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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.**

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

Plaintiffs, the NAVAJO NATION and NAVAJO NATION GAMING  
ENTERPRISE (the “Enterprise”), bring this action for declaratory and injunctive relief

1 against the United States Department of the Interior (“Department”), the Bureau of Indian  
2 Affairs (the “BIA”), the Interior Board of Indian Appeals (“IBIA”), DAVID BERNHARDT  
3 in his official capacity as the Secretary of the Interior (the “Secretary”), TARA KATUK  
4 MAC LEAN SWEENEY in her official capacity as Assistant Secretary of the Interior for  
5 Indian Affairs, and ALLEN ANSPACH in his official capacity as Acting Western Regional  
6 Director of the BIA, and states:

### 7 INTRODUCTION

8 1. The Navajo Nation is a federally-recognized Indian tribe, and the Enterprise  
9 is an instrumentality of the Navajo Nation, whose primary purpose is to conduct gaming  
10 and other related business activities. On December 16, 2013, the Western Regional Director  
11 issued a Letter Decision in favor of another tribe, the Hopi Tribe (“Hopi”), but strips the  
12 Navajo Nation and the Enterprise of valuable and recorded property rights without  
13 providing Plaintiffs timely written notice of, and an opportunity to comment on, the Letter  
14 Decision.

15 2. The Enterprise received actual notice about the Letter Decision in July 2016,  
16 only after the BIA responded to a Freedom of Information Act (“FOIA”) request. Within  
17 30 days of receiving actual notice of the Letter Decision, Plaintiffs filed an appeal of the  
18 Letter Decision with the IBIA in August 2016. Nevertheless, on May 7, 2019, the IBIA  
19 improperly dismissed the appeal as untimely. The IBIA’s dismissal is a final agency action.

20 3. The IBIA’s wrongful dismissal of Plaintiffs’ appeal as untimely is premised  
21 upon the Western Regional Director’s failure to provide actual notice of the Letter Decision.  
22 Both actions violate federal regulations and Plaintiffs’ rights to due process. These actions  
23 did not afford the Navajo Nation or the Enterprise rights to reasonable notice and an  
24 opportunity to be heard in the administrative process in matters relating to Hopi, but  
25 impacting Plaintiffs’ recorded property rights. Dismissing the appeal, the IBIA issued  
26 findings and conclusions based on erroneous and unreasonable interpretations of the law.  
27 The IBIA’s dismissal is also an abuse of discretion and exceeds the agency’s authority  
28

1 because it is contrary to the federal regulations and fundamental principles of property law  
2 and due process. The dismissal should be reversed so that Navajo Nation and the Enterprise  
3 may be given the opportunity to assert their claims against the Western Regional Director's  
4 decision on the merits.

5 4. Alternatively, if the Western Regional Director and the IBIA have properly  
6 and reasonably interpreted the current federal regulations, those regulations as written and  
7 applied are facially invalid and violate Plaintiffs' constitutional rights to due process and to  
8 protect their property interest.

### 9 PARTIES

10 5. Navajo Nation is a federally-recognized Indian tribe with its reservation lands  
11 based in Arizona, New Mexico and Utah. The Navajo Nation's capital is in Window Rock,  
12 Arizona.

13 6. The Enterprise is an instrumentality of the Navajo Nation created exclusively  
14 under Navajo Nation law for the primary purpose of conducting gaming and other related  
15 business activities pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*  
16 Pub.L. 100-497 (Oct. 17, 1988). The Enterprise operates the Twin Arrows Navajo Casino  
17 Resort ("Casino"), a gaming facility near Flagstaff, Arizona.

18 7. The Department is the federal agency statutorily charged with the primary  
19 administration of the Federal government's trust responsibility to Indian tribes, 25 U.S.C.  
20 §§ 2 and 9.

21 8. The BIA is a federal agency within the Department responsible for delivery  
22 of program services to the federally recognized tribes, individual Indians, and Alaska  
23 Natives, whether directly or through contracts, grants or compacts. The BIA's program  
24 services are administered through various regional offices and agencies across the United  
25 States.

26 9. The IBIA is an appellate review body that is separate and independent from  
27 the BIA and the Assistant Secretary – Indian Affairs. The IBIA is located within the  
28

1 Department's Office of Hearings and Appeals. IBIA exercises the authority to decide  
2 appeals of decisions of the BIA's Western Regional Director pursuant to 25 CFR § 2.4(e),  
3 and to issue final decisions for the Department in appeals involving Indian matters pursuant  
4 to 43 CFR Part 4, Subpart D.

5 10. DAVID BERNHARDT is the Secretary for the Department.

6 11. TARA KATUK MAC LEAN SWEENEY is the Assistant Secretary-Indian  
7 Affairs for the Department. The Assistant Secretary-Indian Affairs carries out the  
8 Department of the Interior's trust responsibilities in managing tribal and individual Indian  
9 trust lands and assets.

10 12. ALLEN ANSPACH is the Acting Western Regional Director of the BIA. The  
11 Western Regional Director is located in Phoenix, Arizona, is responsible for all BIA  
12 activities within a defined geographical area that includes Arizona, and exercises the  
13 Secretary's authority to take land into trust on behalf of Indian tribes pursuant to 25 U.S.C.  
14 § 5108 and 25 CFR Part 151.

### 15 **JURISDICTION AND VENUE**

16 13. The allegations in the preceding paragraphs are re-alleged and incorporated  
17 by reference as though fully set forth herein.

18 14. This Court has subject-matter jurisdiction over this action under 28 U.S.C. §§  
19 1331 and 1362 because the claims are brought by a federally recognized Indian tribe and  
20 arise under federal law.

21 15. This Court also has subject-matter jurisdiction under the Administrative  
22 Procedures Act ("APA"), 5 U.S.C. §§ 701-706 because the claims arise from a final federal  
23 agency action entitled to judicial review.

24 16. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(B) because  
25 Plaintiffs are located in Arizona, the relevant federal decision was rendered in Phoenix,  
26 Arizona, and Plaintiffs' property interests are located in Coconino County, Arizona.

**FACTUAL ALLEGATIONS**

17. The allegations in the preceding paragraphs are re-alleged and incorporated by reference as though fully set forth herein.

18. On August 16, 2010, the Enterprise purchased 435 acres of land located in the Twin Arrows area of northern Arizona, just east of Flagstaff, Arizona ("Casino Property"), where the Enterprise planned to build the Casino.

19. In order to make the Casino Property accessible from Interstate 40, on August 16, 2010, the Enterprise also entered into an easement agreement with Steven and Patsy Drye (the "Dryes") that expressly granted a perpetual non-exclusive right in a 500 foot easement over their private property to the Enterprise and the public for the purpose of pedestrian and vehicular access, ingress and egress ("Road Easement"). The Enterprise recorded its interest in the Road Easement in the Coconino County Recorder's Office on August 16, 2010, at Record No. 3570615.

20. The Enterprise began construction of the Casino in 2011, and the Casino opened to the public on Memorial Day weekend in 2013. In connection with its development of the Casino, the Enterprise also constructed a road over the Road Easement. The Road Easement provides the only commercially viable access to the Casino for the public, patrons, vendors, staff and others.

21. On August 25, 2010, the Enterprise conveyed the Casino Property to the Navajo Nation. The Navajo Nation submitted an application to the Navajo Regional Office of the BIA to have the Casino Property placed into trust on behalf of the Navajo Nation.

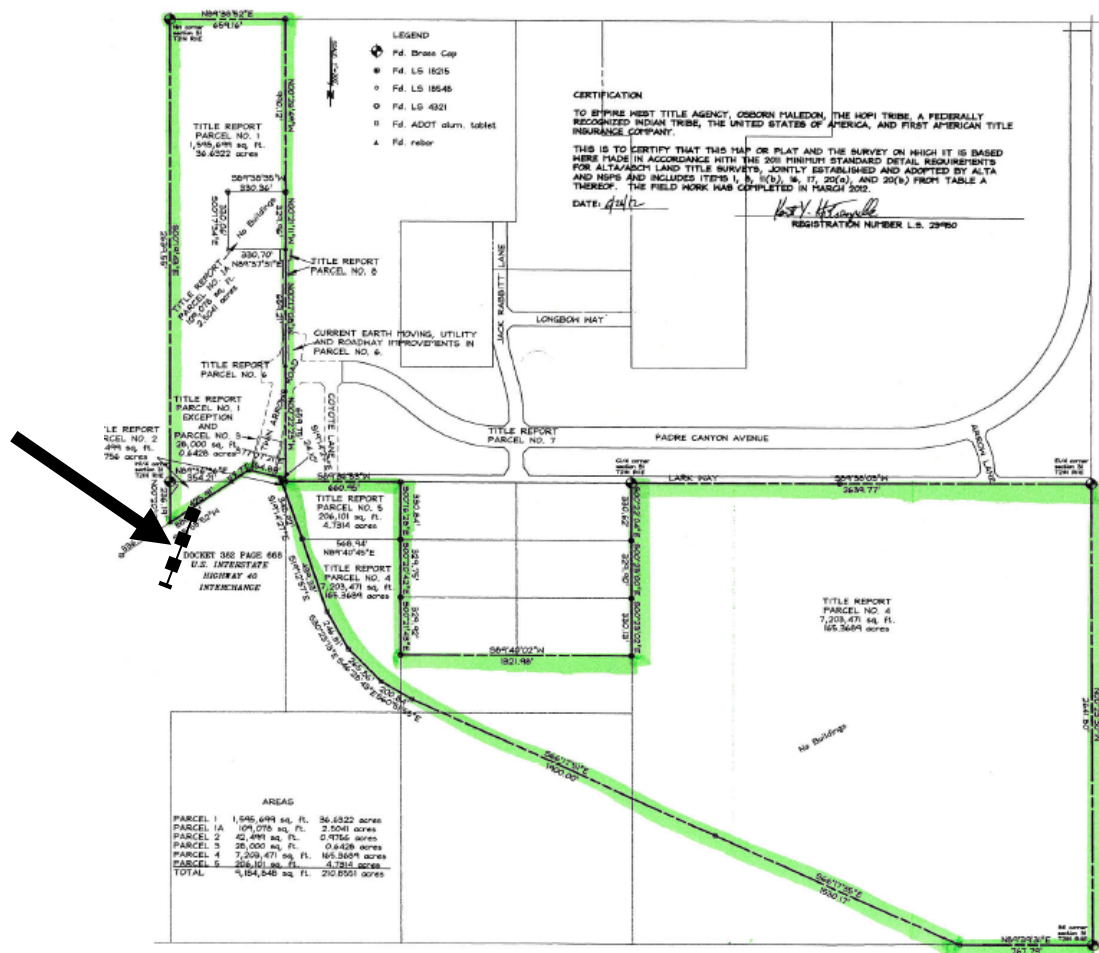
22. Subsequent to the August 2010 conveyance, the Navajo Nation added the Road Easement to its Long Range Transportation Plan and the BIA Reservation Road Inventory.

23. On February 23, 2015, the Enterprise assigned its right, title, and interest in, to and under the Road Easement to the Navajo Nation. The Navajo Nation recorded its interest in the Road Easement on May 11, 2015. The Enterprise is recognized as a

beneficiary in the recorded Road Easement documents and continues to maintain the Road Easement.

24. According to the administrative record, on June 11, 2012, Hopi purchased the Dryes' private land adjacent to the Casino Property (the "Hopi Property"). This purchase included the parcel in, through and over which the Road Easement runs. The boundaries of the Hopi Property and the location of Plaintiffs' Road Easement are depicted in the following survey:

**A.L.T.A./A.C.S.M. LAND TITLE SURVEY**  
**ASSESSOR PARCELS 303-38-003C, 003K, 003R (FORMERLY 003N AND 003P),**  
**004A (FORMELY 004 AND A PORTION OF 303-38-001D), & 012**  
 SITUATE IN A PORTION OF SECTION 31, TOWNSHIP 21 NORTH, RANGE 11 EAST, G. & S.R.M., COCONINO COUNTY, ARIZONA



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1           25. According to the administrative record, on August 22, 2012, Hopi submitted  
2 an application to the BIA Western Regional Director, pursuant to the Navajo Hopi Land  
3 Dispute Settlement Act of 1996, requesting that the BIA take the newly purchased property  
4 into trust for the benefit of Hopi (“Hopi’s fee-to-trust application”).

5           26. According to the administrative record, Hopi’s fee-to-trust application  
6 explicitly acknowledges Plaintiffs’ interest in the Road Easement, including the following:

- 7           a. the application listed Twin Arrows Road amongst “[e]asements over Navajo  
8 Trust land and third party fee land” included in the Subject Lands;  
9           b. the title insurance policy submitted with Hopi’s fee-to-trust application  
10 excepted the Road Easement from coverage; and  
11           c. the legal description of the Hopi’s property submitted with Hopi’s fee-to-trust  
12 application excluded the Road Easement and identified the recorded  
13 instrument documenting the Road Easement.

14           27. According to the administrative record, on December 16, 2013, the Western  
15 Regional Director issued a Letter Decision to Hopi approving Hopi’s fee-to-trust  
16 application. The Letter Decision provides a 30-day deadline to appeal following “receipt”  
17 of the Letter Decision, citing 43 CFR Part 4.

18           28. According to the administrative record, despite the Western Regional  
19 Director’s knowledge of Plaintiffs’ recorded property interest in the Road Easement, the  
20 Western Regional Director did not provide actual written notice of the Letter Decision to  
21 the Navajo Nation or the Enterprise at the time he issued his Letter Decision or within a  
22 reasonable time thereafter pursuant to agency regulations, including 25 CFR  
23 §151.12(d)(2)(ii)(A).

24           29. According to the administrative record, the Western Regional Director  
25 published notice of the Letter Decision on December 19, 2013, in the Arizona Daily Sun.

26           30. The Western Regional Director placed the Hopi property into trust on or  
27 around January 19, 2014.







**CLAIM ONE**  
**WESTERN REGIONAL DIRECTOR DECISION VIOLATED**  
**PROCEDURAL DUE PROCESS**

39. The federal government is prohibited from depriving anyone the right to procedural due process – notice and an opportunity to be heard.

40. Plaintiffs’ property rights in the Road Easement were made known in writing to the Western Regional Director by virtue of a recorded interest in property and by virtue of statements and information in Hopi’s fee-to-trust application.

41. Knowledge of title record is legally sufficient to designate Plaintiffs as interested parties under the BIA regulations.

42. Well-established due process principles require the Western Regional Director to provide reasonable notice under the circumstances – (1) to apprise Plaintiffs of the Hopi’s pending fee-to-trust application action, and (2) to provide Plaintiffs an opportunity to comment on any proposed federal action that could impair Plaintiffs’ property interest in the Road Easement.

43. Indeed, BIA claims it “takes all reasonable and necessary steps to identify and resolve competing claims on the property before issuing a decision to acquire the land in trust and completing such trust transfer.” *See* 78 FR 67928-01.

44. Under these circumstances where BIA knew of Plaintiffs’ property interest, the Western Regional Director’s failure to provide actual written notice to Plaintiffs violated the BIA’s obligation to provide Plaintiffs’ procedural due process rights that would have protected Plaintiffs’ property interest from competing claims.

45. Further, the Western Regional Director’s constructive notice by publication does not constitute a reasonable means of notice to Plaintiffs, sufficient to satisfy due process requirements, when the Western Regional Director had actual written notice of Plaintiff’s recorded Road Easement.

46. As a result, the Western Regional Director’s misapplication of 25 CFR Part 151 and failure to provide actual notice to Plaintiffs, known interested parties with a

1 recorded property interest, of the pendency of Hopi's fee-to-trust application, violated  
2 Plaintiffs' due process and deprived Plaintiffs of an opportunity to be heard and comment.

3 47. Finally, the Western Regional Director misapplied  
4 25 CFR § 151.12(d)((2)(ii)(A), in violation of Plaintiffs due process rights, by failing to  
5 provide Plaintiffs with actual written notice of the Letter Decision that approved Hopi's  
6 fee-to-trust application, thus depriving Plaintiffs of an opportunity to object and appeal the  
7 Letter Decision.

8  
9 **CLAIM TWO**  
10 **WESTERN REGIONAL DIRECTOR DECISION VIOLATED THE**  
11 **ADMINISTRATIVE PROCEDURES ACT**

12 48. The APA, 5 U.S.C. § 706(2), requires courts to, among other things, "hold  
13 unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary,  
14 capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to  
15 constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction,  
16 authority, or limitations, or short of statutory right; [and] (D) without observance of  
17 procedure required by law."

18 49. Western Regional Director violates the APA because his interpretation of 25  
19 C.F.R. §§ 151.10, 151.12 (d)(2)(ii)(A)-(B) is unreasonable, arbitrary and capricious, and  
20 contrary to the Due Process Clause of the Constitution.

21 50. Under 25 CFR § 151.10, the BIA is required to provide prompt, actual written  
22 notice of a request to place land into trust to any state or local government having  
23 jurisdiction over the land to be acquired.

24 51. Under 25 CFR § 151.12(d)(2)(ii)(A), the BIA is required to provide actual  
25 written notice, by mail or personal delivery, to "[i]nterested parties who have made  
26 themselves known, in writing, to the official prior to the decision being made" upon  
27 approval of a request to place land into trust.

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55. The Western Regional Director's failure to provide actual notice to Plaintiffs harmed Plaintiffs' ability to defend and protect their property interest in the Road Easement, effectively disabled Plaintiffs' ability to comment on Hopi's fee-to-trust application, and hindered Plaintiffs ability to appeal within 30 days of the issuance of the Letter Decision to Hopi.

**CLAIM THREE**  
**IBIA DECISION VIOLATED PLAINTIFFS’ PROCEDURAL DUE**  
**PROCESS RIGHTS**

57. The IBIA ruled that a recorded interest is insufficient to place an agency official on notice of a property interest, and Plaintiffs were required to take additional steps to make their recorded interests known to the Western Regional Director.

60. The IBIA's interpretation violates one of the bedrock principles of due process—that the federal government must give notice to affected parties whose property interests may be harmed.

61. The IBIA's decision upholding of the Western Regional Director's strict interpretation of the BIA regulations is also unreasonable, arbitrary, capricious, and contrary to law and thus violates the APA.

63. The administrative record explicitly demonstrates that the Western Regional Director actually knew of Plaintiffs' property interest, and the IBIA's disregard of that record and information is also arbitrary and capricious in violation of the APA.

64. The IBIA's misinterpretation of 25 C.F.R. § 151.12(d)(2)(ii)(A) and disregard for information in the administrative record is unreasonable and contrary to law because the Dismissal denied Plaintiffs their right to notice, an opportunity to be heard, and an opportunity to appeal the Western Regional Director's approval of Hopi's fee-to-trust application necessary to protect Plaintiffs' property interest in the Road Easement.

**CLAIM 5**  
**BIA REGULATION, 25 CFR 151.12(D)(2)(II), VIOLATES THE DUE**  
**PROCESS CLAUSE**

65. Alternatively, if the Western Regional Director and the IBIA reasonably interpreted 25 C.F.R. § 151.12 (d)(2)(ii)(A-B), then that BIA regulation is facially unconstitutional because it deprives Plaintiffs—and others similarly situated—of their due process right to reasonable notice of an administrative decision and an opportunity to be heard as necessary to protect recorded property rights.

66. The BIA promulgated amendments to 25 CFR Part 151 in 2013, changing the notice requirements for interested parties. *See* Final Rule, 78 Fed. Reg. 67928, 67930 (Nov. 13, 2013) (“Under existing regulations, BIA officials who issue decisions under this part are required to provide known interested parties with written notice of such decisions.” (“the change-in-notice requirements”).

67. The change-in-notice requirements, which now require an interested party to provide notice to the BIA before the BIA is required to provide notice to the interested party, violate the federal government's due process obligation to provide notice and an opportunity to be heard when government action may harm or impair the party's property interest.

68. The change-in-notice requirements impermissibly (and nonsensically) place the burden on property owners to notify the federal government even where property owners have no knowledge of a pending or concluded federal action, and its impact on recorded property interests, and the relevant appellate deadlines.

69. Further, the change-in-notice requirements violate the right to notice of pending federal action even in instances where, as here, the government officials actually had knowledge of Plaintiffs' property interest.

70. The BIA's unreasonable procedural expectation, embedded in the regulation, that Plaintiffs who have a recorded and known property interest must affirmatively make themselves known *again* before they are entitled to notice and an opportunity to be heard and to appeal the Letter Decision contradicts and violates the Due Process Clause.

### **REQUESTS FOR RELIEF**

Plaintiffs, the Navajo Nation and the Enterprise request that this court:

a. overturn the IBIA's improper interpretation of the federal regulations and issue a decision that Plaintiffs' appeal of the Western Regional Director Letter Decision was timely;

b. in the alternative, issue a declaratory order that 25 CFR § 151.12 violates Plaintiffs' constitutional rights to due process and is therefore contrary to law; and

c. remand the Dismissal to the IBIA with instructions to the IBIA to hear Plaintiffs' appeal of the Western Regional Director's Letter Decision on the merits.

DATED this 13th day of December, 2019

**LEWIS ROCA ROTHGERBER CHRISTIE LLP**

By: /s/ Pilar M. Thomas

Pilar M. Thomas

Marla Hudgens

**AND**

**NAVAJO NATION DEPARTMENT OF JUSTICE**

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