IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TOWN OF LAC DU FLAMBEAU,

Plaintiff, Case No. 23-cv-541-wmc

v.

BRYAN NEWLAND, et al.

Defendants.

FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff Town of Lac du Flambeau ("Town" or "Plaintiff") brings this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"), against Bryan Newland, in his official capacity as Assistant Secretary for Indian Affairs ("Assistant Secretary"), Tammie Poitra, in her official capacity as Midwest Regional Director, Bureau of Indian Affairs ("Regional Director"), Deb Haaland, in her official capacity as Secretary of the Interior ("Secretary"), the United States Department of the Interior ("Interior"), and the Bureau of Indian Affairs ("BIA") (collectively, "Federal Defendants"), to challenge the BIA's removal of four roads from the Tribal Transportation Program's ("TTP") National Tribal Transportation Facility Inventory ("NTTFI"). The four roads—Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane (the "Roads")—are located within the exterior boundary of the Lac du Flambeau Band of Lake Superior Chippewa Indians Reservation (the "Reservation") on multiple tracts of land the United States owns in trust for the Lac du Flambeau Band (the "Band") and seventy-six individual Indian landowners. *See Pollard v. Johnson*, No. 23-cv-135-wmc, 2023 WL 6276403, at *1-2 (W.D. Wis. Sept. 26, 2023). Plaintiff's five-count Complaint (Dkt. 1) specifically alleges that the Federal Defendants violated the APA by misapplying the federal regulations governing the TTP to remove the Roads from the NTTFI.

As set forth below, the Town both lacks standing to challenge the BIA's ministerial act removing the Roads from the NTTFI and fails to state plausible claims for relief. Regarding standing, Plaintiff's allegations demonstrate neither an injury in

fact, a causal link between an injury and the action complained of, nor how a decision by this Court would redress an injury. Additionally, the Complaint fails to state claims for which relief can be granted. First, Plaintiff's claims do not fall within the zone of interests protected by the Federal-Aid Highway Act and the TTP, the statutes governing the NTTFI. Plaintiff's Counts I through IV do not allege any error under the APA. And Plaintiff lacks a property or liberty interest in the Roads that dooms its constitutional challenge to the application of the operative regulations as a matter of law. In the absence of valid subject-matter jurisdiction and plausible claims for relief, the Court should dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

STATUTORY AND REGULATORY BACKGROUND

The TTP, authorized at 23 U.S.C. §§ 201-202, is a funding program that was established for the benefit of federally recognized Tribes. It is a part of the Federal-Aid Highway Program and is jointly administered by the BIA and the Department of Transportation's Federal Highway Administration. *Id.* § 202(a)(5)-(6). The Program is governed by regulations published by the Secretary at 25 C.F.R. Part 170 ("TTP regulations"), and it receives its funding through the Department of Transportation's annual appropriations.

The TTP was established to help provide "safe and adequate transportation and public roads" within or providing access to Tribal lands, through the allocation of federal funds. 81 Fed. Reg. 78,456, 78,456-57 (Nov. 7, 2016). Tribes that receive funding through the TTP can expend those funds on surface transportation needs, including

transportation planning and construction, roadway and facility maintenance, environmental mitigation as it relates to transportation facilities, and other critical transportation infrastructure needs. 23 U.S.C. § 202(a)(1) (use of federal funds); *see also* 23 U.S.C. § 101(a)(33) (defining a "tribal transportation facility" as a "public highway, road, bridge, trail, or transit system that is located on or provides access to tribal land and appears on the [NTTFI] described in [23 U.S.C. §] 202(b)(1)").

For almost a century,[1] the TTP has contributed to the "economic development, self-determination, and employment of Indians and Alaska Natives" through the funding of surface transportation needs of Tribes. 81 Fed. Reg. at 78,457. The TTP is administered for the "benefit of Tribes" and is tribally driven in accordance with the federal policy of "self-determination and self-governance" of tribal governments. 25 C.F.R. § 170.2(h); *see also Pollard*, 2023 WL 6276403, at *4 (Congress's intent in passing the TTP was "to assist tribes in providing safe and adequate transportation and public road access to and within Indian lands, 23 U.S.C. § 202, while at the same time respecting Tribal self-determination and self-governance").

For a road or transportation facility to be eligible for the expenditure of TTP funds, it must be listed on the NTTFI. 23 U.S.C. § 202(b)(1)(A); *see also* 25 C.F.R. § 170.5 (further defining the NTTFI). The NTTFI is maintained by the Secretary, and Tribes must submit certain documentation to the Secretary to have a public road or facility listed on the NTTFI. 25 C.F.R. §§ 170.443-447. Once a roadway or facility is listed on the

[1] The TTP's predecessor—the Indian Reservation Roads Program—was established May 26, 1928. *See* 45 Stat. 750, 25 U.S.C. § 318a.

NTTFI, the Tribe may expend its TTP funds on that road or facility in accordance with the Tribe's Federal Highway Administration ("FHWA")-approved "tribal transportation improvement program," or "TTIP."[2] *See* 23 U.S.C. § 202(b)(4)(A).

If a Tribe wants to update data for a road already on the NTTFI, including removing it from the NTTFI, the Tribe can submit the update to the BIA. 25 C.F.R. § 170.444(b). The BIA will carry out the ministerial act of removing the roadway or facility from the NTTFI only after it verifies that the Tribe has not expended federal transportation funds on that roadway or facility.[3] The sole consequence of a roadway or facility being removed from the NTTFI is simply that the Tribe may no longer expend any of its TTP funds on the road.

The NTTFI data identifies the public authority responsible for maintaining each road or facility listed on the NTTFI. *See* 23 U.S.C. § 101(a)(22) (definition of "public authority"); *see also* 25 C.F.R. § 170.5. The purpose of the NTTFI, however, is "limited to

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[2] Defined by the TTP regulations at 25 C.F.R. § 170.5, a TTIP is a "multi-year list of proposed transportation projects developed by a Tribe from the Tribal priority list or the long-range transportation plan."

[3] Federal lands and tribal transportation facilities are to be "treated under uniform policies similar to the policies that apply to Federal-aid highways" at Chapter 1 of Title 23. 23 U.S.C. § 201(a). Chapter 1 of Title 23 provides that "it shall be the duty of the State transportation department or other direct recipient to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior [Highway] Acts." *Id.* § 116(b). While the BIA jointly administers the TTP with the FHWA, Tribes are the direct recipients of TTP funds authorized by 23 U.S.C. § 202(b)(3). The TTP allows Tribes to use a limited portion of their available tribal shares to be used for maintenance activities. *Id.* § 202(a)(8). Read in harmony, these provisions mean that roads constructed with funds authorized by the FHWA must be maintained by Tribes until the government has received a reasonable return on its investment. Here, the Town is the public authority responsible for maintaining the roads at issue, and the BIA confirmed that the Tribe spent no TTP funds on the roads in question.

establishing eligibility for assistance using TTP funds." Bureau of Indian Affairs, *Rights-of-Way on Indian Lands Handbook*, 52 IAM 9-H at 4 (Office of Trust Services Jan. 10, 2022) ("ROW Handbook")[4]. Under the TTP, it is always the Tribes that are the direct recipients of the TTP funds authorized by 23 U.S.C. § 202(b)(3), not the road "owner." *See* 23 U.S.C. § 202(b)(3)(A)(i). NTTFI data therefore "should not be used for determining real property ownership." ROW Handbook, 52 IAM 9-H at 4. Simply put, the sole function of the TTP and the NTTFI is to provide funding to *Tribes* for transportation infrastructure on or about Indian lands. *See Pollard*, 2023 WL 6276403, at *4 ("Nothing in the Act suggests that the [TTP] is intended to promote or protect access rights of the public or individual citizens who want to traverse Indian lands.").

Working independently of the TTP is the Indian Right-of-Way Act, 25 U.S.C. §§ 323-328, and the regulations found at 25 C.F.R. Part 169 ("ROW Act"). Tribal lands and interests in those lands—including rights-of-way—can only be validly conveyed pursuant to unambiguous congressional authorization. *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 667-670 (1974); Non-Intercourse Act, 25 U.S.C. § 177. The ROW Act, since its enactment in 1948, has provided the authorization for rights-of-way, authorizing the Secretary to grant rights-of-way across trust and restricted lands of both Tribes and individual Indians. 25 U.S.C. § 324. With respect to tribal trust land, the ROW Act contains two requirements for granting a right-of-way. First, "[n]o grant of a

[4] The ROW Handbook is publicly accessible at: https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/52%20IAM%209-H%20ROW%20HB%20_FINAL_signed_w.footer_Jan%202022_minor%20corrections_508.pdf.

right-of-way . . . shall be made without the consent of the proper tribal officials." *Id.* Second, "[n]o grant of right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just." *Id.* § 325. Grants of right-of-way must be for a term of years, and to renew a right-of-way the applicant must apply for a renewal before that right-of-way expires, 25 C.F.R. § 169.18. Absent compliance with the ROW Act, "the user of a right-of-way over Indian lands obtains no interest in those lands and may be held to be a trespasser." *Cohen's Handbook of Federal Indian Law* § 15.09[4] at 1064 (Nell Jessup Newton ed. 2012).

FACTUAL BACKGROUND

The four Roads at the heart of the Town's Complaint—Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane—are located in part on tracts of land that the United States owns in trust for the benefit of the Band and individual Indian landowners. The Roads are within the exterior boundaries of the Lac du Flambeau Reservation. In the 1960s, the BIA approved and granted to private land developers grants of easement for rights-of-way for the Roads (the "ROWs"), pursuant to the ROW Act. Sometime after approval, the developers assigned the ROWs to Plaintiff. The ROWs for each of the Roads expired by their terms at various times in 2011, 2014, and 2018. The Town never renewed the easements and continued to operate, maintain, and use the Roads despite the expired ROWs. The United States has filed a lawsuit against the Town for its ongoing trespass in Indian country. *See United States v. Town of Lac du Flambeau*, 23-cv-355 (W.D. Wis.) (filed May 31, 2023). In 2017, some non-Indian landowners began the right-of-way application process under Part 169 to secure

continued access to the Roads. By early 2023, however, negotiations over the new ROWs stalled. The Band, on January 19, 2023, notified the ROW applicants that without a ROW, the Band planned to limit road access as of January 31. On January 31, 2023, the Band asserted its sovereign authority over the Roads and closed them to non-tribal member access by use of physical barricades. *See Pollard*, 2023 WL 6276403, at *2.

From 2001 until March 24, 2023, the Roads were listed on the NTTFI, at the request of the Band.[5] On March 15, 2023, the BIA received Resolution No. 69(23) from the Band, requesting the removal of the Roads from the NTTFI. On March 30, 2023, the BIA notified the Band that, effective March 24, 2023, the BIA carried out the ministerial act of removing the Roads from the NTTFI, citing to 25 C.F.R. § 170.444(b). *See* Dkt. 1, Exhibit A. The BIA did so after verifying that the Band had not expended federal transportation funds on the Roads and confirming that the Band had submitted the required paperwork to the BIA. *Id.* As a result of their removal from the NTTFI, the Roads are no longer eligible for the expenditure of any TTP funds. *See id.*

On April 28, 2023, Plaintiff sent a "Notice of Appeal" letter to the Interior Board of Indian Appeals (the "IBIA"), the Director of the BIA, and the Regional Director. Plaintiff alleged in that letter that the Regional Director erroneously decided to remove the Roads from the NTTFI, that the Regional Director "may not have received all

[5] "The Secretary *shall include* [in the NTTFI], at a minimum, [roads] that are eligible for assistance under the [TTP] *that an Indian tribe has requested*[.]" 23 U.S.C. § 202(b)(1)(B) (emphasis added). While any public road located on or providing access to tribal lands may be included in the NTTFI, the TTP is tribally driven and nothing in Federal law or regulations requires a Tribe to request that all, some, or no roads be added to its NTTFI. The choice is a Tribe's alone.

appropriate approvals" to remove the Roads from the NTTFI, and that the TTP regulations are unconstitutional. On May 9, 2023, the Assistant Secretary informed the IBIA that he would exercise his authority to assume jurisdiction over Plaintiff's "Notice of Appeal," pursuant to 25 C.F.R. §§ 2.4(c), 2.20(c), and 43 C.F.R. § 4.332(b). On July 5, 2023, the Assistant Secretary entered a Dismissal Order, determining that Plaintiff's third-party appeal of the NTTFI update was not authorized by the TTP regulations at 25 C.F.R. § 170.444(c). Dkt. 1, Exhibit B. Specifically, the Assistant Secretary explained that while the Town attempted to challenge the NTTFI update under 25 C.F.R. Part 2, that Part did not apply since the TTP regulations at 25 C.F.R. Part 170 provided an administrative appeal procedure specific to that statutory program. And, the Assistant Secretary explained, the appeal procedure available in Part 170 only granted a limited appeal process to Tribes, not third parties. *Id.* (citing 25 C.F.R. § 170.444(c)). Thus, the Town had no right to appeal the NTTFI update.

On August 7, 2023, Plaintiff filed this APA suit against the Federal Defendants. For all the reasons argued below, Plaintiff's APA suit should be dismissed in its entirety.

APPLICABLE LEGAL STANDARDS

I. SUBJECT-MATTER JURISDICTION

Article III of the Constitution limits the "judicial power of the United States" to "Cases" or Controversies." U.S. Const. art. III, §§ 1-2; *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). "As an essential part of a federal court's authority under Article III, standing doctrine ensures respect for these jurisdictional bounds,

'confin[ing] the federal courts to a properly judicial role' and 'limit[ing] the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.'" *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1007 (7th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). "As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing the elements of Article III standing." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (citations omitted).

At an "irreducible constitutional minimum," to establish standing a plaintiff must show it has "suffered an injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" that the injury is "fairly traceable to the challenged action of the defendant;" and that it is "likely," rather than "merely speculative," "that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (cleaned up). "If the plaintiff lacks standing, the federal court lacks subject matter jurisdiction and the suit must be dismissed under Rule 12(b)(1)." *Taylor v. McCament*, 875 F.3d 849, 853 (7th Cir. 2017).

Here, the Town's Complaint lacks sufficient factual allegations to establish standing. In such a facial challenge to subject-matter jurisdiction, "[b]ecause *Lujan* mandates that standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof,'" the Seventh Circuit incorporates "the *Twombly-Iqbal* facial plausibility requirement for pleading a claim . . . into the standard for pleading subject matter jurisdiction." *Silha*, 807 F.3d at 174. Thus, "when evaluating a facial challenge to subject matter jurisdiction under Rule 12(b)(1), a court should use

Twombly-Iqbal's "plausibility" requirement, which is the same standard used to evaluate facial challenges to claims under Rule 12(b)(6)." *Id.* (citations omitted).

II. FAILURE TO STATE A CLAIM

"A motion to dismiss under Rule 12(b)(6) is designed to test the complaint's legal sufficiency." *Blitz v. Monsanto Co.*, 317 F. Supp. 3d 1042, 1046 (W.D. Wis. 2018). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to state a cause of action and must be disregarded. *Id.* (citing *Twombly*. 550 U.S. at 555). Similarly, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). In evaluating a Rule 12(b)(6) motion, the court may consider not only the facts alleged in the complaint, but also facts or documents referred to or incorporated into the complaint which are central to Plaintiff's claim, *Burke v. 401 N. Wabash Venture, LLC*, 714 F.3d 501, 505 (7th Cir. 2013), and matters of which the Court may take judicial notice, *Fosnight v. Jones*, 41 F.4th 916, 922 (7th Cir. 2022).

ARGUMENT

I. THE TOWN LACKS STANDING

The Court should dismiss the Complaint in its entirety because the Town has failed to adequately establish standing. Consistent with Article III's case-or-controversy requirement, Plaintiff must establish standing to sue. To do so, it must establish: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.* 528 U.S. 167, 180-81 (2000). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element" of standing. *Spokeo*, 578 U.S. at 338 (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Thus, "[t]o withstand a challenge to standing on a motion to dismiss, the 'plaintiff must plead sufficient factual allegations, taken as true, that 'plausibly suggest' each of these elements.'" *The Cornucopia Inst. v. USDA*, 260 F. Supp. 3d 1061, 1067 (W.D. Wis. 2017) (quoting *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016)).

The pleading bar here is not particularly demanding. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005) ("A motion to dismiss for lack of standing should not be granted unless there are no set of facts consistent with the complaint's allegations that could establish standing."). But that is not to say that any set of allegations will suffice. "If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case

or controversy for the federal court to resolve." *Casillas v. Madison Ave. Assocs.*, 926 F.3d 329, 333 (7th Cir. 2019). Here, the allegations of the Complaint, even liberally construed, cannot meet any of the elements of Article III's standing.

A. The Complaint Does Not Plausibly Allege That The BIA's Removal Of The Roads From The NTTFI Has Injured The Town.

To meet this element, a plaintiff must demonstrate "an 'injury in fact'"—which must, among other things, comprise "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. And the legally protected interest must be particularized to the plaintiff—in other words, "[i]t is the responsibility of the [Town] clearly to allege facts demonstrating that [it] is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518. Ultimately, the allegations of the Complaint fail to identify a cognizable injury sufficient to meet this element of Article III's requirements.

We first identify the allegations of injury contained in the Complaint and then explain why those allegations do not pass the injury-in-fact test. Plaintiff alleges that it has been "gravely harmed" by "the decisions of [the Assistant Secretary] and [the Regional Director]," Dkt. 1 at ¶ 43, and has suffered the following injuries as a result:

- "The removal of the Roads from NTTFI, and their closure as public roadways, has decreased the property values within Plaintiff's jurisdiction, will lower assessed property values, and therefore, property taxes, and will prevent Plaintiff from providing critical services to its residents, which they are required to provide by law." *Id.* ¶ 35

- "The removal of the Roads from NTTFI, and their closure as public roadways, also prevents public access and travel for the Town, the Town's residents, and others, including the property owners, within the Plaintiff's jurisdiction." *Id.* ¶ 36

- "[The Assistant Secretary]'s decision eviscerates Plaintiff's ability to protect its legally cognizable interest in maintaining critical infrastructure located within its jurisdiction." *Id.* ¶ 37

- "Moreover, as a result of [the Assistant Secretary]'s erroneous decision," twelve Town residents have provided Plaintiff with notice of intent to sue under Wisconsin law, "seek[ing] over $6,000,000.00 in damages," and "two homeowners have already filed actions against Plaintiff." *Id.* ¶¶ 38-40.

- "[T]itle companies have indicated that, as a result of the Roads' closure and related concerns, title companies are considering to cease writing title insurance policies for properties like those impacted by the tribal road closures in this matter." *Id.* ¶ 41.

- "The lack of title insurance on the properties at issue would make the properties untouchable, thus wiping out a significant amount of property value, drastically decreasing assessed values and the corresponding tax value for the Town, and further limiting public travel and access to properties within Plaintiff's jurisdiction." *Id.* ¶ 42.

While these allegations identify potentially cognizable injuries, they nonetheless fail due to their vague and largely abstract nature, and because the Town itself has not been injured.

First, the Town's claimed injuries arising from "decreased . . . property values within [its] jurisdiction" and the threatened action of title companies "to cease writing title insurance policies for properties" located on the Roads do not directly injure the Town, but rather the specific owners of the properties in question. These alleged injuries thus do not "affect the plaintiff in a personal and individual way" so as to meet the particularity requirement. *Lac du Flambeau Band*, 422 F.3d at 496 (citation and

internal quotation omitted); *see also Lujan*, 504 U.S. at 563 (injury-in-fact test "requires that the party seeking review be himself among the injured").[6]

Second, the aforementioned injuries and others that the Town alleges—like the alleged diminution of property taxes and liability for threatened and filed legal actions by Town residents—are all simply too attenuated and speculative. *See Cornucopia Inst.*, 260 F. Supp. 3d at 1069-70. Because the Town's allegations merely postulate about possible future injury from potential action taken by others, they are inadequate to demonstrate a certainly impending injury as of the date of the Complaint. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of possible future injury are not sufficient" (citations and internal quotations omitted; emphasis in original)).

Third, the Town asserts that its injuries stem both from "[t]he removal of the Roads from NTTFI, *and* their closure as public roadways." Dkt. 1 at ¶¶ 35-36 (emphasis added). But this allegation cannot state a plausible injury claim because it rests upon a faulty premise: the BIA's ministerial act of removing the Roads did not operate to "close" the Roads. As explained, *see* discussion, *supra*, at 3-4, removal of the Roads from the NTTFI only makes the Roads ineligible for the use of the Band's TTP funds. Whether the portions of the Roads located on the Reservation have legal tenure and

[6] The Town also has no standing to assert the injuries of third parties who are capable of asserting their own claims. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Warth*, 422 U.S. at 499)).

remain open depends solely upon the Town's compliance with the ROW Act. In short, the BIA's ministerial act could not have caused any injury to the Town because it affected only the Band by prohibiting the use of its TTP funds on the Roads; it did not close the Roads.[7]

B. The Complaint Does Not Plausibly Allege That The Town's Putative Injury Is Fairly Traceable To The Removal Of The Roads From The NTTFI.

"The causation element of standing demands that the injury be fairly traceable to the challenged action of a defendant, rather than the result of independent action by some third party not before the court." *Boyden v. Conlin*, No. 17-cv-264-wmc, 2018 WL 2191733, at *3 (W.D. Wis. May 11, 2018) (citing *Lujan*, 504 U.S. at 560). Although the bar to meet this element is usually "fairly modest," *id.*, "much more is needed," where, as here, the Town's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 504 U.S. at 562 (emphasis in original); *see id.* ("Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.").

[7] The Town's allegation that the removal of the Roads from the NTTFI "eviscerates" its "ability to protect its *legally cognizable interest in maintaining critical infrastructure located within its jurisdiction*," Dkt. 1 at ¶ 37 (emphasis added), relies on two other distinct, but connected, erroneous premises. First, BIA's ministerial act has no effect on the legal status of the portions of the Roads located on land held by the United States in trust for either the Band or the individual Indian landowners. While those lands may technically lie within the Town's borders, which in part overlap the Reservation boundary, in the absence of a valid right-of-way the lands are not "within its jurisdiction" in any sense such that the Town has a legal right to use them. And second, the Town has not—and cannot—identify any legal interest the Town derives or obtains from the Roads' listing on the NTTFI or from Part 170 generally.

Specifically, because the BIA's act of removing the Roads from the NTTFI affects only the Band and its eligibility for TTP funding for the Roads, the Town can show no injury fairly traceable to that act. The sole legal consequence of the BIA carrying out that ministerial act is that the Roads are no longer "eligible for assistance" through the use of TTP funds. 23 U.S.C. §§ 101(a)(33), 202(b)(1)(A-B). Removal of the Roads from the NTTFI does not visit any consequences upon the Town because the Town is not an eligible recipient of TTP funds. *Id.* § 202(b)(3)(A)(i) ("the Secretary shall distribute . . . [TTP funds] . . . among [eligible] Indian tribes[.]")

The Town's reliance on 25 C.F.R. § 170.114(c) cannot cure the Town's causation deficit. *See* Dkt. 1 at ¶ 15. As this Court has already recognized, "[n]othing in the [Federal-Aid Highway Act or Tribal Transportation Program] suggests that the program is intended to promote or protect access rights of the public or individual citizens who want to traverse Indian lands." *Pollard*, 2023 WL 6276403, at *4. Such rights are governed by the entirely separate regulatory scheme under the ROW Act, which the Complaint does not mention. For these reasons, the cause of the Town's alleged injury is the lapse of the ROW and there is no causal connection between the Town's claimed injury and the BIA's ministerial act.

C. The Complaint Does Not Plausibly Allege That The Town's Putative Injury Will Be Redressed By A Favorable Decision.

Closely related to causation, the redressability element of the standing test "examines the causal connection between the alleged injury and the judicial relief requested." *Lac du Flambeau Band*, 422 F.3d at 501 (quoting *Allen v. Wright*, 468 U.S. 737,

753 n.19 (1984)). At the motion-to-dismiss stage, this element requires the Town to show "that there is a substantial likelihood that the relief requested will redress the injury claimed." *Boyden*, 2018 WL 2191733, at *5 (citations omitted). As this Court noted in *Boyden*, "[c]onstitutional standing only requires that the requested relief be *capable* of redressing the injury." *Id.* at *6 (emphasis in original).

As explained in the preceding section, the BIA's ministerial act only affects the Band's discretion to potentially use its TTP funding for the Roads; it does not—and, under the Part 170 regulations, cannot—deal with third-party access rights to the Roads. Thus, there is no circumstance under which the requested relief here is capable of redressing the Town's alleged injuries, which arise entirely from and are solely traceable to the Town's claimed lack of access. *See* Dkt. 1 at ¶ 12 ("This action stems from the decision of the Lac du Flambeau Band . . . to limit access to certain public roadways located in the Town . . . ."). In light of this, even were the Court to grant them all, none of the forms of relief requested in the Complaint, *see id.* at 11-12, are capable of "alleviat[ing] the harm" complained of. *Boyden*, 2018 WL 2191733, at *5 (citing *Lac du Flambeau Band*, 422 F.3d at 502). The Town thus cannot satisfy the redressability element to establish standing.

II. THE TOWN FAILS TO STATE PLAUSIBLE CLAIMS FOR RELIEF

Even if the Court finds that the Town has Article III standing to challenge the BIA's removal of the Roads from the NTTFI, the Town nevertheless fails to state claims for which relief can be granted for three reasons. First, the suit fails entirely because the Town does not fall within the zone of interests of the Federal-Aid Highway Act and the

TTP. Second, as to Counts I through IV, the Town fails to allege any violation of the APA. And third, the Town has identified no constitutionally protected property or liberty interest on which to base the constitutional challenge in Count V.

A. The Town's Claims Do Not Fall Within The "Zone Of Interests" Protected By The Federal-Aid Highway Act And The Tribal Transportation Program.

The Town asserts vague interests it has in the procedure by which the Roadways were removed from the NTTFI. *See* Dkt. 1. However, Plaintiff does not fall within the zone of interests of the pertinent statutes. The TTP was enacted for the purpose of providing funding to Tribes, not to provide benefits to third parties. Because the Town falls well outside of the zone of interests of this statutory program, the Town's Complaint should be dismissed in its entirety.[8]

The zone-of-interests analysis asks whether a "particular class of person ha[s] a right to sue under th[e] substantive statute" at issue. *Lexmark,* 572 U.S. at 127. "Whether a plaintiff comes within 'the zone of interests' is an issue that requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* The Seventh Circuit "generally understand[s] the zone-of-interests doctrine to ask 'whether the statute arguably protects the sort of interest a would-be plaintiff seeks to advance.'" *T.S.*

[8] The zone-of-interests inquiry is not jurisdictional. *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). Thus, since Plaintiff falls outside of the zone of interests, all of its claims should be dismissed with prejudice. *See, e.g.*, *Friends of Trumbull v. Chicago Bd. of Edu.*, 123 F. Supp. 3d 990, 999 (N.D. Ill. 2015) (dismissing claims with prejudice, since the plaintiff did not fall within the zone of interests); *Permapost Prods., Inc. v. McHugh,* 55 F. Supp. 3d 14, 24 (D.D.C. 2014) (citing *Lexmark* for the proposition that "[i]f plaintiffs' interests do not fall within that zone of interests, their claim will be dismissed with prejudice").

v. Heart of CarDon, 43 F.4th 737, 741 (7th Cir. 2022) (quoting *Stockbridge-Munsee Cmty. v. Wisconsin*, 922 F.3d 818, 821 (7th Cir. 2019)).

The analysis is two-part. First, the purpose of the statutory provisions that the plaintiff invokes must be ascertained, "thereby identifying the interests arguably to be protected by it." *Id.* Then, the Court must "determine whether the interests claimed by the plaintiff are among those statutory interests." *Id.* The question is not whether Congress "should have authorized" the plaintiff's suit, "but whether Congress in fact did so." *Lexmark*, 572 U.S. at 128. In an APA case, the relevant statute to analyze is the one "whose [alleged] violation is the gravamen of the complaint." *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 529 (1991) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990)). The zone-of-interests analysis is not "especially demanding in the APA context," *Lexmark,* 572 U.S. at 130 (internal quotation omitted), in light of Congress's "evident intent when enacting the APA to make agency action presumptively reviewable," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (internal citations omitted). Still, though, the "breadth of the zone of interests varies according to the provisions of law at issue." *Lexmark*, 572 U.S. at 130. Thus, the Court should take care to not adopt an overly generalized definition of zone of interests—even in the APA context—so to deprive the doctrine of any outer boundaries. *E.g.*, *Air Courier*, 498 U.S. at 530.

The Town does not invoke a substantive statute in its Complaint. *Cf. Air Courier*, 498 U.S. at 529 (relevant statute to analyze in APA case is the one whose alleged violation is the "gravamen of the complaint"). Plaintiff's Complaint instead focuses

solely on the BIA's own procedural regulations. Even so, Plaintiff falls well outside of the zone of interests of the Federal-Aid Highway Act and the TTP.

The TTP, through the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq*., is a funding program, where both the BIA and the Federal Highway Administration can "allocate program funds among tribes for use in transportation improvement projects and review progress on road projects." *Pollard*, 2023 WL 6276403, at *4. The program's purpose could not be more explicit: the TTP exists to help provide "safe and adequate transportation and public roads" within or providing access to tribal lands. 81 Fed. Reg. at 78,456-57; *see also Pollard*, 2023 WL 6276403, at *4 (discussing the purpose of the TTP). The TTP is administered for the "benefit of Tribes." 25 C.F.R. § 170.2(h). Indeed, only federally recognized Tribes can receive funding under the program. 23 U.S.C. § 202(b)(3). And not only is the TTP strictly for the benefit of Tribes, but the program offers no rights or obligations to any other entity beyond Tribes and the federal government. *Pollard*, 2023 WL 6276403, at *4 ("Nothing in the Act suggests that the program is intended to promote or protect access rights of the public or individual citizens who want to traverse Indian lands."). Because of the limited scope and purpose of the TTP, Congress did not offer third parties any private right of action under the program. *Id.*

Plaintiff does not fall within the limited zone of interests of this funding program. The "interest protected" by the TTP is assisting Tribes achieve safe and adequate transportation within Indian country while respecting tribal self-determination and self-governance. *See* 23 U.S.C. § 202; 81 Fed. Reg. at 78,456-57.

Plaintiff, on the other hand, is not a federally recognized Tribe, does not receive any funds through the TTP, and otherwise receives no particularized right of use or occupation of the Roads through the TTP. *Compare* 23 U.S.C. § 202 (TTP funding program for Tribes), *with* ROW Act, 25 U.S.C. §§ 323-328 (giving access rights to holders of ROWs in Indian country). The Town alleges vague interests in the property values of parcels near the Roads, and an interest in public access to Indian country. *See* Dkt. 1 at ¶¶ 35-36. But at bottom, the program is not intended to protect the Town's alleged interests in Indian country or provide a backdoor around the ROW Act. The TTP was enacted strictly for the purpose of providing federal funds to Tribes.

That the Town is not within the zone of interests of the TTP is further illustrated in the program's implementing regulations. *Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (agency's interpretation of the statute deserves deference). The BIA recognizes that the TTP is for the benefit of Tribes, and specifically to implement the federal policy of "self-determination and self-governance." 25 C.F.R. § 170.2(h) (policies governing the TTP). The program is meant to encourage tribal "flexibility" and "innovation" through federal funds and is to be implemented consistent with the government-to-government relationship that the United States has with federally recognized Tribes. 25 C.F.R. § 170.102. And while the Town sought to appeal the removal of the Roads from the NTTFI, the relevant TTP regulations do not authorize third-party appeals of NTTFI updates. 25 C.F.R. § 170.444(c). As the Assistant Secretary explained in his Dismissal Order, 25 C.F.R. § 170.444(c)—not 25 C.F.R. Part 2—governs appeals of NTTFI updates. Dkt. 1, Exhibit B. The TTP regulations found at

Part 170 provide a limited appeal procedure for updates to the NTTFI. Specifically, 25 C.F.R. § 170.444(c) says that "*Tribe[s]* may appeal the rejection of submitted data on a new or existing facility included in the NTTFI by filing a written notice of appeal to the Director, Bureau of Indian Affairs, with a copy to the BIA Regional Director" (emphasis added). Part 170 offers no appeal rights or processes to third-parties.[9] It is the Tribes that enjoy the government-to-government relationship with the United States, the Tribes that benefit from the TPP, receiving funding under it, and the Tribes that have a limited appeal process under Part 170. Consistent with the statutory authorization and the regulatory scheme, BIA thus interprets the TTP as giving no substantive or procedural rights to third parties.

Congress did not set out to protect the Town's purported interests when enacting the TTP; the program was enacted for the benefit of Tribes. The Town falls outside of the zone of interests of the pertinent statutes, and its Complaint should therefore be dismissed.

B. Counts I Through IV Fail To Allege Any Violation Of The APA.

Even if Plaintiff established standing, and fell within the zone of interests of the TTP, both of which it does not, its Complaint should nevertheless be dismissed because Plaintiff has not identified any legal error in the BIA's ministerial act of removing the

[9] Part 25 of the C.F.R. was recently updated; section 2.3(b), which formerly provided that "[t]his part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision," can now be found at 25 C.F.R. § 2.103. *See* 88 Fed. Reg. 53,779, 53,781 (Aug. 9, 2023). Section 2.103 states that "[n]ot all appeals are subject to this part," and "[o]ther regulations govern appeals of administrative decisions regarding certain topics." The table included in § 2.103 provides that appeals for Indian Reservation Road Program funding are governed by 25 C.F.R. Part 170.

Roads from the NTTFI or in dismissing Plaintiff's purported administrative appeal. Instead, this suit is merely an attempted end-run around the ROW Act. Plaintiff wants to have continued use of and access to the Roads, notwithstanding its failure to secure valid rights-of-way under the ROW Act. *See United States v. Town of Lac du Flambeau*, 23-cv-355 (W.D. Wis.) (trespass case). The Town seeks to use this suit to establish use and access rights to the Roads in the absence of any valid legal entitlement. Dkt. 1 at ¶¶ 34-38. Try as it might, its efforts fail under Rule 12(b)(6).

The Town asserts throughout the Complaint that the BIA and the Band conspired to remove the Roads from the NTTFI to fortify the Band's litigation position in *Pollard v. Johnson*. *See* Dkt. 1 at ¶¶ 16, 25, 48. Count I alleges that the Regional Director and the Assistant Secretary used the wrong procedure in removing the Roads from the NTTFI in an effort to bolster the Band's arguments in litigation. *Id.* ¶¶ 45-51. Count II complains that the Town lacks an administrative appeal process under Part 170, despite there being no requirement under the APA that a regulatory program offer an administrative appeal process. *Id.* ¶¶ 52-59. Count III sets forth a host of unsupported conclusions, alleging that Federal Defendants acted "intentionally and maliciously" in using the process found at 25 C.F.R. § 170.444 to update the NTTFI. *Id.* ¶¶ 61-68. And Count IV merely alleges the existence of an "actual controversy" between the parties within the meaning of the Declaratory Judgment Act, and it therefore lacks any

independent substance and should be dismissed outright for failure to state a claim. *Id.* ¶¶ 69-71.[10]

The sufficiency of Plaintiff's Complaint must be considered against the presumption of regularity that applies to the agency decisions that they challenge. *United States v. Chem Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007) (same); *see Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (presumption may be overcome only "upon a strong showing of bad faith or improper behavior"). This presumption means, in the present context, that Plaintiff's mischaracterizations about the removal of the Roads from the NTTFI should not be taken as true, as they are conclusory and unsupported. *E.g., Texas All. For Home Care Servs. v. Sebelius*, 811 F. Supp. 2d 76, 104 (D.D.C. 2011), *aff'd*, 681 F.3d 402 (D.C. Cir. 2012) (plaintiff's "conclusory" allegations could not overcome the presumption of agency regularity).

Plaintiff alleges in Count I that the Regional Director and Assistant Secretary purposefully used the "wrong" regulation to remove the Roads from the NTTFI in an effort to assist the Band in pending litigation. Dkt. 1 at ¶ 48. Plaintiff's Count III is

[10] The Declaratory Judgment Act, 28 U.S.C. § 2201, offers Plaintiff no private right of action; it only provides an additional remedy where a "judicially remediable right" already exists. *Schilling v. Rogers*, 363 U.S. 666, 667 (1960); *see also Pollard*, 2023 WL 6276403, at *4 (same). As argued herein, Plaintiff has no judicially remediable right to advance in this case. Thus, any claim advanced only under the Declaratory Judgment Act—such as Count IV—should be dismissed.

nothing more than accusations that Federal Defendants conspired with the Band to remove the Roads from the NTTFI. *Id.* ¶¶ 60-68. The Town's conspiracy allegations are nothing more than unsupported legal conclusions that the Court is not bound to accept as true. *Redd v. Nolan*, 663 F.3d 287, 292 (7th Cir. 2011). The Town offers no facts (or even inferences) to support these allegations. The Complaint "includes not a whiff of conspiratorial agreement or any improper complicity between [the Federal Defendants and the Band] to support the [Town's] conclusory allegation[s]." *Id.* And these conclusory statements cannot overcome the presumption of agency regularity. The Court must therefore presume that the agency has carried out its official duties without impropriety. Because Count III is made up solely of unsupported conclusory statements, it should be dismissed.

Even beyond that, Plaintiff's Count I and III do not sufficiently allege any violation of the APA. While Plaintiff argues that the BIA improperly used 25 C.F.R. § 170.444 to update the NTTFI, Dkt. 1 at ¶¶ 48-49, 63-64, it is Plaintiff that has the process confused. For the NTTFI to be updated—which is what happened here—a Tribe merely needs to submit the required documents to the BIA, to which BIA must respond within 30 days. 25 C.F.R. § 170.444(b). Here, the Band submitted its request to have the Roads removed from the NTTFI, thus eliminating the Band's option to expend federal funds for those roadways. Section 170.114(c), on the other hand, deals with the "permanent closure" of a road or facility owned by a Tribe or the BIA, with removal of the road or facility from the NTTFI being a consequence of its closure. The BIA followed the correct ministerial process for removing the Roads from the NTTFI; there has been

no violation of the APA. Count I and III should therefore be dismissed for failure to state a claim.

Finally, Plaintiff argues in Count II that "nothing in § 170.444 forecloses appeals by aggrieved entities such as Plaintiff," and the Assistant Secretary's determination that Plaintiff had no appeal right violates the APA. Dkt. 1 at ¶¶ 54, 56. The Town provides no statute, regulation, or legal theory in support of its claimed right to an administrative appeal. As explained above, *see* discussion, *supra,* at 21-22, Section 170.444(c) offers only a limited appeal procedure to Tribes to appeal NTTFI update requests because the regulatory program grants no rights to and imposes no obligations on entities other than Tribes. This limited right of appeal thus aligns with the limited purposes of the TTP and the NTTFI. For this reason, that Part 170 offers no appeal process to the Town to challenge NTTFI updates does not violate the APA. The APA does not mandate that a regulatory program require an administrative appeal right to the general public. Count II must therefore be dismissed for failure to state a claim.

C. Count V Fails to State A Valid Due-Process Claim Because The Town Lacks A Property Or Liberty Interest In The Roads.

In Count V of the Complaint, the Town alternatively alleges that, "should the Court determine that Newland has appropriately interpreted 25 C.F.R. § 170.444(c) as precluding Plaintiff from seeking relief, then Plaintiff seeks a declaratory judgment that 25 C.F.R. § 170.444(c) is unconstitutional as applied to Plaintiff." Dkt. 1 at ¶ 75. It is axiomatic that a procedural-due-process claim cannot be maintained unless the claimant establishes that it has a constitutionally protected liberty or property interest at

stake. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569-72 (1972). The Town contends that Newland's interpretation of 25 C.F.R. § 170.444(c) deprives "Plaintiff of due process of law by preventing Plaintiff from appealing a decision that has caused, and will continue to cause, grave harm to Plaintiff." Dkt. 1 at ¶ 75. The gravamen of the Town's claim is that its purported interest in the Roads is such that the regulation providing for the Roads' removal from the NTTFI must afford the Town an opportunity to be heard. And, if the regulation does not, it violates the Fifth Amendment's Due Process Clause.

The Supreme Court directs that "[w]e examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State . . . ; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient . . . ." *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). For the Town to state a due process claim, it thus must allege that BIA's ministerial act of removing the Roads from the NTTFI deprived it of a constitutionally protected property interest. *See Makhsous v. Daye*, 980 F.3d 1181, 1183 (7th Cir. 2020) (citing *Kowalski v. Boliker*, 893 F.3d 987, 1000 (7th Cir. 2018)); *see also Forest Cnty. Potawatomi Comty. of Wisconsin v. Doyle*, 828 F. Supp. 1401, 1407-08 (W.D. Wis. 1993) ("To prevail on a claim that their procedural due process rights have been or will be violated, plaintiffs must establish that they will be deprived of a constitutionally protected property or liberty interest and that defendants intend to interfere with this interest without a hearing or other appropriate process." (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) and *Roth*,

408 U.S. at 569–70 (1972))). The Town has not identified any such right in these lands, which are held in trust for the Band and its individual members.

"A property interest is a right created by 'existing rules or understandings that stem from an independent source such as state law.'" *Makhsous*, 980 F.3d at 1183 (quoting *Roth*, 408 U.S. at 577). "For an interest to be constitutionally protected, a plaintiff must have a 'a legitimate claim of entitlement to it' rather than 'a unilateral expectation of it.'" *Id.* (quoting *Roth*, 408 U.S. at 577). Here, the Town alleges that denying it an opportunity to be heard on the BIA's removal of the Roads from the NTTFI "will wipe out tens of millions of dollars in property value within Plaintiff's jurisdiction, will render Plaintiff unable to provide critical services to those within its jurisdiction, and prevents public access." Dkt. 1 at ¶ 76. Even putting aside the speculative nature of the allegations, as well as their—at best—tenuous connection to the removal of the Roads from the NTTFI, *see* discussion, *supra*, at 12-17, none of the Town's claimed interests implicate a liberty or property interest protected by the Due Process Clause.[11]

First, assuming that the BIA's ministerial act actually puts "millions of dollars in property value" at risk "within Plaintiff's jurisdiction" it does not create "a legitimate claim of entitlement" to that value in the Town, even if the Town itself actually owned

[11] In addition to the aforementioned allegations of injury contained in Count V itself, the Complaint further contains the conclusory statements that "the Town is, at least in part, owner of the Roads," Dkt. 1 at ¶ 13; and that "[the Assistant Secretary]'s decision eviscerates Plaintiff's ability to protect its legally cognizable interest in maintaining critical infrastructure located within its jurisdiction," *id.* ¶ 37. The Town neglects to mention that the Roads are situated in part on trust land, nor does the Town allege—because it cannot—that it holds valid grants of easement for the Roads under applicable federal law.

all the property whose value is at risk, a fact to which the Complaint does not speak. *See Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir. 1990) ("A person cannot claim a constitutionally-protected property interest in uses of neighboring property on the ground that those uses may affect the market value of his own property." (citing *Fusco v. Connecticut*, 815 F.2d 201, 206 (2d Cir. 1987))). Moreover, the Town nowhere in the Complaint explains how removing the Roads from the NTTFI could adversely affect property values given that ministerial act's sole consequence is that the Roads became ineligible for the use of the Band's TTP funds. Second, even if the Town is "unable to provide critical services," that does not mean "those within its jurisdiction" will go without, especially considering that the Band's regulatory jurisdiction overlaps the Town's, and the Band too provides critical services, which the Federal Defendants take to mean here police and emergency medical services. *See* Lac du Flambeau Tribe Website, https://www.ldftribe.com/departments/44/Tribal_Operations/Tribal_Law_Enforcement.html (October 19, 2023) (detailing programs and resources provided by the Band's government).[12] And lastly, regarding the "prevent[ion of] public access," the BIA's act of removing the Roads from the NTTFI specifically, and the Part 170 regulations

[12] Even assuming that no critical services could be provided to those within the Town's jurisdiction, it must be noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989). The Court elaborated: "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196 (citations omitted). This longstanding constitutional principle makes the Town's reliance on its alleged inability to "provide critical services" dubious.

generally, as the Federal Defendants previously have discussed in detail, simply do not deal with access to roads on Indian trust lands.

Plaintiff fails to demonstrate a protectible interest in the roads, but nevertheless claims a right to process. But process for process's sake alone does not a valid Fifth Amendment due process claim make. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.") In the absence of a constitutionally protected property interest, the Town does not—and cannot—state a claim for relief under the Due Process Clause. Count V of the Complaint accordingly should be dismissed.

CONCLUSION

Because Plaintiff lacks standing to maintain this suit, and fails to state plausible claims for relief, the Federal Defendants respectfully request that the Court grant the Motion to Dismiss and dismiss this suit in its entirety.

DATED: October 23, 2023

Respectfully submitted,

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