-8, p. ID #474.

This evidence does not show that Ms. Crawford-Hall knew she had to appeal and made a "choice to forego a well-established and easily identifiable exhaustion requirement." Dkt. 39, p. ID # 662. To the contrary, it demonstrates that she did *not* consider herself an "interested party." Rather, the *Journal* and Ms. Crawford-Hall urged citizens to tell the County (which was on the list of identified interested parties) to appeal. They also noted that the "residents" who were on the list– *i.e.*, POLO and SYVCC -- would have to appeal since the County did not. This does not show any knowledge that *she* was obligated to appeal.

///

Nor is the exhaustion requirement "easily identifiable." The NOD was misleading. It did not include a copy of all relevant regulations, particularly Section 2.2. It was (and is) unimaginable to a person of common intelligence that the government would consider "interests" that only "*could be*" affected might create some obligation to appeal from a case which one had not litigated. And Defendants' cases do not so state. As explained in Plaintiffs' initial supplemental brief, BIA's NOD and regulations are *not* clear. They are a hodgepodge of inconsistent terms, and do not adequately explain what is required.

Moreover, Defendants' argument also improperly seeks to chill fundamental First Amendment rights. The free press is essential to the welfare of the public, and a condition of a free society. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 252 (1974). A major purpose of the First Amendment is to protect free discussion of governmental affairs. *Id*. at 257. It is therefore paramount to prevent penalties accruing to newspapers that might lead the newspaper to avoid controversy. *Id*. Here, Ms. Crawford-Hall has the First Amendment right to publish news of local interest. She also owns property in the Santa Ynez Valley. To sweep her property interests into the basket of those who "could" be affected impermissibly raises the potential of penalties. It might cause Plaintiff to pause, questioning whether the newspaper's expressing knowledge of any matter could bar her from raising challenges to specific other actions, improperly chilling First Amendment speech. This additional concern also should compel rejection of the Defendants' arguments.

B. The Due Process Balance Favors Plaintiffs In this Case

A procedural due process challenge requires the court to balance the private interest affected and the government interest involved. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Nozzi v. Hous. Auth.*, 806 F.3d 1178, 1192-93 (9th Cir. 2015); *Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, 686 F.3d 965, 980 (9th Cir. 2012). "Under the *Mathews* balancing test, courts must carefully assess the precise 'procedures used' by the government, 'the value of additional safeguards,'

and 'the burdens of additional procedural requirements.'" *Nozzi*, 806 F.3d at 1193, citing *Mathews*, 424 US at 335.

Here, the private interest is Plaintiffs' right to challenge decisions which directly impact their property. Plaintiffs had no property interest affected by the 6.9 Acre decision, and for that reason did not litigate that matter. However, Plaintiffs' San Lucas property sits across the narrow road from Camp 4. As a result of BIA's decision on Camp 4, Plaintiffs now face city-sized, unregulated residential and commercial development across the street. Plaintiffs have a constitutional right to protect their property interests, and fully participated in the Camp 4 case.

By contrast, the Defendants' interest is the finality provided by the exhaustion requirement. See, Def. Br. at 2:9-11. However, the government's precise procedures to effectuate that "finality" are constitutionally inadequate. The Defendants do not have to notify community members or property owners of a fee-to-trust application in the first place, rendering the proceedings obscure from the outset. See, 25 C.F.R. §§ 151.10, 151.11 (notice only to state and local government). When BIA reaches its decision after an opaque administrative procedure, it gives notice of its decision via a misleading NOD which does not include Section 2.2's speculative definition. This unfairly allows the Defendants to benefit at the expense of the citizens: Defendants do not have to give notice to all interested parties, but Defendants can then later penalize persons by arguing they did not comply with the exhaustion requirement, since their interests "could" have been affected. This is a lopsided and fundamentally unfair set of circumstances. Given the important property rights at issue, why should BIA not be required to alert all interested property owners of pending matters and decisions, if BIA believes these are parties whose interests *could* be affected? See, e.g., *Harris v. County of Riverside*, 904 F.2d 497, 504 (9th Cir. 1990) (direct notice to affected party is not only feasible but necessary in zoning case).

The constitutional imbalance is particularly striking here, since Defendants

have not proffered *any* case where Section 2.2 and its related regulations were approved as support for the proposition that a person who did not have an opportunity to be heard in the underlying case was obligated to appeal from that decision or be barred from judicial review in a separate, subsequent case involving different property.[1] This includes *Faras v. Hodel*, 845 F.2d 202 (9th Cir. 1988), which found that a plaintiff who affirmatively sought redress initially, but did not pursue her appeal through two *additional* regulatory levels, had not exhausted administrative remedies.

Defendants ask this Court to find, as a matter of first impression, that Section 2.2 passes constitutional muster. However, the open-ended language of Section 2.2, the failure of the NOD to explain exactly what is required, and the ambiguous regulatory language in the NOD's attached regulations,[2] defeat this argument. The Defendants should not be allowed to enforce Section 2.2 here, as a litigating position, and bar Plaintiffs' right to petition the court for judicial review.

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court reject Defendants' arguments and deny the motion to dismiss.

DATED: December 11, 2017

CAPPELLO & NOËL LLP

By: */s/ Wendy D. Welkom*
A. Barry Cappello
Lawrence J. Conlan
Wendy D. Welkom
Attorneys for Plaintiffs

---

[1] Moreover, Defendants have not provided authority to establish that the 6.9 Acre decision was precedential or binding in any way as to Plaintiffs. It was not even binding on the BIA, as it did not involve an "M" opinion, and certainly would not bind this Court.

[2] Defendants' cases support Plaintiffs on this issue. For example, *US Tel. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), approves notice because the regulations were extremely specific, setting forth numerous factors for guidance. *Id.* at 736-737. Section 2.2 is the opposite of specific.

CERTIFICATE OF SERVICE

I, Wendy D. Welkom, hereby certify that on December 11, 2017, I caused the foregoing **PLAINTIFFS' RESPONSIVE SUPPLEMENTAL BRIEF REGARDING CONSTITUTIONAL DUE PROCESS ISSUES** to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Wendy D. Welkom
Wendy D. Welkom