GARY M. RESTAINO
United States Attorney
District of Arizona
WILLIAM C. STAES
Assistant U.S. Attorney
Illinois State Bar No. 6314835
40 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-4449
Telephone: (602) 514-7500
Main Fax: (602) 514-7693
Email: William.Staes@usdoj.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Navajo Nation and Navajo Nation Gaming Enterprise, Plaintiffs, v. U.S. Department of the Interior, *et al.*, Defendants.	No. CV-19-08340-PCT-JJT **DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendants, through undersigned counsel, move to dismiss Claims One, Three, and Five of Plaintiffs' First Amended Complaint (Doc. 31) under Federal Rule of Civil Procedure 12(b)(6). This motion is supported by the below memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The Navajo Nation and Navajo Gaming Enterprise ("NNGE") commenced this action seeking to challenge a decision that the Bureau of Indian Affairs ("BIA") made in December of 2013 to take fee land into trust on behalf of the Hopi Tribe pursuant to the Navajo-Hopi Land Dispute Settlement Act of 1996. The Act mandated that the BIA acquire the land in trust, on behalf of the Hopi Tribe, once the requirements in the Act were met.

Plaintiffs' First Amended Complaint ("FAC")—the operative pleading—alleges that the Western Regional Director of the BIA ("Regional Director") issued a decision (the "Letter Decision") approving the Hopi Tribe's fee-to-trust application without providing Plaintiffs actual written notice or an opportunity to appeal, despite Plaintiffs' recorded property interest

in a non-exclusive easement over the subject land. Plaintiffs' allegations describe a dispute between Plaintiffs and the Hopi Tribe regarding transportation of alcohol over the easement that developed following the Regional Director's Letter Decision and the BIA taking the underlying property into trust on behalf of the Hopi Tribe. More specifically, Plaintiffs allege that the Hopi Tribe asserted that Hopi tribal law applied to the easement and prohibited Plaintiffs from transporting alcohol over the easement to their casino. Plaintiffs allege that they have suffered monetary and non-monetary harm as a result of the Hopi Tribe's assertion of jurisdiction over the easement, which would not have occurred but for Defendants taking the underlying land into trust without providing Plaintiffs actual written notice.

Similar to Plaintiffs' original complaint, the FAC includes five claims. Plaintiffs assert that the Regional Director misinterpreted BIA's notice regulations, 25 C.F.R. § 151.12(d)(2)(ii)(A)–(B), violating the Administrative Procedure Act ("APA") and their procedural due process rights. Plaintiffs raise similar APA and procedural due process claims against the Interior Board of Indian Appeals ("IBIA") for dismissing their appeal of the Regional Director's Letter Decision—which they filed more than two-and-a-half years later—as untimely. Alternatively, Plaintiffs assert that 25 C.F.R. § 151.12(d)(2)(ii)(A)–(B), as interpreted by the Regional Director and the IBIA, is unconstitutional because it deprives Plaintiffs of procedural due process.

Although the FAC raises new allegations that expand upon the ostensible dispute between Plaintiffs and the Hopi Tribe that developed following the BIA's trust acquisition, Plaintiffs still cannot allege that the Regional Director, the IBIA, or the BIA's notice regulations, codified at 25 C.F.R. § 151.12(d)(2)(ii)(A)-(B), deprived them of a property interest protected by the Fifth Amendment. Accordingly, their procedural due process claims (Claims One, Three, and Five) should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

A. Legal and Regulatory Overview

Congress enacted the Navajo-Hopi Land Dispute Settlement Act of 1996, P.L.

104-301, 110 Stat. 3649, to settle longstanding disagreements between the Navajo Nation and the Hopi Tribe (the "Act"). Section 5(4) of the Act provides that, upon finding certain conditions satisfied, "the Secretary is directed to take lands into trust under this Act expeditiously and without undue delay."

When a BIA official approves a fee-to-trust application, BIA regulations require the official to provide written notice of the decision, by mail or personal delivery, to "[i]nterested parties who have made themselves known, in writing, to the official." 25 C.F.R. § 151.12(d)(2)(ii)(A). The regulations also require the official to "publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision." 25 C.F.R. § 151.12(d)(2)(iii). The regulations specify that "[t]he administrative appeal period . . . begins on . . . [t]he date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii)," 25 C.F.R. § 151.12(d)(3)(ii), and "[a]ny party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 C.F.R. part 2."[1] 25 C.F.R. § 151.12(d)(4).

B. Relevant Procedural History

On December 13, 2019, Plaintiffs commenced this action by filing a complaint for declaratory and injunctive relief against Defendants. (Doc. 1.) Plaintiffs' complaint sought to challenge a decision that the BIA made in December of 2013 to take certain lands into trust on behalf of the Hopi Tribe under the Settlement Act, along with the IBIA's subsequent dismissal of Plaintiffs' appeal of that decision. (*See id.*) The complaint included five claims: three procedural due process claims and two claims under the Administrative Procedure Act ("APA"), which generally asserted that the Regional Director and the IBIA misinterpreted the BIA's notice regulations, 25 C.F.R. § 151.12(d)(2)(ii)(A)–(B), in violation of the APA and the Due Process Clause of the Fifth Amendment or, alternatively, that 25 C.F.R. § 151.12(d)(2)(ii)(A)–(B) is unconstitutional because it deprives Plaintiffs of procedural due process. (*Id.* at ¶¶ 46, 47, 49, 56, 61-62, 65.)

[1] 25 C.F.R. Part 2 starts with 25 C.F.R. § 2.1 and continues through 25 C.F.R. § 2.21.

On March 19, 2020, Defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. 17.) In their motion under Rule 12(b)(1), Defendants argued that the complaint should be dismissed for lack of subject matter jurisdiction because Plaintiffs had failed to allege sufficient facts to establish Article III standing. (*Id.* at 8-12.) Alternatively, Defendants moved to dismiss Plaintiffs' claims pursuant to the Due Process Clause of the Fifth Amendment under Rule 12(b)(6), arguing that Plaintiffs had failed to show that either Defendants or the notice provisions of 25 C.F.R. § 151.12 deprived Plaintiffs of a property interest protected by the Fifth Amendment. (*Id.* at 12-15.)

On November 23, 2020, the Court issued an Order granting Defendants' motion to dismiss and dismissing the complaint for lack of subject matter jurisdiction, holding that "Plaintiffs have failed to allege a concrete and particularized injury that is fairly traceable to Defendants' actions." (Doc. 23 at 8.) In doing so, the Court found that Plaintiffs had "not established that their property interest in the [Road Easement] was somehow extinguished or otherwise adversely affected" by the United States' trust acquisition, and thus the Court held that Plaintiffs' allegations amounted to a "'bare procedural violation, divorced from any concrete harm,'" which is insufficient to establish Article III's injury-in-fact requirement. (*Id.* at 7.) The Court further held that Plaintiffs had not shown that their alleged injury was "fairly traceable" to Defendants' challenged actions, as opposed to the "'independent action of some third party not before the court,'" based upon its finding that Plaintiffs "failed to demonstrate that Defendants' actually deprived Plaintiffs of any property rights." (*Id.* at 7-8.) Having determined that Plaintiffs failed to establish their standing to sue under Article III, the Court did not resolve Defendants' motion under Federal Rule of Civil Procedure 12(b)(1). (*Id.* at 3 n.2.) The Clerk of Court entered judgment later that same day, dismissing the case for lack of subject matter jurisdiction pursuant to the Court's Order. (Doc. 24.) On December 22, 2020, Plaintiffs filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. (Doc. 25.)

On June 25, 2021, Plaintiffs filed a motion for leave to amend or to supplement the record in the Ninth Circuit. *See* Appellants' Motion for Leave to Amend or to Supplement the

Record, *Navajo Nation and Navajo Nation Gaming Enterprise v. U.S. Department of the Interior, et al.*, No. 20-17475, ECF No. 14 (9th Cir. June 25, 2021) ("*Navajo Parties v. USDOI*"). Plaintiffs' motion attached a number of exhibits, including a proposed first amended complaint, raising new allegations regarding Plaintiffs' standing to sue under Article III that were not before the Court when it ruled on Defendants' motion to dismiss. *See id.* at 13-415. Later that same day, Plaintiffs filed their opening brief on appeal, which incorporated these new materials and allegations in support of their arguments to the Ninth Circuit on Article III standing. *See generally* Appellants' Opening Brief, *Navajo Parties v. USDOI*, No. 20-17475, ECF No. 15 (9th Cir. June 25, 2021).

Recognizing that Plaintiffs' appellate filings raised new allegations that were not before the Court when it ruled on Defendants' motion to dismiss, the parties filed a joint motion and stipulation to remand the case and allow this Court to review Plaintiffs' new allegations in the first instance. *See* Joint Motion and Stipulation to Remand Case, *Navajo Parties v. USDOI*, No. 20-17475, ECF No. 22 (9th Cir. Sep. 22, 2021). On November 10, 2021, the Ninth Circuit issued an order granting the parties' joint motion, vacating the Court's judgment of dismissal, and remanding the case. *Id.* at ECF No. 23. On January 3, 2022, the Ninth Circuit issued a mandate pursuant to Federal Rule of Appellate Procedure 41(a) and its remand order took effect. *Id.* at ECF No. 24.

C. The First Amended Complaint and Matters Subject to Judicial Notice

Following the Ninth Circuit's remand order, Plaintiffs filed a First Amended Complaint ("FAC") in this Court on April 29, 2022. (Doc. 31.) According to the FAC, in August 2010, NNGE acquired 435 acres of land in northern Arizona for the purpose of developing a casino. (FAC, ¶ 18.) To make the property accessible, NNGE entered into an easement agreement with Steven and Patsy Drye (the "Dryes"), granting NNGE and the public a perpetual, non-exclusive easement across the Dryes' land for the purpose of pedestrian and vehicular access, ingress, and egress (the "Road Easement"). (FAC, ¶ 19.)

On August 16, 2010, NNGE recorded its interest in the Road Easement in the Coconino County Recorder's Office, at Record No. 3570615. (FAC, ¶ 19; Amended and

Restated Declaration of Easement Agreement, August 16, 2010, Official Records of Coconino County No. 3570615, attached as **Exhibit A**.) The recorded instrument provides that the Road Easement "shall run with the land" and be "governed" by "the laws of the State of Arizona." (Ex. A, ¶¶ 3-4; FAC, ¶ 20.) "[A]t the time the Road Easement was granted, it was legal under the laws of Arizona to transport alcohol over the Road Easement," and according to Plaintiffs, the parties to the easement "intended that [NNGE] would have the right, ability, and power to transport alcohol over the Road Easement." (FAC, ¶ 21.) Plaintiffs allege that, since NNGE opened its casino to the public in 2013, NNGE and vendors "have regularly transported alcohol over the Road Easement pursuant to liquor licenses validly issued under Arizona and Navajo law." (*Id.*, ¶ 23.) Plaintiffs further allege that "transport[ing] alcohol over the Road Easement is essential" to NNGE's business operations. (FAC, ¶ 24.)

On June 11, 2012, the Dryes sold their interest in certain lands to the Hopi Tribe (the "Hopi Property"). (FAC, ¶ 28.) The Dryes conveyed the land to the Hopi Tribe pursuant to special warranty deeds, which made the Hopi Property "subject" to "matters of record in the Official Records of the Coconino County Recorder's Office." (Special Warranty Deeds, June 11, 2012, Official Records of Coconino County No. 3629513, attached as **Exhibit B**.)[2] The Hopi Tribe then submitted a fee-to-trust application to the Regional Director, requesting that the BIA take the Hopi Property into trust. (FAC, ¶ 29.) According to Plaintiffs, the Hopi Property included the land underlying the Road Easement and the Hopi Tribe's fee-to-trust application acknowledged "Plaintiffs' interest in the Road Easement." (FAC, ¶¶ 28, 30.)

On December 16, 2013, the Regional Director issued a "Letter Decision" to the Hopi Tribe that approved their fee-to-trust application. (FAC, ¶ 33.) The Regional Director published notice of the Letter Decision in the Arizona Daily Sun three days later, on December

[2] As noted in Defendants' prior motion to dismiss (Doc. 17), the Court may take judicial notice of matters of public record, such as the Amended and Restated Declaration of Easement Agreement (**Exhibit A**) and the Special Warranty Deeds (**Exhibit B**), as both are publicly-recorded and publicly-available documents, filed in the Official Records of Coconino County at Record Nos. 3570615 and 3629513, respectively, and whose accuracy cannot reasonably be questioned. *See, e.g.*, *Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 768 (D. Ariz. 2012) (taking judicial notice of publicly-filed Trustee's Deed Upon Sale in ruling on motion to dismiss); *Kimbrew v. Bank of New York Mellon*, No. CV-13-02441-PHX-SRB, 2014 WL 12729164, at *1 (D. Ariz. Jan. 9, 2014) (warranty deed).

19, 2013. (FAC, ¶ 35.) Plaintiffs allege that the Regional Director "did not provide" them with "actual written notice of the Letter Decision," despite "know[ing] of Plaintiffs' recorded property interest in the Road Easement." (FAC, ¶ 34.) On or around January 19, 2014, the Regional Director took the Hopi Property into trust, with the deed ("Hopi Trust Deed") being recorded on April 25, 2014. (FAC, ¶ 36.) Plaintiffs allege that the Hopi Trust Deed did not mention the Road Easement or explicitly state that "the underlying land is being taken into trust subject to easements and matters of record." (FAC, ¶ 36.)

Plaintiffs allege that in or around May 2015 – approximately one-and-a-half-years after the Regional Director issued his Letter Decision – a dispute arose between the Hopi Tribe and NNGE with respect to the Road Easement. (FAC, ¶ 37.) The Hopi Tribe "asserted that it had jurisdiction over the Road Easement and that Hopi law prohibited the transport of alcohol over the Road Easement," and Plaintiffs "disagree[d] that Hopi tribal law applies to the Road Easement and that they are prohibited from transporting alcohol over the Road Easement." (FAC, ¶¶ 37, 50.) According to Plaintiffs, NNGE and the Hopi Tribe "made several unsuccessful efforts" to resolve their dispute over the Road Easement "[b]etween May 2015 and March 2016." (FAC, ¶ 32.) Plaintiffs allege that, despite pointing out that "the deed that transferred title to the Hopi Tribe made it clear that Hopi accepted the property subject to matters of record"—including the Road Easement—the Hopi Tribe continued to assert jurisdiction and "threatened" criminal and civil penalties for transporting alcoholic beverages over the Road Easement. (FAC, ¶¶ 42-43.) Ultimately, in late January 2016, Plaintiffs allege that the Hopi Tribe demanded that NNGE pay $1 million per year to transport alcohol over the Road Easement. (FAC, ¶ 44-45.) Plaintiffs allege that "it was Defendants' actions in taking the land underlying the Road Easement into trust . . . that gave rise to Hopi's assertion of jurisdiction," since prior to the trust acquisition "the land was indisputably not subject to Hopi's jurisdiction" even though the "Hopi Tribe was the owner of the land in fee simple." (FAC, ¶¶ 47-48.) Plaintiffs further allege that, "[b]y taking title to the underlying land, the United States deprived" them of the "legal right to protect their interest in the Road Easement through a quiet title action." (FAC, ¶ 53.)

On March 1, 2016, the Navajo Nation submitted a FOIA request to the BIA seeking the Regional Director's Letter Decision and related documents. (FAC, ¶ 54.) On July 26, 2016, the BIA provided the Navajo Nation with the Letter Decision and other documents pertaining to the trust acquisition. (FAC, ¶ 56.) Plaintiffs then filed a Notice of Appeal with the IBIA, seeking reversal of the Regional Director's Letter Decision approving the Hopi Tribe's fee-to-trust application. (FAC, ¶ 57). On May 7, 2019, the IBIA dismissed Plaintiffs' appeal as untimely and for lack of jurisdiction, concluding that Plaintiffs failed to file their Notice of Appeal within 30 days after receiving notice of the Letter Decision through publication in the Arizona Daily Sun on December 19, 2013. (FAC, ¶ 58; FAC at Ex. 8, 66 IBIA 237, 242.)

Similar to Plaintiffs' original complaint, the FAC includes five claims—three procedural due process claims and two APA claims. Claim One asserts that the Regional Director's "fail[ure] to provide Plaintiffs with actual written notice of the Letter Decision . . . depriv[ed] Plaintiffs of an opportunity to object and appeal the Letter Decision" in violation of procedural due process. (FAC, ¶¶ 68, 70.) Claim Two asserts that the Regional Director's interpretation of 25 C.F.R. § 151.12(d)(2)(ii)(A) was "unreasonable, arbitrary and capricious, and contrary to the Due Process Clause of the Constitution" in violation of the APA. (FAC, ¶ 72.) Claims Three and Four assert similar procedural due process and APA claims against the IBIA for "upholding" the Regional Director's interpretation 25 C.F.R. § 151.12(d)(2)(ii)(A). (FAC, ¶¶ 77, 84-85.) Finally, Claim Five asserts that 25 C.F.R. § 151.12(d)(2)(ii)(A)-(B) is "unconstitutional because it deprives Plaintiffs . . . of their due process rights to reasonable notice of an administrative decision and opportunity to be heard as necessary to protect recorded property rights." (FAC, ¶ 88.)

LEGAL STANDARD

A motion under Federal Rule of Civil Procedure 12(b)(6) "test[s] the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory," *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988), or a failure to allege "enough facts to state a claim to relief that is plausible," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff

must allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The court accepts as true all well-pleaded facts but is not required to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sci. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Nor is the court required to "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001). In ruling on motion under Rule 12(b)(6), the court may consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice" without "converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

ARGUMENT

Although the FAC raises new allegations describing a dispute between Plaintiffs and the Hopi Tribe that developed following the United States' trust acquisition, Plaintiffs still cannot establish that *Defendants* deprived them of a constitutionally protected property interest. Accordingly, Plaintiffs' procedural due process claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

I. Plaintiffs' Procedural Due Process Claims Should Be Dismissed Because Plaintiffs Have Not Been Deprived of a Protected Property Interest.

Plaintiffs' procedural due process claims (Claims One, Three, and Five) should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs cannot allege that the Regional Director, the IBIA, or the BIA's notice regulations, codified at 25 C.F.R. § 151.12(d)(2)(ii)(A)-(B), deprived them of a property interest protected by the Fifth Amendment.[3]

[3] In Claim Two, Plaintiffs assert that the Regional Director violated the APA because "his interpretation of 25 C.F.R. §§ 151.10, 151.12 (d)(2)(ii)(A)–(B) was unreasonable, arbitrary and capricious, and contrary to the Due Process Clause of the Fifth Amendment to the Constitution." (FAC, ¶ 72.) To the extent that Claim Two is premised on a violation of

"To obtain relief on a procedural due process claim, the plaintiff must establish the existence of (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008). Importantly, the requirements of procedural due process attach only to the deprivation of constitutionally protected liberty and property interests. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972); *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 972 (9th Cir. 2015). Thus, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Where, as here, Plaintiffs have not been deprived of a protected property interest, the Court need not "look to see if the . . . procedures" complained of "comport with due process." *Id.*

Here, the Regional Director's Letter Decision and the BIA's subsequent trust acquisition did not strip, extinguish, or otherwise impair any property right that Plaintiffs ostensibly held in the Road Easement. As explained in Defendants' prior motion to dismiss, the special warranty deeds conveying the land underlying the Road Easement (referred to as the "servient estate") to the Hopi Tribe made the land "subject" to all "matters of record in the Official Records of the Coconino County Recorder's Office," including the previously recorded Road Easement. (Ex. B; FAC, ¶¶ 19, 42.) The recorded Road Easement provides that it "shall run with the land" and be "governed" by Arizona law (Ex. A, ¶ 3), which holds that "[o]nce an easement is recorded, it runs with the land and burdens the servient estate's successors." *See, e.g.*, *Scalia v. Green*, 229 Ariz. 100, 102, 271 P.3d 479, 481 (Az. Ct. App. 2011). Given that the special warranty deeds explicitly made the Hopi Property subject to the Road Easement, along with Arizona easement law, there can be no dispute that the Hopi Tribe acquired the property subject to the Road Easement.[4]

In contrast to their original complaint (*see* Doc. 1. ¶ 1), Plaintiffs do not allege in their

Plaintiffs' procedural due process rights, it should also be dismissed.

[4] Notably, in ruling on Defendants' prior motion to dismiss, the Court recognized that "[b]oth parties agree that Plaintiffs' rights in the easement were preserved in the transaction between the Dryes and the Hopi Tribe." (Doc. 23 at 6.)

FAC that the Regional Director's Letter Decision or the BIA's subsequent trust acquisition extinguished any property rights that Plaintiffs held in the Road Easement. (*See generally* FAC.) Instead, Plaintiffs allege that "Defendants adversely affected [their] property interest" in the Road Easement "by taking the underlying land into trust without indicating that the government was taking the land into trust subject to recorded easements and property interests." (FAC, ¶ 69.) Yet Plaintiffs do not explain how the absence of such a clause in the Hopi Trust Deed "adversely affected" their alleged property interest in the Road Easement. Plaintiffs do not allege that the absence of such a clause in the Hopi Trust Deed itself extinguished any property rights that Plaintiffs held in the Road Easement. And while Plaintiffs assert that the Hopi Trust Deed "should be corrected to add language that the underlying land was acquired subject to easements and matters of record" (FAC, ¶ 50), it does not follow that the Regional Director's Letter Decision or the BIA's subsequent trust acquisition extinguished any property rights that Plaintiffs held in the easement.

In addition, to the extent Plaintiffs are alleging that the absence of such assurances emboldened the Hopi Tribe's in asserting jurisdiction over the Road Easement (FAC, ¶¶ 49-50), it is well established "indirect harm" from government action is not sufficient to assert a procedural due process violation. *See, e.g.*, *Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir. 1996) ("Procedural due process protections do not extend to those who suffer indirect harm from government action."); *Cohen v. Cty. of Santa Cruz*, No. 16-CV-06404-LHK, 2017 WL 467846, at *8 (N.D. Cal. Feb. 3, 2017). And, contrary to Plaintiffs' allegations, the Hopi Trust Deed need not have contained an explicit assurance that underlying land was being taken into trust subject to matters of record because the Hopi Tribe's acquisition of the property, and thus its subsequent trust conveyance to the United States, were already subject to the Road Easement under the property record and Arizona property law. Indeed, as the Court determined in ruling on Defendants' prior motion to dismiss, "a lack of explicit reference to the easement is not sufficient to demonstrate that the Hopi Trust Deed extinguished any rights Plaintiffs had in the easement." (Doc. 23 at 6.)

Plaintiffs also contend that the United States' trust acquisition deprived them of the

"legal right to protect their interest in the Road Easement through a quiet title action," which Plaintiffs claim "lessened the value of [their] property interest," because "trust lands . . . are exempt from the United States' waiver of sovereign immunity for quiet title actions in 28 U.S.C. § 2409a(a)." (FAC, ¶¶ 53, 69.) Plaintiffs do not expound upon this alleged deprivation or how it "lessened the value" of any property rights that Plaintiffs held in the Road Easement. At any rate, Plaintiffs do not allege that the Regional Director's Letter decision or the BIA's subsequent trust acquisition itself *deprived* Plaintiffs of any ostensible property right held in the Road Easement. Rather, Plaintiffs allege only that the United States' trust acquisition *diminished* the value of their property interest in the easement by limiting their ability to bring a quiet title action. This kind of indirect impact is not a "deprivation" for purposes of procedural due process. *See Dumas*, 90 F.3d at 392; *Sierra Nevada SW Enterprises, Ltd. v. Douglas Cnty.*, 506 F. App'x 663, 665 (9th Cir. 2013). Plaintiffs also have no legitimate claim of entitlement to a quiet title action. To have a legitimate claim of entitlement to a benefit, a plaintiff "must have more than a unilateral expectation of it." *Roth*, 408 U.S. at 577. To create an entitlement to a benefit, an independent source, such as state law, must establish and define the contours of that benefit. *Id.* Plaintiffs' allegations acknowledge that federal law curtails their ability to bring a quiet title upon the United States taking the Hopi Property into trust, which, as noted above, Plaintiffs do not allege itself extinguished any property rights that Plaintiffs ostensibly held in the Road Easement.

Finally, Plaintiffs assert that the Regional Director's failure to provide them actual notice of the Letter Decision, as well as the IBIA's decision to "uphold" the Regional Director's alleged failure, deprived them an opportunity to object and appeal the Letter Decision in violation of procedural due process. (FAC, ¶¶ 68, 70, 77.) They allege that 25 C.F.R. § 151.12(d)(2)(ii)(A) "deprives Plaintiffs . . . of their due process rights to reasonable notice of an administrative decision and opportunity to be heard." (FAC, ¶ 88.) To the extent Plaintiffs claim that their alleged right to notice and an opportunity to appeal constitutes a property interest protected by the Constitution, they "collaps[e] the distinction between [the substantive interest] protected and the process that protects it." *Town of Castle*

Rock, Colo. v. Gonzales, 545 U.S. 748, 772 (2005) (Souter, J., concurring).

In *Cleveland Bd. of Educ. v. Loudermill*, the Supreme Court made clear that a property right cannot be determined by the procedures provided for its deprivation:

> [T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation[.]

470 U.S. 532, 541 (1985). The Ninth Circuit recognizes this principle, as do other Courts of Appeals. *See, e.g.*, *Dorr v. Butte Cty.*, 795 F.2d 875, 877 (9th Cir. 1986) ("[A] substantive property right cannot exist exclusively by virtue of a procedural right."); *Roberts v. United States*, 741 F.3d 152, 161-62 (D.C. Cir. 2014); *Elliott v. Martinez*, 675 F.3d 1241, 1245 (10th Cir. 2012); *Doe by Nelson v. Milwaukee Cty.*, 903 F.2d 499, 502-03 (7th Cir. 1990). For example, the Second Circuit addressed a procedural due process claim similar to Plaintiffs' in *Fusco v. State of Connecticut*, 815 F.2d 201 (2d Cir. 1987). In *Fusco*, the plaintiffs asserted that a state statute, which provided for notice by publication but did not require actual notice of zoning decisions, deprived them of their statutory "right to appeal," since without actual notice "there was no way they could comply with the time constraints on taking appeals." *Id.* at 205. The court affirmed dismissal of the complaint, holding that the right to appeal zoning decisions is "purely procedural and does not give rise to an independent interest protected" by the Constitution. *Id.* at 205–06. As in *Fusco*, Plaintiffs' alleged deprivation of their right to actual notice and an opportunity to appeal is "purely procedural and does not give rise to an independent interest protected" by the Fifth Amendment. *Id.* at 206; *Dorr*, 795 F.2d at 877 (right to appeal disciplinary decisions "does not give rise to a protected property interest").

The circular nature of Plaintiffs' procedural due process claims underscores this conclusion. The Supreme Court has held that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). What Plaintiffs describe as their protected substantive interest—the right to notice and an

opportunity to be heard—is precisely that core of procedure. Inasmuch as Plaintiffs claim that the BIA's notice regulations create a property interest protected by the Fifth Amendment, their claim reflects a fundamental confusion between what is substantive property interest is and what procedures the government must follow before restricting that interest.

In short, the Due Process Clause "forbids the governmental deprivation of substantive rights without constitutionally adequate procedure." *Shanks*, 540 F.3d at 1090-91. Because Plaintiffs have not established that the Regional Director, the IBIA, or the BIA's notice regulations deprived them of a property interest protected by the Fifth Amendment, their procedural due process claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court dismiss Claims One, Three, and Five of Plaintiffs' First Amended Complaint. Defendants' Notice of Certification of Conferral is attached hereto as **Exhibit C**.

RESPECTFULLY SUBMITTED this 12th day of July, 2022.

GARY M. RESTAINO
United States Attorney
District of Arizona

s/*William C. Staes*
WILLIAM C. STAES
Assistant United States Attorney
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2022, 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 CM/ECF registrant(s):

Doreen Nanibaa McPaul
Tohono O'odham Nation Office of the
Attorney General
P.O. Box 830
Sells, AZ 85634−0830
520−383−3410
Fax: 520−383−2689
dmcpaul@nndoj.org

Marla Jordan Hudgens
Laura Pasqualone
Lewis Roca Rothgerber Christie LLP −
Phoenix Office
201 E Washington St., Ste. 1200
Phoenix, AZ 85004
602−262−5773
mhudgens@lewisroca.com
lpasqualone@lewisroca.com

Paul Wesley Spruhan
Navajo Nation Dept of Justice
PO Box 2010
Window Rock, AZ 86515
928−871−6275
Fax: 928−871−6177
paspruhan@nndoj.org

Attorneys for Plaintiffs

s/ Lauren M. Routen
U.S. Attorney's Office