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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Navajo Nation and Navajo Nation Gaming Enterprise,

Plaintiffs,

v.

United States Department of the Interior; Bureau of Indian Affairs; Interior Board of Indian Appeals; David Bernhardt, in his official capacity as the United States Secretary of the Interior, Tara Katuk Mac Lean Sweeney, in her official capacity as the Assistant Secretary of the Interior for Indian Affairs, and Allen Anspach, in his official capacity as the Acting Western Region Director of the Bureau of Indian Affairs,

Defendants.

No. 3:19-cv-08340-JJT

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS [DKT. NO 17]

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2013, the Hopi Tribe ("Hopi Tribe") applied to the United States Department of the Interior, Bureau of Indian Affairs ("BIA") to take certain land in to trust located in Northern Arizona. Since 2010, however, the land has been burdened by a Road Easement owned by Plaintiff, the Navajo Nation. The Road Easement is critically important because it is the only public access point from Interstate-40 to a casino owned by Plaintiff, the Navajo Nation Gaming Enterprise ("NNGE").

The Hopi Tribe disclosed the existence of the Road Easement to the BIA in its fee-to-trust application: it referred to the Road Easement directly, its title insurance policy submitted to the BIA excepted the Road Easement from coverage, and the deed proposed by the Hopi Tribe included Plaintiffs' Road Easement as part of the property to be acquired by the United States in trust. Nevertheless, the United States took the property into trust for the Hopi Tribe without providing actual written notice of its intention to do so. Plaintiffs, as interested parties, had no opportunity to be heard promptly as to their significant, substantive interest in the Road Easement. It should be no surprise to the Defendants that, later, a jurisdictional dispute arose between the Hopi Tribe and Plaintiffs as to the Road Easement. Plaintiffs were left scrambling to protect their lawful interest in the Road Easement.

Under the BIA's regulations, this conflict should have been resolved before the dispute arose. Indeed, the BIA is obligated to, among other things, consider with a fee-to-trust application, any "[j]urisdictional problems and potential conflicts of land use which may arise." 25 CFR § 151.10(f). The regulation exists so that disputes are resolved *before* a tribe has the authority to assert sovereign control over the land.

Not only did the BIA fail to afford the Plaintiffs this opportunity, they wholly failed to notify Plaintiffs of the decision to take the land in to trust. This, too, constitutes a violation of BIA regulations, which require "prompt" notice to all interested parties and an

opportunity to appeal. As a result of Defendants' violations, the Plaintiffs are subject to ongoing and continuous risk of material interference of their lawful property rights.

Despite this, Defendants move to dismiss Plaintiffs' complaint for lack of standing under Rule 12(b)(1) and for failure to make a claim under Rule 12(b)(6). Defendants argue that Plaintiffs have only alleged a "bare procedural harm," that Defendants' actions are not linked to Plaintiffs' harm, and that Plaintiffs have suffered no harm at all. Doing so, Defendants do not present all of the pertinent facts or the applicable law. In short, Plaintiffs have satisfied all pleading requirements at this stage in the litigation and Defendants' Motion should be denied.

II. BACKGROUND AND RELEVANT FACTS

A. Context

The Indian Reorganization Act ("IRA") [48 Stat. 984, 25 U.S.C. § 5108 et seq. (June 18, 1934)] provides the Secretary of the Department of the Interior (the "Secretary") the discretion to acquire trust title to land or interests in land for eligible Indian Tribes. In addition, Congress may also authorize or mandate that the Secretary acquire title to particular land and interests in land into trust under statutes other than the IRA.

Congress enacted the Navajo-Hopi Land Dispute Settlement Act of 1996, P.L. 104-301, 110 Stat. 3649, in an effort to finally settle longstanding disagreements between the two Tribes (the "Act"). The Act mandated that the United States take certain lands in to trust for the benefit of the Hopi Tribe subject to certain conditions.

Trust acquisitions are reviewed under regulations found under 25 CFR § 151.[1] Among other factors, and before land is taken into trust, the Secretary *must* consider the

[1] Although mandatory acquisitions are not ordinarily subject to 25 CFR 151, Section 7 of the Settlement Agreement, and express language in the Act makes all trust acquisitions subject to those regulatory rules. *See* S. 1973 Rep. No. 104-363, at 31 ("[A]ny action by the Department of the Interior to take land into trust for the Hopi Tribe will be subject to all existing applicable laws and regulations, including . . . 25 C.F.R. Part 151 . . . (which sets forth public comment procedure for the taking of lands into trust for tribes)); S. 1973 Rep. No. 104-363, at 40, § 7(i) ("[T]he Secretary, at the request of the [Hopi] Tribe and subject to all existing applicable laws and regulations (including . . . 25 CFR Part 151 . . .), will take the parcel into trust for the Tribe.").

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"purpose for which the land will be used," (25 CFR § 151.10(c)), and any "jurisdictional problems and potential conflicts of land use which may arise. . . . " 25 CFR §151.10(f).[2]

B. Key Factual Statements

The Navajo Nation is a federally recognized Indian Tribe and NNGE is an instrumentality of the Navajo Nation. (Dkt. 1 at ⁋ 1.) The NNGE owns and operates a casino located in the Twin Arrows area of Northern Arizona, just east of Flagstaff. (*Id*. at ⁋ 18.) The Casino is not directly accessible from Interstate-40, but, in 2010, the Nation acquired an easement on adjacent land that grants access thereto (the "Road Easement"). (*Id*. at ⁋ 19.) The Road Easement is recorded in the Coconino County Recorder's Office. (*Id*.)

On August 22, 2012, the Hopi Tribe applied to the BIA Western Regional Director to take newly purchased property ("Hopi property") adjacent to NNGE's Twin Arrows Casino into trust ("Hopi's fee-to-trust application"). (*Id*. at ⁋ 18-25.) The Road Easement run through the Hopi property. The Hopi Tribe had purchased the land on June 11, 2012, from private landowners Steven and Patsy Drye (the "Dryes") pursuant to a special warranty deed ("Hopi Fee Deed"). (*Id*. at ⁋ 19; Dkt. 17-2.) The Hopi Tribe disclosed the existence of the Road Easement to the BIA in its fee-to-trust application. (Dkt. 1 at ⁋ 26.)

On December 16, 2013, the Western Regional Director issued a Letter Decision to the Hopi Tribe approving its fee-to-trust application. (*See* Dkt. 1 at ⁋ 27; **Ex. 1**.[3]) The Letter Decision makes no mention of the Road Easement or controlling regulation 25 CFR § 151.10(f) or any facts demonstrating that the BIA considered any "jurisdictional problems and potential conflicts of land use which may arise." (*Id*.) Similarly, the Western

[2] In addition to 25 CFR 151 regulations, the Department of the Interior is also obligated to abide by all federal laws, including NEPA. *See* 25 CFR § 151.13. This means, for example, that even for mandatory acquisitions, review of a fee-to-trust application requires the BIA to consider the type of environmental analysis appropriate for the property and its intended use.

[3] In ruling on a motion to dismiss for failure to state a claim, the court may consider documents referred to in the complaint, documents that are central to the plaintiff's claim, and documents that no party questions the authenticity of. *Ranch Realty, Inc. v. DC Ranch Realty, LLC*, 614 F. Supp. 2d 983, 987-88 (D. Ariz. 2007).

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Regional Director did not provide actual written notice of the Letter Decision to the Nation or NNGE at the time the Letter Decision was issued or within a reasonable time thereafter. (Dkt 1 at ⁋ 28; *see* 25 CFR 151.12(d)(2)(ii)(A) (the Secretary is required to promptly provide written notice to "Interested parties who have made themselves known, in writing, to the official prior to the decision being made.").)

On January 19, 2014, the Western Regional Director placed the Hopi property into trust pursuant to a special warranty deed recorded on April 25, 2014 ("Hopi Trust Deed"). (Dkt. 1 ⁋ 30; **Ex. 2**.) The Hopi Trust Deed does not mention the Road Easement, nor does it make the acquisition "subject to" the Road Easement. (*Id*.)

In around May 2015, the Hopi Tribe asserted it had jurisdiction over the Road Easement; NNGE disagreed. (Dkt. 1 at ⁋ 31.) Despite Plaintiffs' efforts, the parties have been unable to resolve this dispute. (*Id*. at ⁋ 32.) As a result, on March 1, 2016, the Nation submitted a FOIA request to the BIA seeking Hopi's fee-to-trust application and related documents, including the Letter Decision (*Id*. at ⁋ 33.) The BIA responded and provided written notice of its Letter Decision on July 26, 2016. (*Id*. at ⁋ 34.)

Within 30 days, Plaintiffs timely appealed the Letter Decision with the Interior Board Of Indian Appeals ("IBIA") on multiple grounds. (*Id*. at ⁋ 35.) The IBIA dismissed the appeal as untimely, which constitutes a final agency action under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 704, 45 CFR § 4.312. (*Id*. at ⁋ 36.)

Plaintiffs filed their Complaint on December 13, 2019, alleging five claims, and asking this Court to remand the case to the IBIA to hear the case on the merits. (Dkt 1.) On March 19, 2020, the Defendants filed their Motion to Dismiss ("Motion"). (Dkt. 17.)

III. ARGUMENT

Defendants move to dismiss Plaintiffs' Complaint for lack of standing and for the failure to plead the deprivation of a protected property interest. (Dkt. 17.) Defendants arguments, however, are based only on partial facts and a superficial presentation of applicable law. All arguments fail.

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First, contrary to Defendants' arguments, Plaintiffs *have* alleged the deprivation of a concrete property right; specifically, the deprivation of the right to fully enjoy the Road Easement if the Hopi Tribe has jurisdiction and its laws apply. The alleged harm is more than a "bare procedural violation."

Second, Defendants argument that Plaintiffs have suffered no harm because the Hopi Fee Deed is "subject to" the Road Easement is specious. There are *two* relevant property deeds: (1) the Hopi Fee Deed, and (2) the Hopi Trust Deed. The former identifies the Road Easement, but the latter does not. That latter deed, and the decision to place the burdened land in to trust for the Hopi Tribe, is the genesis of this lawsuit. It was arbitrary and capricious and contrary to law for the United States to place in to trust the Hopi property without applying its own regulations and, among other things, considering the jurisdictional dispute or potential conflict that might arise given the location and nature of the Road Easement.

Third, neither Rule 8 nor the applicable regulations require Plaintiffs to allege detailed or specific facts describing the nature of their jurisdictional dispute with the Hopi Tribe. Rather, Plaintiffs need only provide a short and plain statement that they are entitled to relief. Plaintiffs have met that standard.[4]

Fourth, Defendants argue Plaintiffs' injury is not "fairly traceable" to their conduct because of the lack of an arbitrary temporal connection between the Letter Decision and Plaintiffs' appeal. But the passage of time by itself is not determinative. Plaintiffs have alleged a "line of causation" between their harm and Defendants' action or inaction, which is sufficient to meet the jurisdictional threshold.

Finally, Defendants assert that Plaintiffs' due process claims should be dismissed because Plaintiffs have not pled the deprivation of a property interest. But this is not true. Defendants have caused a substantial interference and deprivation of Plaintiffs' substantive property rights, which the procedural regulations are designed to protect.

[4] Should the Court disagree, and rule that Plaintiffs have not properly pled their claims, Plaintiffs request permission of the Court to submit an amended pleading.

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A. Plaintiffs have Standing to Assert their Claims

"[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The constitutional limits of Article III standing involve three components designed to ensure that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy.'" *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). First, there must be "a distinct and palpable injury to the plaintiff, be it threatened or actual; second, a fairly traceable causal connection between that injury and the challenged conduct of the defendant; and third, a substantial likelihood that the relief requested will redress or prevent the injury." *McMichael v. Napa Cty.*, 709 F.2d 1268, 1270 (9th Cir. 1983) (internal citations and quotations omitted).

While the party seeking to invoke the court's jurisdiction has the burden of establishing standing, "'[w]hen confronted with a motion to dismiss for want of standing, the court must accept each material allegation in the complaint as true and construe the complaint in favor of the complainant.'" *In re Arizona Theranos, Inc., Litig.*, 256 F. Supp. 3d 1009, 1041 (D. Ariz. 2017), on reconsideration in part, No. 2:16-CV-2138-HRH, 2017 WL 4337340 (D. Ariz. Sept. 29, 2017) (internal quotation omitted). Similarly, the proof necessary to confer standing depends upon the stage of litigation. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice,'" and the court "'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992).

1. Plaintiffs have alleged more than a "Bare Procedural Violation"—Defendants have Deprived Plaintiffs of a Property Right

Defendants first argue that Plaintiffs do not have standing because "the principal

harms that Plaintiffs allege in their Complaint—the deprivation of their ostensible right to notice and an opportunity to appeal—are bare procedural harms that 'alone, cannot confer Article III standing.'" (Dkt. 17 at 9 (quoting *Rey*, 622 F.3d at 1257.)

But Defendants have not analyzed the applicable legal test in these circumstances. *See Patel v. Facebook, Inc.,* 932 F.3d 1264, 1270 (9th Cir. 2019); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) (*"Spokeo II"*). Defendants are not wrong in recognizing that Plaintiffs have experienced a violation of their procedural rights. But Defendants miss that this violation directly caused the deprivation of Plaintiffs' substantive property rights. The two wrongs are inextricably intertwined, and it is the ultimate deprivation of Plaintiffs' substantive property rights that forms the basis of their Complaint and vests this Court with Article III standing.

a. Alleging a Violation of a Statute or Regulation can be Sufficient to Constitute an Injury in Fact

Standing requires an "injury in fact," which in turn necessitates "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Patel*, 932 F.3d at 1270. Defendants cite *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016) ("*Spokeo I*") and other cases to argue that "[a] plaintiff asserting a procedural injury must point to a separate 'threatened concrete interest that is the ultimate basis of his standing' and one that the' procedures in question are designed to protect.'" (Dkt. 17 at 9 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). But that is only a superficial reading of the law.

Spokeo concerned a class action against a consumer reporting agency, alleging it willfully failed to comply with the Fair Credit Reporting Act (the "FCRA"). *Id*. at 1544. The Supreme Court remanded the case to the Ninth Circuit to analyze the concrete injury requirement for Article III standing in a way that recognizes that "*a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact; in such a case, a plaintiff need not allege any additional harm beyond the one identified by*

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Congress." *Id.* at 1544 (emphasis added).

On remand, the Ninth Circuit ruled that "there is sufficient injury in fact when a defendant's statutory violation creates a 'risk of real harm' to a plaintiff's concrete interest." *Spokeo II*, 867 F.3d at 1113. To determine whether an intangible harm constitutes an injury in fact, the Ninth Circuit adopted a two-step approach that asks:

> (1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.

Id.; Patel, 932 F.3d 1264, 1270–71 (9th Cir. 2019) (internal citations and quotations omitted).

Applying that test, the plaintiff in *Spokeo* alleged a concrete injury because (1) the FCRA's provisions at issue were established to protect consumers' concrete interest in accurate credit reporting, *id*. at 1113–15, and (2) defendants' alleged violations showed a risk of harm to the statute's underlying concrete interests. *Id*. at 1115–17.

Like the plaintiff in *Spokeo*, Plaintiffs have alleged a concrete injury-in-fact to meet Article III standing requirements. 25 CFR §151 regulations are designed to clarify competing property owners' legal rights and interests. Defendants' violations of these provisions deprived Plaintiffs of the right to assert, defend, and protect their significant substantive property right in the Road Easement.

To that end, Plaintiffs allege that Defendants violated 25 CFR §§ 151.10 and 151.12. (Dkt. 1 at ¶¶ 40-70.) 25 CFR § 151.10 requires the Secretary to evaluate "[j]urisdictional problems and potential conflicts of land use which may arise." *See Cnty. of Charles Mix v. U .S. Dep't of Interior,* 799 F.Supp.2d 1027, 1046 (D.S.D.2011) ("[DOI] fulfills its obligation under Section 151.10(f) as long as it 'undertake[s] an evaluation of potential problems.'"). 25 CFR § 151.12(d)(2)(ii)(A) requires the Secretary to "[p]romptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision. . ., by mail or personal delivery to: (A) Interested

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parties who have made themselves known, in writing, to the official prior to the decision being made." And, similarly, 25 CFR § 2.7(a) states that "[t]he official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail."

These regulations were promulgated pursuant to the IRA, which "provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 220 (2005). As explained in *City of Sherrill*, "[t]he regulations implementing [25 U.S.C.] § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Id*. at 220–21. Given these potential issues, the BIA has proclaimed that:

> The Department takes all reasonable and necessary steps to uncover any adverse claims to the property before acquiring the land in trust. In addition, the applicant secures title insurance for the property, adding *another measure of certainty that the applicant and the decision-maker have taken all reasonable and necessary steps to ensure that anyone with a competing interest in the property is identified, and their interest is resolved, prior to the transfer of the property into trust*.

78 Fed. Reg. 67928-01 (emphasis added).

Thus, the Section 151 regulations are "not mere procedural or technical requirements." *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1029 (9th Cir. 2020). They are designed to protect the very concrete property interests of State and local governments and any other person "whose interests could be adversely affected by a decision in an appeal." 25 CFR § 2.2 (defining "interested party"). The regulations serve to avoid the very legitimate problems, which the Supreme Court recognized in *City of Sherrill*, that may arise when an Indian Tribe regains sovereign control over land through a trust acquisition. The BIA recognizes the material risk of harm to competing property owners and governmental units should they not be given the opportunity to protect their lawful property rights.

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Thus, although a violation of Section 151 regulations may seem "procedural" in nature, the BIA has formally announced that they have been promulgated in order to ensure the protection of the lawful rights of States, local governments, and interested parties in the context of a land acquisition. Plaintiffs assertion of these violations compounded with the real property rights at issue and subject to interference are sufficient for standing purposes.[5]

2. Plaintiffs' Property Rights were not Preserved in the Relevant and Challenged Property Deed

Defendants also argue that Plaintiffs have not suffered an actual harm because the Hopi Fee Deed conveyed the land underlying the Road Easement "'subject' to all 'matters of record in the Official Records of the Coconino County Recorder's Office.'" (Dkt No. 17 at 10.) Since the Road Easement "run[s] with the land" and is "governed" by Arizona law, the Defendants suggest "one cannot seriously dispute that the Hopi Tribe acquired the property subject to the Road Easement," and "the Regional Director's Letter Decision (as well as BIA's subsequent trust acquisition) ***did not*** "strip," extinguish, or otherwise impair any property rights that Plaintiffs ostensibly held in the Road Easement but rather preserved those rights." (*Id.*). This argument is a red herring.

Plaintiffs have not challenged the transaction between the Dryes and the Hopi Tribe, which culminated in the Hopi Fee Deed. Rather, the Complaint concerns the United States' acquisition of the Hopi property to hold in trust for the Hopi Tribe. *That* transaction is entirely different, and culminated in the Hopi Trust Deed. The difference in the two transactions only highlights the Defendants' egregious disregard of the Plaintiffs' interest in the Road Easement.

Indeed, although (1) the Hopi Fee Deed references the Road Easement, (Dkt 17-2),

[5] *Summers v. Earth Island* Institute, 555 U.S. 488 (2009), cited by Defendant, does not change this conclusion. In *Summers*, the alleged injuries were distinguishable from those alleged here, as the regulations complained about did not directly affect the plaintiffs. Unlike here, those plaintiffs challenged certain regulations in the abstract, without "any concrete application that threatens harm to his interests." *Id.* at 494.

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(2) Hopi's fee-to-trust application referenced the Road Easement, (Dkt. 1 at ¶ 26), (3) the title insurance policy submitted with Hopi's fee-to-trust application excepted the Road Easement from coverage, (*id.*), and (4) the proposed deed submitted with Hopi's fee-to-trust application included the Road Easement and identified the recorded instrument documenting the Road Easement, the United States took the Hopi property in to trust and recorded the Hopi Trust Deed with no reference to Plaintiffs' Road Easement in either the legal description or a protective clause making the conveyance "subject to" the Road Easement (language Defendants cite as included in the Hopi Fee Deed) and without providing written notice to Plaintiffs of their intention to accept the land underlying Plaintiffs' Road Easement in trust for the Hopi Tribe. To suggest that Plaintiffs' rights were somehow "preserved" in that process is specious.

3. Plaintiffs Properly Alleged the Existence of a Dispute with the Hopi Tribe

Defendants also argue that Plaintiffs have failed to allege "specific facts describing the nature of their disagreement with the Hopi Tribe," including "any facts showing how the Hopi Tribe's assertion of jurisdiction adversely affected or harmed Plaintiffs themselves." (Dkt. 17 at 11.) But Defendants ask this court to hold Plaintiffs to a standard higher than that required at the pleading stage.

A Rule 12(b)(1) motion to dismiss for lack of standing can only succeed if the plaintiff has failed to make "general factual allegations of injury resulting from the defendant's conduct." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("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 factual allegations embrace those specific facts that are necessary to support the claim.'") (citation and alteration omitted); *Bernhardt v. L.A. County,* 279 F.3d 862, 869 (9th Cir. 2003).

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In the context of a claim for judicial review under the APA, a plaintiff need only (1) "identify some 'agency action' that affects him in the specified fashion," and (2) show that "he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990) (*quoting* 5 U.S.C. § 702). "[T]o be 'adversely affected or aggrieved ... within the meaning' of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Id.* at 883.[6]

Plaintiffs have met the pleading standard. Plaintiffs have identified an agency action: the Defendants' failure to comply with Section 151 regulations. (Dkt. 1, *generally*.) And, the Plaintiffs have alleged they were adversely affected or aggrieved as a result—specifically, that the Hopi Tribe asserted jurisdiction over the Road Easement, which threatens Plaintiffs' property rights. (*Id*. at ¶ 31-32.) In this way, Plaintiffs have alleged "a (1) legally recognized injury, (2) caused by the named defendant that is (3) capable of legal or equitable redress." *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002).

Critically, Plaintiffs' injury affects *them* and falls within the "zone of interests" sought to be protected by the agency's regulations. The BIA's notice provisions are designed to protect interested parties who may have competing property claims with a Tribe applying to place land in to trust. *See,* 78 Fed. Reg. 67928-01, *supra*.

Thus, Plaintiffs adequately pled their harm, and additional allegations regarding their dispute with the Hopi Tribe are not required to establish standing.

4. The Alleged Harm is Fairly Traceable to Defendants as there is a Causal Link between the Harm and Defendants' Conduct

Defendants next argue that Plaintiffs "cannot show their alleged harm is fairly

[6] The zone-of-interest test applies to regulations as well as statutes. *Dan Caputo Co. v. Russian River Cty. Sanitation Dist*., 749 F.2d 571, 575 (9th Cir. 1984).

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traceable to the Regional Director's Letter Decision or subsequent trust acquisition." (Dkt. 17 at 12.) Defendants' argument is seemingly based on the time gap between the issuance of the Letter Decision and Plaintiffs' dispute with the Hopi Tribe. (*Id.*) This argument is unsupported by case law. Article III standing requires the alleged injury be fairly traceable to its alleged cause, *see, e.g.*, *Summers*, 555 U.S. at 492, and temporal considerations are not wholly determinative.

For purposes of Article III standing, an injury is "fairly traceable" when there is a causal link between the alleged injury and alleged cause. *See, e.g.*, *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citations omitted). This is the case even if the causal chain has "several links," so long as the relationship between them is plausible. *Id.* (internal quotations and citations omitted). The injury remains fairly traceable to the alleged misconduct despite the existence of other contributing causes. *See, e.g.*, *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011); *Isabel v. Regan*, 394 F. Supp. 3d 966, 973 (D. Ariz. 2019). And, "Plaintiffs' alleged injuries does not cease simply because there are others who are necessary links in the causal chain." *Planned Parenthood Arizona, Inc. v. Brnovich*, 172 F. Supp. 3d 1075, 1094 (D. Ariz. 2016).

Plaintiffs' injury is both fairly and clearly traceable to Defendants' actions (or inaction). Plaintiffs' alleged harm includes the deprivation of their right to fully enjoy the Road Easement without interference from, or dispute with, the Hopi Tribe. (Dkt. 1 ¶ 31.) This harm is traceable to the Defendants' failure to provide notice to Plaintiffs of the Letter Decision in an effort to resolve jurisdictional or other potential conflicts either before the land was taken in to trust, or promptly thereafter.

Contrary to Defendants' assertions, Plaintiffs' injury was not caused by the independent action of a third party not before the court. (Dkt. 17 at 12). According to agency regulations, the Western Regional Director, not the Hopi Tribe, was required to resolve jurisdictional conflicts and provide Plaintiffs' with notice of the fee-to-trust action. (Dkt. 1 at ¶ 28; 25 CFR § 151.12(d)(2)(ii)(A)). To the extent that the Hopi Tribe's actions

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are related to Plaintiffs' claims, Plaintiffs have adequately alleged that Defendants "unlawful conduct is at least a substantial factor motivating the third parties' actions" because Defendants failure to do so led to precisely the type of dispute the regulations were designed to prevent. *Novak v. U.S.*, 795 F.3d 1012, 1019 (9th Cir. 2015) (internal citation omitted)).

Defendants acquired the Hopi property to hold in trust for the Hopi Tribe without affording the Plaintiffs any meaningful opportunity, at all, to weigh in or comment on the application process despite that the Road Easement burdens the Hopi property and correspondingly benefits the Plaintiffs' neighboring parcel. Defendants' violations of 25 CFR § 151 allowed—and perhaps emboldened—the Hopi Tribe to assert jurisdiction over the Road Easement, creating uncertainty in Plaintiffs' ability to rely on the Road Easement for access to its casino. The Hopi Tribe's actions do not break the causal link between Defendants' actions (or inactions).

B. <u>Defendants' Failure to Provide Proper Notice Caused Plaintiffs to be Deprived of a Substantive Interest.</u>

In addition to their standing arguments, Defendants also move for dismissal under Rule 12(b)(6), arguing that Plaintiffs have not made out a claim for procedural due process. But contrary to Defendants' arguments, Plaintiffs do not merely allege a procedural violation; instead, they allege that the Defendants' actions have led to the deprivation of a substantive property right. Under Federal Rule of Civil Procedure 12(b)(6), a complaint should not be dismissed unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019) (internal citation omitted), and Plaintiffs have met that standard.

First, under Ninth Circuit law, "[w]hen an easement owner is deprived of some aspect of its property right, the owner may seek damages and injunctive relief." *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 763 (9th Cir. 2003). Plaintiffs

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have alleged its jurisdictional dispute with the Hopi Tribe that should have been resolved by the Defendants before the dispute arose. These allegations are sufficient to show that some aspect of its property right has been infringed upon.

Second, Defendants cite multiple cases to argue that the existence of a procedural right does not automatically create a substantive right. (Dkt. 17 at 14). But these cases are not persuasive here.

Defendants' focus on *Fusco v. State of Conn.*, 815 F.2d 201 (2d Cir. 1987) serves only to highlight the merit of Plaintiffs' claims. In *Fusco*, certain property owners alleged they were not provided proper notice of certain zoning and planning matters pertaining to immediately adjacent land. 815 F.2d at 202-04. They also alleged that applicable zoning statutes are unconstitutional as they do not require actual notice of hearings pending before zoning commissions or zoning boards of appeals to aggrieved parties, and that their property values would decline as a result of the failure to afford an opportunity to be heard. *Id.* at 204.

The Second Circuit, however, affirmed the district court's dismissal of plaintiffs' due process claims, reaffirming that "[t]he opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural . . . ." *Id*. at 205–06 (*citing BAM Historic District Association v. Koch,* 723 F.2d 233, 236–37 (2d Cir. 1983)). And, a decline in property values is insufficient for purposes of a due process claim. *Id*. Crucially, the *Fusco* court stressed that, absent rule-making by state and local legislative bodies, there is no constitutional right to public participation in governmental decisions that impact or affect neighborhood life. *Id.*; *Koch*, 723 F.2d at 237 ("Plaintiffs are not claiming that their property has been taken or their use of it so drastically regulated as to destroy its value.").

The *Fusco* court distinguished *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791 (1983). *Id.* In *Mennonite*, the Supreme Court held that an Indiana statute that required only constructive notice to mortgagees of impending tax foreclosure sales violated a

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mortgagee's due process. *Id.* at 798. The Court held that "[s]ince a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale," and "[n]either notice by publication and posting, nor mailed notice to the property owner, are means such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." *Id.* at 799 (internal citations and quotations omitted).

Here, Plaintiffs have alleged that Defendants violated certain procedural regulations that led to the deprivation of their substantive property right in the Road Easement. This is not merely a zoning matter; it pertains to an acquisition of land that comes with certain rights only a sovereign entity may assert. Plaintiffs do not merely claim that they were denied the opportunity to be heard *in vacuo*, nor do they merely seek to participate in decision-making affecting neighborhood life; rather, Plaintiffs allege they own a Road Easement that runs through the very land the Defendants acquired for the Hopi Tribe. (Dkt. 1 ¶ 19.) The Road Easement is the only commercially reasonable way to access Plaintiffs' casino property. (Dkt. 1 ¶ 20.) The Road Easement, therefore, is tremendously vital to the very purpose of their adjacent land. *Any* conflict or dispute over the jurisdiction of the Road Easement poses a significant threat and risk of harm to Plaintiffs, and the United States Defendants had an obligation under 25 CFR § 151 to consider and address these issues prior to placing the Hopi property in to trust. Their failure to do so forms the basis of Plaintiffs' claims.

IV. CONCLUSION

For the foregoing reasons, this court should deny Defendants' Motion to Dismiss, (Dkt. 17), and should allow Plaintiffs to proceed in to the next stage of litigation. Plaintiffs have alleged sufficient facts to demonstrate that they have Article III standing and this court has jurisdiction over the asserted claims.

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DATED this 4th day of May, 2020

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By: */s/ Marla J. Hudgens*
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CERTIFICATE OF SERVICE

I certify that on this 4th day of May, 2020, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following registrants:

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