

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

TOWN OF LAC DU FLAMBEAU,

Plaintiff,

v.

BRYAN NEWLAND, in his official capacity as
Assistant Secretary for Indian Affairs of the
United States Department of the Interior,

TAMMIE POITRA, in her official capacity as
the Midwest Regional Director of the Bureau of
Indian Affairs,

Case No. 23-CV-541

DEB HAALAND, in her official capacity as
United States Secretary of the Interior,

UNITED STATES DEPARTMENT OF THE
INTERIOR,

BUREAU OF INDIAN AFFAIRS,

Defendants.

COMPLAINT

1. This is an action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, *et seq.*, seeking judicial review of a July 5, 2023 decision issued by Assistant Secretary for Indian Affairs Bryan Newland, which arose from the appeal of a decision issued by the Midwest Regional Director, Bureau of Indian Affairs, to remove four roads located in the Town of Lac du Flambeau, Wisconsin from the National Tribal Transportation Facility Inventory (“NTTFI”).

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the Constitution and laws of the United States, namely, the APA, 5 U.S.C. § 701, *et seq.*, and 28 U.S.C. §§ 2201–2202.

3. The July 5, 2023 decision of Bryan Newland constitutes final agency action and no further agency appeal is available.

4. The sovereign immunity of the United States has been waived with respect to the subject matter of this action and the relief requested herein by 5 U.S.C. § 702.

5. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that this is a civil action against the United States, an agency of the United States, and officials and employees thereof, and a substantial part of the events or omissions giving rise to this action occurred within the Western District of Wisconsin. Moreover, a substantial part of the property that is the subject of this action is situated within the Western District of Wisconsin.

PARTIES

6. Plaintiff Town of Lac du Flambeau is a municipal corporation located in Vilas County, Wisconsin.

7. Defendant United States Department of the Interior is an executive agency of the United States government, established pursuant to 43 U.S.C. § 1451, *et seq.*

8. Defendant Deb Haaland is the United States Secretary of the Interior, an office established by 43 U.S.C. § 1451.

9. Defendant Bureau of Indian Affairs (“BIA”) is a United States federal agency within the Department of the Interior.

10. Defendant Tammie Poitra (“Poitra”) is the Midwest Regional Director of the Bureau of Indian Affairs, and is responsible for two of the adverse decisions issued.

11. Defendant Bryan Newland (“Newland”) is the Assistant Secretary for Indian Affairs of the United States Department of the Interior, and is responsible for the July 5, 2023 decision.

GENERAL ALLEGATIONS

12. This action stems from the decision of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the “Band”) to limit access to certain public roadways located in the Town of Lac du Flambeau, Wisconsin.

13. On or about January 31, 2023, Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane (the “Roads”) were barricaded by members of the Band, causing severe disruption to the Town, the Town’s residents, and those property owners who relied on the Roads for public travel and access; the Town is, at least in part, owner of the Roads.

14. As a result, and on February 28, 2023, several property owners filed lawsuits against individual members of the Band, asserting, in part, that the Roads were required to remain open to the public due to the fact that the Roads were listed on the NTTFI. *See Pollard, Donald et al. v. Johnson, Sr., John et al.*, No. 3:23-cv-00135-wmc (W.D. Wis. 2023) (the “Property Owners’ Suit”).

15. 25 C.F.R. § 170.114 requires that all roads listed in the NTTFI “must be open and available for public use as required by 23 U.S.C. § 101(a)(31).”

16. After all defendants in the Property Owners’ Suit had been served, and after the Band had knowledge that the property owners were relying on the Roads inclusion in the NTTFI as support that the Roads must remain open to the public, the Band clandestinely applied to have

the Roads removed from the NTTFI in an attempt to do nothing more than thwart the Property Owners' Suit.

17. In a letter from Poitra dated March 30, 2023, Poitra indicated that the Band had passed a resolution and submitted documentation seeking the removal of the Roads from the NTTFI. A copy of Poitra's letter is attached hereto as **Exhibit A**.

18. The letter further indicated that the "Regional Road Engineer reviewed the Resolution and its accompanying documents, verified that the Tribe has not expended federal transportation funds on the Roads, and validated the update request."

19. The letter went on to state that, on March 24, 2023, the BIA – Division of Transportation, "approved the update request and removed the Roads from the NTTFI with immediate effect" pursuant to 25 C.F.R. § 170.444(b)(3).

20. As a result, Poitra stated, the Roads were no longer on the NTTFI and were therefore ineligible for the expenditure of any Tribal Transportation Program funds.

21. Immediately thereafter, the tribe filed a motion to dismiss the Property Owners' Suit, arguing that, since the Roads were no longer on the NTTFI, the Roads were no longer required to be open to the public.

22. While 25 C.F.R. § 170.444 provides how the NTTFI is "updated," the removal/closure of facilities from the NTTFI is governed by 25 C.F.R. § 170.114(c), which provides that a tribal transportation facility may only be permanently closed where the "Tribal government and the Secretary agree."

23. Upon information and belief, the Band's government and the Secretary of the Interior have not agreed on the closure of the Roads or their removal from the NTTFI.

24. Accordingly, the Band and Poitra failed to utilize the correct procedure to close the Roads and remove them from the NTTFI.

25. Additionally, the Band and Poitra engaged in a concerted effort to remove the Roads from the NTTFI that constituted an abuse of process.

26. On May 2, 2023, Plaintiff appealed Poitra's decision to the Interior Board of Indian Appeals ("IBIA").

27. However, on May 5, 2023, Newland sent a memorandum to the Chief Administrative Judge of the IBIA, indicating that Newland would be exercising his authority under 25 C.F.R. § 2.4(c), 25 C.F.R. § 2.20(c), and 43 C.F.R. § 4.332(b) to assume jurisdiction over Plaintiff's appeal.

28. Two months later, on July 5, 2023, Newland issued an order dismissing Plaintiff's appeal. A copy of Newland's order is attached hereto as **Exhibit B**.

29. In his order, Newland recited the procedural history of the appeal and noted that Plaintiff sought to appeal Poitra's decision pursuant to 25 C.F.R. Part 2.

30. Newland stated that 25 C.F.R. Part 2's appeal procedure does not apply where "any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision."

31. Newland further stated that 25 C.F.R. § 170.444(c) provides a "limited administrative appeal procedure" that grants a "right of appeal to a Tribe, which may only 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.'"

32. Accordingly, Newland concluded that Plaintiff's appeal is "not authorized by the TTP regulations at 25 C.F.R. § 170.444(c)," and as a result, *sua sponte* ordered the dismissal of Plaintiff's appeal.

33. Newland's July 5, 2023 decision is final agency action of the department and is reviewable pursuant to 5 U.S.C. §§ 704 & 706.

34. Plaintiff has expended significant funds to maintain the Roads as public roadways.

35. 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.

36. 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.

37. Newland's decision eviscerates Plaintiff's ability to protect its legally cognizable interest in maintaining critical infrastructure located within its jurisdiction.

38. Moreover, as a result of Newland's erroneous decision, which has allowed the Roads to be removed from the NTTFI without appeal, Plaintiff has been subjected to several claims from the affected landowners.

39. Plaintiff has received twelve notices of circumstances giving rise to claim and notices of claim pursuant to Wis. Stat. § 893.80, which, in total, seek over \$6,000,000.00 in damages.

40. Of those notices of circumstances and notices claims previously provided to Plaintiff, two homeowners have already filed actions against Plaintiff. *See Beer Jr., et al. v. Town*

of Lac du Flambeau, Vilas County Case No. 2023CV000078; *Hornbostel v. Town of Lac du Flambeau*, Vilas County Case No. 2023CV000068.

41. Upon information and belief, title 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.

42. 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.

43. Accordingly, the decisions of Newland and Poitra have gravely harmed Plaintiff.

COUNT I

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

44. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 43 of this Complaint.

45. Pursuant to 25 C.F.R. § 170.114(c), the Roads were only able to be closed and removed from the NTTFI through the agreement of the Band and the Secretary of the Interior.

46. Upon information and belief, the Band and the Secretary of the Interior have never agreed to close the Roads and remove them from the NTTFI.

47. 25 C.F.R. § 170.444 merely provides the method by which the NTTFI is "updated" and does not use the terms "close" or "remove" at any point.

48. Poitra and Newland's decision to utilize 25 C.F.R. § 170.444 to remove the Roads from the NTTFI in an expedited fashion, and in an effort to enable the tribe to argue that the Roads

did not have to remain open to the public, is arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, pursuant to 5 U.S.C. § 706(2)(A).

49. Poitra and Newland's decision to utilize 25 C.F.R. § 170.444 to close the Roads and remove them from the NTTFI is contrary to constitutional right, power, privilege or immunity, pursuant to 5 U.S.C. § 706(2)(B).

50. Poitra and Newland's decision to utilize 25 C.F.R. § 170.444 to close the Roads and remove them from the NTTFI is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. § 706(2)(C).

51. Poitra and Newland's decision to utilize 25 C.F.R. § 170.444 to close the Roads and remove them from the NTTFI is without observance of procedure required by law, pursuant to 5 U.S.C. § 706(2)(D).

COUNT II

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

52. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 51 of this Complaint.

53. Newland's decision concluded that, because § 170.444(c) described the specific process that a tribe must follow to appeal the rejection of submitted data on a new or existing facility included in the NTTFI, Plaintiff had no authorization to appeal the decision of Poitra.

54. Notwithstanding the fact that § 170.444 is not the proper procedure to close the Roads and remove them from the NTTFI, nothing in § 170.444 forecloses appeals by aggrieved entities such as Plaintiff as a result of an erroneous decision made pursuant to § 170.444.

55. Poitra and Newland's decision has nothing to do with the rejection of submitted data, but instead, surrounds the erroneous *acceptance* of submitted data by virtue of following the

incorrect procedure; nothing in § 170.444 prevents Plaintiff from appealing such an erroneous decision.

56. Newland's determination that Plaintiff has no appeal rights under § 170.444 is arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, pursuant to 5 U.S.C. § 706(2)(A).

57. Newland's determination that Plaintiff has no appeal rights under § 170.444 is contrary to constitutional right, power, privilege or immunity, pursuant to 5 U.S.C. § 706(2)(B).

58. Newland's determination that Plaintiff has no appeal rights under § 170.444 is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. § 706(2)(C).

59. Newland's determination that Plaintiff has no appeal rights under § 170.444 is without observance of procedure required by law, pursuant to 5 U.S.C. § 706(2)(D).

COUNT III

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

60. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 59 of this Complaint.

61. Upon information and belief, the decisions of Poitra and Newland were made for no other reason than to improperly aid the Band in seeking dismissal of the Property Owners' Suit.

62. Defendants, working hand-in-hand with the tribe, improperly utilized the process found in 25 C.F.R. § 170.444 to give the tribe an expedited and unfair advantage in the Property Owners' Suit.

63. 25 C.F.R. § 170.444 and its processes were neither designed to address the closure and removal of the Roads from the NTTFI, nor to allow Defendants to provide the tribe with an expedited and unfair advantage in the Property Owners' Suit.

64. Nonetheless, Defendants intentionally and maliciously used 25 C.F.R. § 170.444 to wrongfully remove the Roads from the NTTFI and to provide an unfair advantage to the tribe in the Property Owners' Suit.

65. Poitra and Newland's decisions are arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, pursuant to 5 U.S.C. § 706(2)(A).

66. Poitra and Newland's decisions are contrary to constitutional right, power, privilege or immunity, pursuant to 5 U.S.C. § 706(2)(B).

67. Poitra and Newland's decisions are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. § 706(2)(C).

68. Poitra and Newland's decisions are without observance of procedure required by law, pursuant to 5 U.S.C. § 706(2)(D).

COUNT IV

DECLARATORY JUDGMENT (ADMINISTRATIVE PROCEDURE ACT)

69. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 68 of this Complaint.

70. An actual controversy has arisen and exists between Plaintiff and Defendants regarding their respective rights, duties, and obligations because Plaintiff contends that Defendants have violated the APA and that this unlawful agency action has injured Plaintiff.

71. Plaintiff seeks a declaratory judgment the Poitra and Newland's decisions violate the APA and should be vacated and/or remanded.

COUNT V

DECLARATORY JUDGMENT (CONSTITUTIONALITY OF 25 C.F.R. § 170.444(c))

72. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 71 of this Complaint.

73. In the alternative, 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.

74. The Fifth Amendment to the Constitution of the United States provides that no person shall be “deprived of life, liberty, or property, without due process of law.”

75. As interpreted by Newland, 25 C.F.R. § 170.444(c) operates to deprive 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.

76. If unable to appeal, Poitra and Newland’s decision 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 within the Plaintiff’s jurisdiction.

77. If 25 C.F.R. § 170.444(c) precludes Plaintiff from appealing, Plaintiff will have been deprived of due process, and will suffer significant damages as a result.

78. Accordingly, Plaintiff seeks a declaratory judgment that 25 C.F.R. § 170.444(c) is unconstitutional as applied to Plaintiff.

REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Vacate and/or remand the decisions of Poitra and Newland;

- B. Issue a declaratory judgment that the decisions of Poitra and Newland violate the APA;
- C. Stay the decisions of Poitra and Newland pending the resolution of this dispute;
- D. Issue a declaratory judgment that 25 C.F.R. § 170.444(c) is unconstitutional as applied to Plaintiff; and
- E. Such other further relief as this Court may deem just and proper.

Dated: August 7, 2023.

VON BRIESEN & ROPER, S.C.

s/ Frank W. Kowalkowski

Frank W. Kowalkowski, SBN 1018119

VON BRIESEN & ROPER, S.C.

300 N. Broadway, Suite 2B

Green Bay, Wisconsin 54303

T: (920) 713-7800

F: (920) 232-4897

frank.kowalkowski@vonbriesen.com

Derek J. Waterstreet, SBN 1090730

VON BRIESEN & ROPER, S.C.

411 E. Wisconsin Avenue, Suite 1000

Milwaukee, Wisconsin 53202

T: (414) 287-1519

F: (414) 238-6434

derek.waterstreet@vonbriesen.com

*Attorneys for Plaintiff,
Town of Lac du Flambeau*