IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

WESTERN ENERGY ALLIANCE Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, SALLY JEWELL, in her official Capacity as Secretary of the United States Department of the Interior; BUREAU OF INDIAN AFFAIRS, and MICHAEL S. BLACK, in his official Capacity as Director of the Bureau of Indian Affairs Defendants.	)	Case No. 16-cv-00050-DLH-CSM

MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO STAY IMPLIMENTATION OF FINAL RULE

Plaintiff Western Energy Alliance ("Alliance"), by and through its undersigned counsel, hereby submits this Memorandum, pursuant to N.D. Civ. L.R. 7.1 (B), in support of its Motion for a Temporary Restraining Order and Preliminary Injunction seeking to stay implementation of the final rule entitled *Rights-of-Way on Indian Land*, 80 Fed. Reg. 72492-72549 (Nov. 19, 2015) (the "Rule").

INTRODUCTION

Defendants United States Department of Interior ("DOI") and Bureau of Indian Affairs ("BIA," and collectively with DOI, the "Agencies") recently promulgated Rule – which is currently scheduled to go into effect on Monday, March 21, 2016 – purports to "modernize" the process for securing right-of-way grants across Indian trust lands where the United States

possesses the fee interest, and holds the same for the benefit of tribal governments and individual Indians. *Preamble*, 80 Fed. Reg. 72492. The Agencies' dramatic departure from the current process for obtaining, retaining, and transferring Indian land rights-of-way is, however, fundamentally flawed in numerous material respects.

First, the Rule purports to confer tribal jurisdiction over right-of-way grantees, even though the United States Supreme Court has expressly held that tribes may not regulate non-Indian activity within rights-of-way granted under the 1948 Rights-of-Way for All Purposes Act, 25 U.S.C. § 323-328 (the "1948 Act"). *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997); *Burlington N. R.R. Co. v. Red Wolf,* 196 F.3d 1059, 1063 (9th Cir. 1999).

Second, the Rule would improperly permit federally approved rights-of-way to be unilaterally terminated without the involvement of the Secretary of the DOI (the "Secretary"), who, on behalf of the United States, is the actual grantor of the rights-of-way. 25 U.S.C. § 323.

Third, the Rule seeks to alter the existing property rights attendant to rights-of-way by insinuating that federally granted rights-of-way do not transfer a real property interest to grantees. In so declaring, the Rule provides an end run around traditional principals of jurisdiction where, once an Indian landowner consents to the issuance of a right-of-way, that landowner is no longer entitled to seek to regulate the grantee's access or permitted use within the right-of-way. *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1112 (9th Cir. 1999); *S. Dakota v. Bourland*, 508 U.S. 679, 689 (1993).

Fourth, the Rule seeks to authorize new taxation powers contrary to federal law holding that tribes do not possess the authority to tax non-Indians and non-Indian property within rights-of-way.

Fifth, the Rule is arbitrary and capricious insofar as the Agencies have failed to sufficiently explain the basis for the Rule, and the election to depart from the long-standing statutes and policies that, among other things, previously recognized the supremacy of federal jurisdiction within rights-of-way. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 799 (D.C. Cir. 1983).

Sixth, in promulgating the Rule, the Agencies failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA").

In light of the foregoing, contemporaneously herewith, the Alliance has filed its Complaint seeking judicial review of the Rule and asking that it be set aside. By this Motion, the Alliance also requests that the Court immediately stay implementation of the Rule, pursuant to 5 U.S.C. §§ 704, 705, so as to prevent the irreparable harm that will result if the Rule is not enjoined pending a decision on the merits of the Alliance's Complaint.

BACKGROUND

Indian land rights-of-way are essential to Alliance members engaged in the oil and gas exploration, production, and transportation industry in North Dakota and throughout the Western United States.[1] Exhibit 1 to Motion, Declaration of Kathleen M. Sgamma, Vice President of Government and Public Affairs for the Alliance ("Sgamma Dec.") at ¶ 5. The rights-of-way granted by the United States through BIA are necessary, for example, for well pad locations, ingress and egress access roads, gathering lines, transportation lines, and oil and gas related surface facilities. *Id*. Without the rights-of-way, and without the ability to assign and mortgage

[1] The Alliance notes that several other industries also rely on Indian land rights-of-way. These industries include, but are certainly not limited to, companies involved in: (i) power generation; (ii) power transmission and distribution; (iii) water conservation and distribution; (iv) energy transportation; and (v) telecommunications.

rights-of-way and protect the same from unauthorized challenges, Alliance members would be unable to access production sites or transport resources away from production locations and to the appropriate markets, and would be prohibited from conveying, pledging or otherwise treating rights-of-way as an asset in the ordinary course of business. *Id*. Put simply, mineral extraction within Indian country could not occur without BIA-granted rights-of-way that function in a fashion compatible with real world market operations.

Generally, most, but certainly not all, rights-of-way over Indian trust lands are, at present, granted pursuant to the 1948 Act. The 1948 Act was originally conceived solely as a legislative enactment permitting the Secretary to grant rights-of-way over restricted Osage Indian lands in Oklahoma. S. Rep. No. 823 (1948). The Senate requested the Secretary's insights, and the Secretary responded by providing new proposed legislation wherein Congress would vest the Secretary with the authority to "grant" rights-of-way to applicants over all Indian lands. *Id*. at 3-4. Prior to 1948, Congress had previously vested the Secretary with authority to grant use-specific rights-of-way over Indians lands – *e.g.* railroads, pipelines, and public roads, *see* 25 U.S.C. §§ 312, 321, 311 – whereas, the 1948 Act vested the Secretary with authority to grant rights-of-way for any and all purposes. 25 U.S.C. § 323.

The 1948 Act, for the first-time, also required right-of-way applicants to initially acquire the Indian landowner's "consent." 25 C.F.R. §§ 169.3(a), (b).[2] Thereafter, application for a right-of-way is made to the Secretary, and the Secretary, not the Indian surface owner, grants the

[2] The Secretary may, in certain limited circumstances, grant rights-of-way over Indian lands without the consent of the Indian surface owner. Those circumstances are listed in 25 C.F.R. § 169.3(c) and, generally, apply: (i) in the case of minors; (ii) where a majority of the surface owners have consented to the grant; (iii) when the whereabouts of certain surface owners are unknown; (iv) during the time an Indian surface owner's interest may be in probate; and (v) in instances where the owners are just so numerous in nature that the Secretary determines that acquiring their consent would be impracticable.

right-of-way for a tenure selected by the Secretary. 25 C.F.R. § 169.18. Further, once an applicant has received a Grant of Deed of Easement from the Secretary, it is only the Secretary, as the grantor, that can terminate the same. 25 C.F.R. § 169.20; *Kuykendall v. Phoenix Area Dir., BIA*, 8 IBIA 76, 88 n.20 (1980); *Whatcom County Park Board v. Portland Area Dir., BIA*, 6 IBIA 196 (1977); *Brown County, Wisconsin*, 2 IBIA 320 (1974). This process is in place and followed because 1948 Act rights-of-way represent the transfer of legislatively authorized property rights to a right-of-way grantee by the only landowner permitted to grant such rights: the fee interest owner, the United States through the Secretary.[3] *Redwolf*, 196 F. 3d at 1063. As a consequence, 1948 Act rights-of-way: (1) bestow grantees with property interests in Indian trust lands, *id.*; (2) are contracts between the Secretary and the grantee, *Reservation Tel. Co-op v. Henry,* 278 F. Supp. 1015, 1023 (D. N.D. 2003); and (3) do not represent a contract or consensual relationship between the right-of-way grantee and the Indian surface owners, *Big Horn Cty. Elec. Co-op., Inc. v. Adams,* 219 F.3d 944, 951 (9th Cir. 2000).

The new Rule would require significant more expense, consents, and approvals relating to the acquisition, retention, assignment, and mortgaging of rights-of-way; all of which would result in further delays in the granting and usage of Indian land rights-of-way for oil and gas development and transportation – which, in turn, could decrease both the overall number of rights-of-way on Indian lands and the monetary benefits flowing to Indian beneficial owners with respect to those rights-of-way. Ex. 1, Sgamma Dec. at ¶ 6.

Perhaps more importantly for purposes of this Motion, the Rule seeks to alter longstanding and well recognized concepts and understanding pertaining to: (i) the property rights of right-of-way grantees; (ii) jurisdictional and taxation authorities of tribes, States, and

[3] It is well settled that only Congress may grant real property interests in Indian lands to another. 25 U.S.C. §§ 177, 348.

local governments; (iii) the Secretary's individualized authority to determine, enforce, and respect the rights of right-of-way grantees; (iv) the transferability of rights-of-way by a grantee; (v) the usage of rights-of-way for more than a single purpose; and (vi) contrary to Congressional direction, the issuance of rights-of-way under other statutes authorizing the Secretary to grant use rights in Indian lands under specific circumstances or for specific purposes.

ARGUMENT

I. THE COURT SHOULD ENJOIN IMPLIMENTATION OF THE RULE IN ORDER TO PREVENT IRREPARABLE HARM TO THE ALLIANCE AND ITS MEMBERS.

The Alliance is entitled to a temporary restraining order and preliminary injunction because it is likely to succeed on the merits of its pending challenge to the Rule. Moreover, implementation of the Rule as currently scheduled on March 21, 2016, will result in immediate and irreparable harm to Alliance members. On balance, the equities weigh in favor of an injunction, as delayed implementation of the Rule will not prejudice the Agencies. At the same time, the public interest is best served by allowing meaningful judicial review of the Rule to ensure its propriety and legality before overhauling and remaking the existing system for federally granted rights-of-way traversing Indian trust land.

A. Legal Standard for a Stay and/or Preliminary Injunction.

The standard for granting a preliminary injunction in the Eighth Circuit involves consideration of the following four factors:

(1) the likelihood that the movant will succeed on the merits of its claims;

(2) the threat of irreparable harm to the movant;

(3) the balance of harms between the movant's injury and any harm that granting the injunction will inflict upon the adverse party; and

(4) the public interest.

Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). Whether to issue preliminary injunctive relief should not, however, be made upon mechanical application of these four factors, but rather upon whether the balance of equities so favors the movant that justice requires the Court to intervene to preserve the status quo until the merits are determined. *See, e.g., Wood Mfg. Co. v. Schultz*, 613 F. Supp. 878 (W.D. Ark. 1985). Indeed, no single factor in itself is dispositive; in each case all the factors must be considered to determine whether on balance they weigh towards granting the injunction. *Dataphase Sys.*, 640 F.2d at 113.

The decision to grant preliminary injunctive relief is left to the sound discretion of the District Court. *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861 (8th Cir. 1977). The purpose of such a preliminary injunction is "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Preservation of the status quo enables the court to render a meaningful decision on the merits. *See, e.g., Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

B. The Alliance is Likely to Succeed on the Merits.

When evaluating a movant's likelihood of success on the merits, courts should "flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.,* 815 F.2d 500, 503 (8th Cir. 1987) (quoting *Dataphase,* 640 F.2d at 113) (internal quotations omitted). At this preliminary stage, the Court need not decide whether the party seeking the temporary restraining order will ultimately prevail. *PCTV Gold, Inc. v. SpeedNet, LLC,* 508 F.3d 1137, 1143 (8th Cir. 2007). Although a temporary restraining order cannot be issued if the movant has no chance on the merits, "the Eighth Circuit has rejected a requirement as to a 'party seeking preliminary relief prove a greater than fifty percent likelihood that he will prevail on the merits.'" *Id.* (quoting

Dataphase, 640 F.2d at 113). The Eighth Circuit has also held that of the four factors to be considered by the district court in considering preliminary injunctive relief, the likelihood of success on the merits is "most significant." *S & M Constructors, Inc. v. Foley Co.,* 959 F.2d 97, 98 (8th Cir. 1992).

In this case, the Alliance is likely to succeed in setting aside the Rule because, at a minimum: (i) the Agencies' have improperly exceeded their Congressionally delegated authority; (ii) the Rule runs contrary to well-established federal case law; (iii) portions of the Rule are arbitrary and capricious; and (iv) the Agencies failed to comply with NEPA. A likelihood of success on the merits of even one of these claims can be sufficient to justify injunctive relief. *See Nokota Horse Conservancy, Inc. v. Bernhardt,* 666 F.Supp.2d 1073, 1078–80 (D.N.D. 2009).

1. <u>The Rule Exceeds the Secretary's Authority as Delegated by Congress</u>.

The APA requires reviewing courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(c). Here, the Agencies' promulgation of the Rule exceeds the authority delegated by the legislature in three distinct ways: (i) the Rule would expand tribal law and jurisdiction to cover federally granted property rights in rights-or-way over land possessed by the United States in fee, and all conduct, including non-Indian activities, within the same;[4] and (ii) the Rule would permit Indian tribes and allotted Indian surface owners – who are not parties to the rights-of-way grant; the correct parties being the right-of-way grantee and the Secretary – to terminate federally granted property rights without the Secretary's involvement or consent; and (iii) the Rule purports to allow BIA to impose trespass sanctions when no statutory authority exists to impose

[4] Although possibly beyond the scope of the Alliance's members' concerns and issues with the Rule, it is noteworthy that in addition to the oil and gas industry, the extension of tribal jurisdiction authorized by the Rule would also extend to, at a minimum, railroads, public utilities, interstate transportation facilities, and public highways.

such sanctions on Indian land rights of way. As set forth below, these issues arise out of the Agencies' flawed decision to incorporate into the Rule the same language found in Indian surface leasing regulations. Finally, the Rule reflects the Agencies' unilateral decision to ignore rights-of-way provisions in other laws, even though those statutes have not been repealed by Congress and therefore remain good law.

a. *The Rule would treat rights-of-way like surface leases, even though surface leases are governed by a different enabling statute.*

Rights-of-way traversing Indian lands are not surface leases, should not be treated like surface leases, and – perhaps most importantly – are not legislatively authorized by specific Indian surface leasing legislation. Nonetheless, the Agencies have elected to incorporate the language of the current Indian surface leasing regulations, found in 25 C.F.R. Part 162, into the Rule. The problem with this approach is that BIA's surface leasing regulations arise from separate and distinct legislative authority that is vastly different than the 1948 Act, which is the Agencies' only stated basis for the Rule.

Indian surface leasing regulations have evolved over time, but were promulgated, in part, to implement the American Indian Agricultural Resource Management Act ("AIARMA"), 25 U.S.C. § 3701, *et seq*., which *inter alia*, permits "the Secretary to take part in the management of Indian agricultural lands, with the participation of the beneficial owners of the land." 25 U.S.C. § 3702(2). When enacting AIARMA, Congress directed the Secretary to "comply with tribal laws . . . pertaining to Indian agricultural lands, including . . . [laws] to regulate land use or other activities under tribal jurisdiction"; and in doing so, tasked the Secretary to: (i) "provide

assistance in the enforcement of such tribal laws"; and (ii) "provide notice of such laws to persons or entities undertaking activities on Indian agricultural land." *Id*. at § 3712(b).[5]

Unlike AIARMA and other Indian land surface leasing statutes, however, the 1948 Act *does not* direct the Secretary to recognize or comply with tribal law, nor does it vest Indian tribes with jurisdiction over federally granted rights-of-way, the non-Indian property located within or non-Indian activities occurring on such federally granted property rights. To the contrary, the 1948 Act is silent regarding Congress': (i) recognition of the applicability of tribal law and jurisdiction over non-Indian rights-of-way and non-Indian activities within the same; (ii) bestowment upon tribes of jurisdiction over non-Indians; or (iii) granting tribes the unilateral authority to terminate federally granted rights-of-way if permitted under tribal law. 25 U.S.C. §§ 323 *et seq*.

b. *The Rule would improperly expand tribal law and jurisdiction to cover rights-of-way*

As a general Rule, absent express authorization by federal statute or treaty, efforts by tribes to regulate non-Indian activity or conduct are presumptively invalid. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648 (2001); *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). As the Supreme Court has stated:

> [T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders: [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008) (citing *Montana*, 450 U.S. at 565) (internal quotations omitted). Nor does the 1948 Act vest tribes with jurisdiction over non-Indian activities or conduct.

[5] The provisions of AIARMA also allowed the Secretary to undertake these actions with respect to business leases applicable to Indian land. BIA's regulations applicable to business leases and applying the directives of AIARMA thereto can be found at 25 C.F.R. Part 162.

Ignoring settled principles and the 1948 Act's failure to grant tribes jurisdiction over non-Indian rights-of-way and related activities, BIA seeks, via the Rule, to: (i) recognize the applicability of tribal law to federally granted rights-of-way issued under the 1948 Act; (ii) bestow tribes with jurisdiction over non-Indians within the same; and (iii) permit tribal law to somehow supersede regulations of the Secretary where Congress has "only" allowed the Secretary to issue regulations governing 1948 Act rights-of-way. *See* 80 Fed. Reg. 72538 (25 C.F.R. §§ 169.9, 169.11). Again, these provisions very closely follow the regulations found at 25 C.F.R. Part 162, which have absolutely no application to rights-of-way on Indian lands. As set forth above, the regulations appearing at 25 C.F.R. Part 162, arise from BIA's interpretation of AIARMA and other Indian surface leasing legislation, which include explicit legislative language recognizing tribal law and its applicability to Indian surface leases. In stark contrast, the 1948 Act *does not* include such legislative language, and neither AIARMA, its interpretive regulations, nor any other statute, apply to BIA rulemaking concerning the 1948 Act. Moreover, nothing contained in the 1948 Act's legislative history supports BIA's application of regulations interpreting AIARMA to rights-of-way. *See* S. Rep. 823 (Jan 14, 1948).

c. *No general statutory authority exists that allows BIA's attempt to impose trespass sanctions on grantees on Indian lands.*

The 1948 Act does not authorize BIA to impose sanctions against individuals or entities for allegedly trespassing on tribal or individually owned Indian land. Nonetheless, through promulgation of the Rule, BIA seeks to grant itself such authority. *See* 25 C.F.R. §§ 169.407, 169.413 ("An unauthorized use within an existing right-of-way is also a trespass. [BIA] may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies."). Contrary to BIA's broad brush painting of is powers in this regard, Congress has vested BIA with but very limited authority to address instances of alleged

trespass on Indian lands, and none of that limited authority is applicable to Indian land rights-of-way.

Pursuant to 25 U.S.C. § 3106, Congress vested BIA with the authority to issue regulations to "establish civil penalties for the commission of *forest* trespass," including regulations that would allow BIA to collect "costs associated with damage to the Indian forest land." *Id*. at § 3106(a) (emphasis supplied). Indian forest land is defined to include:

> [C]ommercial and non-commercial timberland and woodland, that are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover."

Id. at § 3103(3). Similar to the "forest trespass" authorization, Congress has also bestowed on BIA authority to issue regulations addressing trespass on Indian *agricultural* lands. *Id*. at § 3713(a). When selecting those Indian agricultural lands to which the authorization applies, Congress restricted the statues reach to:

> farmland and rangeland, but excluding Indian forest land, that is used for the production of agricultural products, and Indian land occupied by industries that support the agricultural community.

Id. at § 3703(1).

Congress has not otherwise granted BIA the ability to deal with trespass on Indian lands that would serve as the basis for the Rule's sweeping assumption of trespass authority.[6] As such, BIA is without authority to enforce alleged trespass actions within Indian land rights-of-way, or over Indian lands generally.

Despite having no statutory basis for doing so, the Rule defines a trespass as "any unauthorized occupancy, use of, or action on *tribal or individually owned Indian land*." 25

[6] There is, admittedly, an additional congressionally-approved trespass restriction vis-à-vis Indian lands, that being 18 U.S.C. § 1165. This statue is, however, only applicable to trespass related to "hunting, trapping, or fishing," and offers no support for BIA's attempt to by regulation created in itself an administrative trespass role it does not possess.

C.F.R. § 169.2 (emphasis supplied). Both tribal lands and individually owned Indian lands are also defined broadly in the Rule to include any surface lands in which an Indian tribe or individual Indian possesses a beneficial interest. *Id*. As should be clear, BIA has not been empowered to enforce alleged trespasses against every type of Indian lands. Instead, and again, Congress has only authorized BIA to enforce trespasses on Indian *forest* and *agricultural* lands, and not Indian lands in general. BIA even appears to recognize this fact, when stating in the *Preamble* that:

> The proposed rule and final rule definition of "trespass" is consistent with the definition of trespass on Indian land in leasing, *forestry* and *agricultural* contexts. *See e.g.*, 25 C.F.R. 166.801.

Preamble, 80 Fed. Reg. at 72531. BIA deftly seeks to side-step its real powers, however, when citing to 25 C.F.R. § 166.801. BIA's lack of authority to regulate alleged trespass outside of Indian *forest* and *agricultural* lands is evident from the very wording of 25 C.F.R. § 166.801, which provides in relevant part that BIA will:

> (a) Investigate accidental, willful, and/or incidental trespass on *Indian agricultural land*;…
> (c) Assess trespass penalties for the value of products used or removed, cost of damage to the *Indian agricultural land* . . .
> (d) Ensure that damage to *Indian agricultural lands* resulting from trespass is rehabilitated and stabilized at the expense of the trespasser.

(emphasis supplied); *see also* 25 C.F.R. § 166.800 ("[T]respass is any unauthorized occupancy, use of, or action on *Indian agricultural lands*") (emphasis supplied)). Therefore, even the citation BIA utilizes to support its purported trespass power in the *Preamble* expressly recognizes the inherent and extremely real limitations on BIA's authority to address future instances of alleged trespass with respect to rights-of-way. BIA thus exceeded its statutory authority when promulgating regulations governing trespass over Indian lands as a general

matter simply because BIA may not enforce the trespass provisions of the Regulations except where the alleged trespass involves Indian *forest* and *agricultural* lands.

d. *The Rule permits rights-of-way to be terminated without the Secretary's consent.*

Equally troubling is the portion of the Rule that would permit tribes and potentially Indian landowners to unilaterally "terminate" 1948 Act rights-of-way without the Secretary's involvement or consent. *See* 80 Fed. Reg. at 72547 (25 C.F.R. §§ 169.403, 169.404). Nowhere is such action authorized by the 1948 Act. Indeed, as set forth above, unlike AIARMA, the 1948 Act does not recognize tribal law or the application of the same to 1948 Act rights-of-way. In addition, providing Indian landowners with termination rights is contrary to existing federal judicial precedent that has never been supplanted by subsequent legislative action.

For example, in 1983, the Ninth Circuit Court of Appeals declared that, regardless of the express terms of a surface lease, an Indian tribe was prohibited from unilaterally terminating interests in real property absent the Secretary's approval. *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075-1076 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017. The Court affirmed a prior Interior Board of Indian Appeals (the "Board") decision that reached the same conclusion, wherein the Board noted:

> In a related subject area, it is recognized that cancellation of rights-of-way over tribally owned trust land requires Departmental action . . .This requirement is provided by regulation even though the [1948 Act] expressly addresses only the authority of the Secretary to grant such rights-of-way.

Kuykendall v. Phoenix Area Dir., BIA, 8 IBIA 76, 88 n.20 (1980); *see also Whatcom County Park Board v. Portland Area Dir., BIA*, 6 IBIA 196, (1977); *Brown County, Wisconsin*, 2 IBIA 320 (1974). The District of Columbia Circuit Court of Appeals reached a similar conclusion

when addressing an individual Indian landowner's ability to cancel a surface lease approved by the Secretary stating:

> It is plain that allottees do not control the leasing of their lands. First, they can only grant those leases which the Secretary approves . . . Second, they can grant leases only on terms and forms that the Secretary dictates . . . Third, an allottee *cannot cancel a lease without the Secretary's prior approval*.

Brown v. United States, 86 F.3d 1554, 1561-1562 (Fed. Cir. 1996) (internal citations omitted) (emphasis supplied). Two federal courts have thus expressly held that Indian landowners are unable to terminate real property interests that were previously reviewed and approved by the Secretary. Instead, only the Secretary may take action to cancel a federally authorized property right in Indian lands.[7]

The source of the problem with the Rule is the Agencies' unwarranted and non-statutory based attempt to incorporate language from the surface leasing regulations, that language arising from a wholly inapplicable statutory authorization, into the right-of-way process and system, which are fundamentally and statutorily different from surface leases. Unlike rights-of-way, Indian landowners grant surface leases, and the Secretary is only tasked with reviewing and approving such surface leases. In direct and unequivocal contrast, the real property interests at issue in the Rule (*i.e.* federal rights-of-way) are direct grants of a real property interest to the

[7] Tellingly, BIA has previously recognized the impact of this controlling precedent in other contexts. In 1996, for example, BIA revised a portion of the regulations governing mineral leasing on Indian lands and, when addressing a tribe's ability to cancel a mineral lease, stated:

> The mineral lease approved by the Secretary concerns land the Department has a statutory obligation to protect. The Secretary will review any and all information an Indian mineral owner may have concerning whether or not a lease should be cancelled but the final decision to cancel must remain with the Secretary:

61 Fed. Reg. 35634, 35450 (July 8, 1996). Rights-of-way, being Congressionally authorized property rights, should deserve no less protection.

grantee by the fee interest owner, the United States. While one might be able to argue that an Indian surface owner may have the legal authority to terminate a surface lease because the surface owner is the lessor, this simply cannot be true for rights-of-way. It is the United States, as the fee interest owner, that "grants" rights-of-way on Indian lands. On the face of every BIA right-of-way grant, the United States is unequivocally identified as the "grantor;"[8] while directly opposite thereto, on the face of Indian surface and mineral leases, the beneficial Indian landowner is identified as the "lessor." As the Agencies have recognized for well over one-hundred years (until the publication of the Rule), Indian land rights-of-way are granted by the fee landowner, the United States, and subject to termination by the Secretary. *See* current 25 C.F.R. § 169.20 ("the Secretary shall issue an appropriate instrument terminating the right-of-way"). Indian landowners are not parties to 1948 Act rights-of-way and have no continual consensual relationship with right-of-way grantees; as such, only the United States, through the Secretary, is vested with Congressional authority to cancel such federal grants.

Finally, it is noteworthy that rights-of-way are considered non-Indian property for governance purposes. *See* 80 Fed. Reg. at 72547 (25 C.F.R. § 169.403). The United States Supreme Court has affirmatively declared that tribal courts are absolutely without jurisdiction to adjudicate matters related to non-Indian real property, including rights-of-way. *See Plains Commerce*, 554 U.S. 316; *see also Kuykendall*, 9 IBIA 90 ("The Board's decision notes . . . tribal trust lands administered by the Secretary, was under the terms of the lease and applicable regulations . . . beyond the subject matter jurisdiction of the tribal court to determine"). Likewise, the Eighth Circuit Court of Appeals has affirmed that tribal courts are without

[8] BIA further admits that it is the United States, not the Indian landowner, who grants Indian land rights-of-way to grantees. *See* 80 Fed. Reg. at 72494 ("In these regulations, as *grantor*, the United States") (emphasis supplied)).

jurisdiction to adjudicate claims related to rights-of-way and individual allotted land. *See Fredericks v. Mandel*, 650 F.2d 144 (8th Cir. 1981) (holding that tribal court was without jurisdiction to condemn individual allotted land for a right-of-way without the participation of the fee owner, the United States). There is, therefore, no basis for the Rule's attempt to permit rights-of-way to be unilaterally terminated by the Indian landowner (who is not a party to the government's grant) without the Secretary's involvement and consent.

e. *The Agencies cannot simply ignore the rights-of-way provisions in other laws that have not been repealed.*

Irrespective of the Rule's attempt to limit trust land rights-of-way to grants under the 1948 Act, there exist other statutes governing rights-of-way that the Agencies improperly seek to ignore. The statutory provisions regarding rights-of-way over Indian lands are codified at 25 U.S.C. §§ 311-28. These statutes reflect a series of legislative acts conferring authority on the Secretary to process, administer, and approve rights-of-way over Indian lands. *See* Matthew C. Godfrey, Emily Greenwald, & David Strohmaier, *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006*, prepared for the United States Department of Interior as part of the Energy Policy Act Section 1813 Study (July 7, 2006) at 3-8, available at: http://teeic.indianaffairs.gov/er/transmission/case/1813/docs/draftstudy/AppendixHRACompensation.pdf. They include specific provisions dealing with highways, railways, telegraph and telephone lines, pipelines, and similar or related rights. 25 U.S.C. §§ 311-322. Nevertheless, BIA relies exclusively on the 1948 Act in the Rule, to the total exclusion of other right-of-way statutes that undoubtedly remain applicable to Indian lands.

When Congress passed the 1948 Act, it expressly considered the possibility that the 1948 Act could replace, rather than supplement, the prior rights-of-way authorities, and rejected such a

result.[9] Instead, Congress specified that "Sections 323 to 328 of this title shall not in any manner amend or repeal . . . any existing statutory authority empowering the [Secretary] to grant rights-of-way over Indian lands." 25 U.S.C. § 326. Put simply, "[t]he 1948 Act does not, by its express terms, amend or repeal any existing legislation concerning rights-of-way across Indian lands." *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cty., Hiram Grant*, 719 F.2d 956, 959 (8th Cir. 1983); *see also Blackfeet Indian Tribe v. Mont. Power Co*., 838 F.2d 1055, 1059 (9th Cir. 1988) ("Since effect can be given to both the 1904 and the 1948 Acts, both should be applied.").

BIA certainly does not possess unbridled power to decide whether to apply a federal statute. *See Mass. v. E.P.A*., 549 U.S. 497, 532-33 (2007); *see also* 25 U.S.C. § 371 ("The Secretary of the Interior shall make all needful rules and regulations, not inconsistent with sections 312 to 318 of this title, for the proper execution and carrying into effect of all the provisions of said sections."). Instead, BIA has a duty to "execut[e]" and "carry[] into effect" these provisions, and to maintain the "rules and regulations" necessary to so do. The

[9] This is particularly important when comparing 25 U.S.C. § 321 to the Rule's new taxation provisions that purportedly permit Indian tribes to tax non-Indian grantees. In this regard, in the pipeline context, 25 U.S.C. § 321 specifically provides that:

> The compensation to be paid . . . shall be determined in such manner as the Secretary of the Interior may direct . . . And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, *not exceeding $5 for each ten miles of line* so constructed and maintained.

(Emphasis supplied). Thus, in the pipeline context, by enacting 25 U.S.C. § 321, Congress specifically limited the tax rate that could be imposed on pipeline grantees, and dictated that any annual tax imposed was to be paid directly to the Secretary. BIA, through regulatory rulemaking, now seeks to circumvent the intent of Congress in that regard and alter the referenced statute by regulation.

combination of 25 U.S.C. § 326 and 25 U.S.C. § 317 leave little doubt that Congress expected and instructed BIA to continue issuing rights-of-way under specific authorities other than the 1948 Act. BIA cannot now abandon its duties under the earlier statutes and opt to remove them from the right-of-way process. *Id*.

Congress has not elected to repeal 25 U.S.C. §§ 312-22, and therefore it is improper for BIA to refuse to implement the same. *Terran ex rel. Terran v. Sec'y of Health & Human Servs*., 195 F.3d 1302, 1312 (Fed. Cir. 1999) ("The Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes."). A decision not to exercise statutory authority because "it would be unwise to do so at this time . . . rests on reasoning divorced from the statutory text." *Massachusetts v. E.P.A*., 549 U.S. at 532. The fact that an agency has substantial discretion in how and when to apply its authority is also "not a roving license to ignore the statutory text." *Id*.; *see also Texas v. United States*, 497 F.3d 491, 509-10 (5th Cir. 2007) ("[T]he authority Congress there delegated to the [DOI] only allows prescription of regulations that implement specific laws, and that are consistent with other relevant federal legislation.") (internal quotation omitted).

In sum, the Agencies are simply without authority to avoid their responsibilities under rights-of-way statutes other than the 1948 Act or to declare that entities seeking rights-of-way under those statutes are now prohibited from doing so. By electing to wholly alter the right-of-way landscape via what amounts to legislation by regulation, the Agencies have violated their duties to implement statutes and have acted arbitrarily and capriciously.

2. <u>The Rule Is Contrary to Existing Federal Law</u>.

By the Rule, the Agencies also improperly seek to circumvent federal judicial decisions. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *see also Neal v.*

United States, 516 U.S. 284, 290-291 (1996). Notwithstanding this well-established limitation on rulemaking, the Rule is contrary to prior judicial decisions in at least three areas: (i) the Rule seeks to alter the property rights attendant with rights-of-way on Indian land; (ii) the Rule seeks to create tribal jurisdiction where none exists; and (iii) the Rule purports to permit tribes to tax non-Indians and non-Indian property within rights-of-way.

a. *The Rule would alter property rights*.

Section 169.10 of the Rule addresses the effect of a right-of-way on a tribe's jurisdiction over the underlying parcel of land, and proclaims that "[a] right-of-way is a non-possessory interest in land, and title does not pass to the grantee." 80 Fed. Reg. at 72538. That proclamation, however, is directly contrary to federal case law confirming that, while a grantee may not actually gain ownership of the lands underlying a right-of-way, he or she nevertheless does acquire a substantial interest in the use of the land, which right is of sufficient importance to change the nature of the land. *Strate v. A-1 Contractors,* 520 U.S. at 456.

In *Strate,* for example, the Supreme Court affirmatively pronounced that rights-of-way create an interest in real property "equivalent, for nonmember governance purposes, to alienated, non-Indian land." 520 U.S. at 454. Thus, when authorizing the issuance of rights-of-way traversing Indian lands "Congress has acted within its plenary power to bestow rights to a parcel of land upon one party, thereby limiting the rights of another to the same land." *Red Wolf*, 196 F.3d at 1063. As a consequence, "a right-of-way created by congressional grant is a *transfer of a property interest*" to the grantee. *Id*. at 1064 (emphasis supplied); *see also State of Mont. Dep't of Transp. v. King*, 119 F.3d 1108, 1112 (1999) (when the United States grants rights-of-way to non-Indians, the "non-Indians have acquired property rights substantial enough to be considered 'land alienated to non-Indians.'"). Federal courts have, without doubt, conclusively

affirmed that when the Secretary grants a right-of-way to a non-Indian, the Secretary is transferring a substantial interest in the underlying land to the non-Indian, and thereby vesting and bestowing real property rights to the parcel in the non-Indian and limiting or revoking the rights of another – *i.e.* the Indian beneficial landowner. Accordingly, contrary to the Rule's pronouncement, rights-of-way granted to non-Indians transfer substantial real property interests to non-Indians; such rights being of sufficient importance to both burden the land in question and to change the nature of the land for jurisdictional and other purposes.

But, the Rule does not stop there. Section 169.10 continues by purporting to authorize tribal jurisdiction over BIA-granted rights-of-way:

> The Secretary's grant of a right-of-way will clarify that it does not diminish to any extent: (a) The Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity within, the right-of-way; (c) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way; (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land; or (e) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.

80 Fed. Reg. at 72538.

As discussed above, federal judicial precedent is clear that rights-of-way granted to non-Indians render the land encompassed by the same "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate*, 520 U.S. at 454. As such, it is also beyond doubt that tribes are without jurisdiction to regulate non-Indian conduct on lands that have lost their Indian character and are viewed as alienated, non-Indian land.

The Supreme Court has repeatedly held, "[it is without question] that there is a significant territorial component of tribal power: a tribe has no authority over a nonmember until the

nonmember enters *tribal land*." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). Further, when a nonmember enters *tribal land*, it is generally accepted that the pertinent tribe has the right to exclude the nonmember, as well as "arguably the lesser included, incidental power to regulate non-Indian use of" tribal land. *S.D. v. Bourland*, 508 U.S. 679 (1993). Conversely, where an Indian tribe loses the right of absolute use and occupation of lands, the tribe no longer possesses the right to exclude others, and thereby loses the incidental power to regulate the use thereof by nonmembers. *Id*. at 687; *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001) ("Only full territorial sovereigns enjoy the power to enforce laws against all who come within the sovereign's territory and Indian tribes can no longer be described as sovereigns in this sense") (internal quotations and citations omitted)).

Based upon this controlling law, Indian landowners, as to rights-of-way, lose all use and occupation of at least a portion of the lands committed thereto; meaning the Indian landowners cannot exclude grantees from accessing and utilizing the same.[10] The Supreme Court's opinion in *Bourland* reveals much in this regard. In determining that a tribe was without jurisdiction to regulate non-Indian conduct on land that had lost its tribal character, the Court concluded:

> *Montana* and *Brendale* [*v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)] establish that when an Indian tribe conveys ownership of its tribal lands . . . it loses any former right of absolute and exclusive use and occupation . . . The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others . . . Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

Bourland, 508 U.S. at 689.

[10] It should be noted that tribes do not have the authority to exclude nonmembers from individual Indian allotments. Thus, any authority tribes possess with regard to non-Indian activities within rights-of-way traversing allotted lands must arise from a source other than a tribe's ability to exclude.

The same holds true with respect to rights-of-way: once an Indian landowner consents to the United States' issuance of a right-of-way, the Indian landowner cannot: (i) exclude the grantee from the legally vested right-of-way; (ii) regulate the grantee's access to the right-of-way; or (iii) regulate the grantee's permitted use within the same. The reason for this is simple: the Indian landowner has previously consented to the grantee's access to and use of land within the right-of-way. It would strain reason for the Agencies to take a position to the contrary. Furthermore, federal case law prohibits the Agencies from interfering with legally cognizable interests in real property based on tribal objections. *See United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) (holding United States liable for a taking where BIA refused to approve a mineral lessee's mining plan that complied with federal regulatory requirements but a tribe objected to the same); *see also Del-Rio Drilling Programs, Inc. v. United States*, 46 Fed. Cl. 683 (Ct. Cl. 2000) (holding United States liable for a taking where the United States unlawfully permitted an Indian tribe to exclude a lessee from its real property interests). It is evident, therefore, that tribes may not exercise tribal law on lands that have lost their Indian character. *See Merrion*, 455 U.S. at 142; *see also MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1072 (10th Cir. 1007) (holding that Navajo Nation could not exercise jurisdiction over activities that occurred outside the of Navajo Nation's territorial jurisdiction). The Supreme Court is abundantly clear: BIA granted rights-of-way are beyond tribal territorial jurisdiction and, as such, tribes may not regulate non-Indian activity within the same. *See Strate*, 520 U.S. at 456.

b. *The Rule would expand tribal jurisdiction.*

The Rule also represents an improper attempt to expand tribal jurisdiction. For example, the Rule 25 C.F.R. § 169.10 states, in part:

> The Secretary's grant of a right-of-way will clarify that it does diminish to any extent:

> (a) The Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way;
> (b) The Power of the Indian tribe to tax the land, any improvements . . . or any person or activity within the right-of-way . . .
> (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on tribal land.[11]

Moreover, the Agencies attempt to speak from two sides of the mouth. In the Proposed Rule, the Agencies – contrary to federal case law – attempted to dictate that an Indian land right-of-way established a consensual relationship between the Indian land owner and the grantee. *See* Proposed 25 C.F.R. § 169.008(e)(4), 79 Fed. Reg. at 34464; *see also Redwolf*, 196 U.S. at 1064 (holding that rights-of-way are "a transfer of a property interest that does *not create a consensual relationship*"). In response to comments the Agencies removed this unlawful dictation. *See* the Rule, 25 C.F.R. § 169.10, 80 Fed. Reg. at 72538. Nonetheless, and despite removing the statement that Indian land rights-of-way establish consensual relationships between Indian landowners and grantees, the Agencies state, "we disagree with the commenters that a tribe is not in a consensual relationship with a right-of-way grantee on tribal trust or restricted land." 80 Fed. Reg. at 72504. By this language, and despite the deletion of similar language from the Rule, the Agencies are attempting to posit that rights-of-way somehow create *consensual relationships* between the Indian landowners and the right-of-way grantees, thereby opening the door for tribes to exercise jurisdiction over non-Indians under the first *Montana* exception.[12] The

[11] 80 Fed. Reg. at 72538 (emphasis supplied). It should also be noted that Final Rule 25 C.F.R. § 169.10 contains another legal error. Final Rule 25 C.F.R. § 169.10 appears to suggest that rights-of-way granted pursuant to the Rule remain "tribal land." As the federal case law cited above demonstrates, for at least regulatory and judicial purposes, nothing could be further from the truth.

[12] The first *Montana* exception reads as follows:

Agencies' attempt in this regard is contrary to law. Several federal courts have addressed whether BIA issued rights-of-way create *consensual relationships*, and all have determined they do *not*. Thus, BIA's statement that a right-of-way "does not diminish" a tribe's jurisdiction is plainly incorrect.

In *Reservation Tel. Co-op. v. Henry*, 278 F.Supp.2d 1015 (D.N.D. 2003), for example, a division of this Court pointedly stated that BIA rights-of-way granted to non-Indians are "a Congressional grant [that] do[es] *not* equate to a 'consensual relationship' with the [Indian landowner] because federal law requires the [grantee] to obtain rights-of-way and provides a statutory mechanism to acquire a right-of-way." *Id*. at 1023 (emphasis supplied). Once more, BIA rights-of-way are Congressional grants of real property administered through the Secretary, and every right-of-way specifically identifies the United States – not the Indian landowner – as the grantor. As the court in *Henry* instructed, the "[grantee] received authority to [traverse Indian land] from a *grant of legislative authority*." *Id*. at 1024 (emphasis supplied). In direct contravention to the wording of the Rule, 25 C.F.R. § 169.10, the Secretary's grant *does* diminish a tribe's authority over the lands encompassed therein and activities occurring thereon, because such grants do not create *consensual relationships* between grantees and Indian landowners. *Id.*

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the *activities* of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.

Montana, 450 U.S. at 565. The first *Montana* exception has been further broken-down into three factors that all must be present for a tribe to exercise jurisdiction over a non-Indian: (i) the presence of a *consensual relationship*; (ii) that the tribe seeks to regulate a non-Indian *activity*; and (iii) that the regulation the tribe seeks to enforce against the non-Indian activity has a "nexus" to the consensual relationship. These latter two elements will be discussed in greater detail below in section B(4)(b)(1) hereof.

Other federal courts have similarly held. *See Redwolf*, 196 U.S. at 1064 (holding that rights-of-way are "a transfer of a property interest that does *not create a consensual relationship*") (emphasis supplied)); *see also King*, 191 F.3d 1108, 1113 (9th Cir. 1999) (holding that transfers of property interests under the 1948 Act created property interests and rights in the grantee, and did not establish a continuing consensual relationship between the grantee and the Indian landowner). In *Big Horn Cty. Elec. Co-op., Inc. v. Adams*, the Ninth Circuit clarified that neither the Indian landowner's consent nor the actual grant between the United States and the grantee was sufficient to create a consensual relationship establishing tribal jurisdiction over a non-Indian. 219 F.3d 944, 951 (9th Cir. 2000); *see also Burlington N. Santa Fe R.R. Co. v. The Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 772 n. 5 (2003); *City of Elko v. Acting Phoenix Area Dir.,* 18 IBIA 54 (1989); BIA Procedural Handbook, *Grants of Easement for Right-of-Way on Indian Lands,* § 5.4. Hence, federal judicial precedent unquestionably supports the fact that, contrary to the Rule, 25 C.F.R. § 169.10, rights-of-way do diminish a tribe's jurisdiction with respect to non-Indian activities within the same because the right-of-way does not represent a consensual relationship between the grantee and the Indian landowner.[13]

[13] There simply can be no consensual relationship between an Indian surface owner and the holder of an Indian land right-of-way because there is no contractual relationship between those parties. Again, it is the Secretary that is authorized to grant rights-of-way and who, in fact, appears as the grantor in BIA right-of-way documents. *See* 25 U.S.C. § 323 ("the Secretary . . . is empowered to *grant* rights-of-way over and across any lands now or hereafter held in trust by the United States") (Emphasis supplied); 25 U.S.C. § 311 ("The Secretary . . . is authorized to *grant* permission . . . to the proper State or local authorities for the opening and establishment of public highway [over Indian lands]" (Emphasis supplied); 25 U.S.C. § 312 ("A right of way for railway . . . is *granted* to any railroad company") (Emphasis supplied); 25 U.S.C. § 319 ("The Secretary . . . is authorized and empowered to *grant* a right of way [for telephone lines across Indian lands]" (Emphasis supplied); 25 U.S.C. § 321 ("The Secretary . . . is authorized and empowered to *grant* a right of way [for pipelines across Indian lands]" (Emphasis supplied).

The Agencies attempt to expand tribal jurisdiction based on a supposed consensual relationship arising in the right-of-way context is, thus, clearly in error. This being the case, the Rule's reliance on the first *Montana* exception is undoubtedly misplaced, and any attempt to rewrite judicial precedent by way of the Rule, improper.

c. *The Rule would authorize new taxation powers.*

Federal case law is clear that tribes do not possess the authority to tax non-Indians and non-Indian property within rights-of-way.[14] Inexplicably, however, the Rule appears to recognize a tribe's ability to do just that, and states:

> The Secretary's grant of a right-of-way does not diminish to any extent…
> (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity within, the right-of-way.
>
> ***
>
> (b) Improvements, activities, and right-of-way interests may be subject to taxation by the Indian tribe with jurisdiction.

80 Fed. Reg. at 72538.

Federal case law dictates that BIA rights-of-way are non-Indian real property interests. *Strate*, 520 U.S. at 454. Furthermore, federal courts have affirmatively held that tribes are prohibited from imposing taxes on non-Indian property within BIA rights-of-way, because such taxes do not seek to tax non-Indian activity or conduct, but solely non-Indian property. *See Adams*, 219 F.3d at 951 ("An ad valoreum tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, *but instead* a tax on the value of the property owned by a nonmember, a tax that is *not* included within *Montana's* [] exception[s]"); *see also Plains*

[14] In fact, federal case law is so clear that the two leading treatises on Indian law both recognize that tribes are prohibited from taxing non-Indians within 1948 Act rights-of-way. *See Felix S. Cohen's Handbook of Federal Indian Law*, Cohen, Felix C., §8.04[2][b], 718-720 (2005 Ed. Supp. 2009) *see also American Indian Law in a Nut Shell*, Canby, William, C., 5th Ed., 308-09 (2009).

Commerce, 544 U.S. at 336-41 (holding that once land becomes non-Indian in nature, the land passes beyond a tribe's jurisdiction and control).

Similarly, in 2003, approximately five years prior to the Supreme Court's decision in *Plains Commerce*, the Ninth Circuit held that tribal taxation of non-Indian property within a right-of-way was prohibited under the first *Montana* exception; admittedly leaving open the possibility that a tribe could potentially tax such property under the second *Montana* exception. *See Burlington N.*, 323 F.3d 767. In *Plains Commerce*, the Supreme Court forever closed that door, though, therein severely restricting the applicability of the second *Montana* exception, and affirmatively declaring that tribes lack regulatory or adjudicatory jurisdiction over non-Indian property. In fact, the Court's decision in *Plains Commerce* closely aligned with another Ninth Circuit decision, *Adams*, wherein the Ninth Circuit invalidated tribal taxation efforts, and held:

> The defendant's request for us to expand *Montana's* second exception would effectively swallow *Montana's* main rule, because virtually any tribal tax would then fall under the second exception, a result that the Supreme Court had never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited.

219 F.3d at 951 (internal citations omitted). Simply put, tribes are without jurisdiction to tax non-Indian property both in the form of BIA rights-of-way and all non-Indian property within such rights-of-way.

3. <u>The Rule is Arbitrary and Capricious.</u>

Section 706 of the APA also empowers the Court to set aside the Agencies' action if it is arbitrary or capricious." 5 U.S.C. § 706(A). The Supreme Court has held that where an administrative agency rule lacks sufficient explanation for its decision or failed to consider an important aspect of the problem, the action of the administrative agency is arbitrary and

capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.,* 463 U.S. at 41-44; *see also Intn'l Ladies' Garment Workers' Union v. Donovan,* 722 F.2d at 799.

a. *The Rule would change long-standing BIA policy without explanation.*

The Board specifically recognizes the concept of administrative *res judicata*, whereby the Board, or an agency, is prevented from reconsideration of a final decision. See *Lowe v. Acting Eastern Okla. Regional Dir.*, 48 IBIA 155, 157-158 (2008); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *see also Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985); *Scammerhorn v. R.R. Ret. Bd. of United States*, 748 F.2d 1008, 1010 (5th Cir. 1984). In the instant case, the Board has previously rendered numerous final decisions determining: (i) federal jurisdiction is supreme within rights-of-way;[15] (ii) BIA is not bound by tribal decisions involving the validity or enforceability or federally granted rights;[16] and (iii) rights-of-way are freely assignable and may be mortgaged without additional consents or approvals.[17] At no point did BIA – who was a party in each matter – appeal the Board's final determinations. As such, these Board decisions are binding on BIA and administrative res judicata precludes BIA from altering the outcome of the decisions by simply promulgating contrary regulations. By attempting to do so here, the Agencies have acted arbitrarily and capriciously and contrary to law.

The Rule conflicts with previously endorsed BIA and Board policy by, *intra alia:* (i) altering requirements and consents for approval; (ii) applying arduous and impossible right-of-way assignment requirements (where prior policy endorsed freely assignable rights-of-way); (iii)

[15] *Utu Utu Gwaitu Paiute Tribe of Benton Paiute v. Sacramento Area Director,* 17 IBIA 78 (1989).
[16] *See Del-Rio*, 46 Fed. Cl. 683 (Ct. Cl. 2000); *see also Citation v. Acting Navajo Reg'l Dir., BIA*, 57 IBIA 234 (2013) (holding BIA is not required to comply with tribal law).
[17] *City of Elko, Nevada v. Acting Phoenix Area Director,* 18 IBIA 54 (1989).

imposing extremely stringent right-of-way mortgage requirements; and (iv) providing for tribal jurisdiction (where prior policy endorsed solely the application of federal law and excluded tribal law). As noted, all of these proposed changes conflict with previously endorsed BIA and Board policy. *See, e.g. Utu Utu Gwaitu Paiute Tribe of Benton Paiute v. Sacramento Area Director*, 17 IBIA 78 (1989); *City of Elko, Nevada v. Acting Phoenix Area Director*, 18 IBIA 54 (1989).

The Agencies have made no effort to explain or provide a foundation for these drastic changes in long-standing policy, nor to inform those impacted by the changes as to the rationale behind the change. The Alliance can only conclude, therefore, that there is no legal or factual support for the change in policy, rendering the Rule arbitrary, capricious, an abuse of discretion, and contrary to law. *Intn'l Ladies' Garment Workers' Union,* 722 F.2d at 818.

4. <u>The Agencies failed to comply with NEPA</u>

NEPA requires the Agencies to conduct an environmental assessment ("EA") of the Rules effects. According to BIA's own internal procedures, NEPA documentation is required if: (i) BIA accomplishes a major federal action and BIA funding or approval is necessary to implement the action; (ii) the action will affect the human environment and can be meaningfully evaluated; and (iii) the action is not exempt from NEPA. *See* Indian Affairs National Environmental Policy Act Guidebook 59 IAM 3-H, § 2.1. Under this standard, NEPA documentation is required with respect to the Rule.

As an initial matter, the Rule constitutes "major federal action." The Council on Environmental Quality ("CEQ") regulations, which BIA has adopted, define a major federal action to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 CFR 1508.18 (CEQ Regulations defining Major Federal Action); *see also* Indian Affairs

National Environmental Policy Act Guidebook, 59 IAM 3-H, § 2.1. The Rule clearly fits this definition and, as such, NEPA compliance is demanded.

Second, the Rule will affect the human environment. CEQ Regulations state that "[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment" and that effects shall include both direct and indirect. 40 CFR §§ 1508.18 (definition of human environment), 1508.08 (definition of effects). As a result of the Rule, rights-of-way applicants are likely to relocate or, at a minimum, side-step rights-of-way over Indian lands, thereby creating significant impacts on the surrounding environment. The application of tribal jurisdiction and law to rights-of-way could significantly impact the treatment of engendered species and species management programs on those lands. Further, newly created consents and approvals, imposed for the first time in the Rule, will alter how right-of-way applicants and grantees do business and change the extent of grantees' property interests. Simply put, due to the clear effect on the human environment, NEPA documentation and process were required of the Agencies when promulgating the Rule.

Lastly, NEPA documentation is required because the Rule is not an exempt action. BIA has developed a list of Categorical Exclusions ("CEs"), which are categories of actions that BIA has determined do not have a significant effect on the quality of the human environment and for which neither an EA nor an Environmental Impact Statement ("EIS") is required. *See* 40 C.F.R. § 1508.4; 43 C.F.R. § 46.205; *see also* Indian Affairs National Environmental Policy Act Guidebook, 59 IAM 3-H, § 4. While BIA's published list of CEs includes individual rights-of-way in certain limited situations, that exclusion is limited to individual rights-of-way (e.g., rights-of-way inside another right-of-way, service line agreements to an individual residence or

building, and renewals, assignments and conversions of existing rights-of-way). 516 Department of Interior Manual 10.5. Importantly, this exclusion does not cover, or excuse, the required NEPA analysis of the significant impact an entire change in policy will have on the human environment, and that encompasses the thousands of miles of Indian lands rights-of- way that presently exist and will exist in the future.

The foregoing analysis notwithstanding, BIA concluded in the *Preamble* to the Rule that NEPA simply does not apply because "[t]his rule does not constitute a major Federal action significantly affecting the quality of the human environment because these are 'regulations whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 79 C.F.R. § 34,460 (June 17, 2014) (citing 43 C.F.R. § 46.210(j). This conclusory assertion is made without any substantiation or explanation and is false, misleading, and a clear abuse of discretion.

NEPA demands that agencies consider every significant aspect of environmental impacts associated with a proposed action, and, thereafter, inform the public that it has indeed considered environmental concerns in its decision-making process. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014); *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014); *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012) (NEPA requires that the agency take a "hard look" at the likely effects of a proposed action; taking a 'hard look' includes considering all foreseeable direct and indirect impacts; and an EA must fully assess the cumulative impacts of a project or rule). BIA could, and should, prepare a programmatic-level environmental impact statement ("PEIS") to analyze the potential environmental effects of the Rule and reasonable

alternatives. Instead, without explanation and contrary to their own regulations that generally require that an EA be conducted for proposed rules, the Agencies have arbitrarily concluded that, in this case, the Rule is inexplicably too broad for assessment.

C. Absent an Injunction, the Alliance will Suffer Irreparable Harm.

A preliminary injunction is warranted when, as here, "irreparable injury is likely in the absence of an injunction. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 22 (2008). To demonstrate irreparable harm, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Util. Bd. v. FCC,* 109 F.3d 418, 425 (8th Cir. 1996).

As an initial matter, it is noteworthy that there is a presumption of irreparable harm where, as is the case here, the Rule has been promulgated in violation of NEPA. *See, e.g., Davis v. Mineta*, 302 F.3d 1104, 1111, 1115 (10th Cir. 2002) ("harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure."). After all, in "mandating compliance with NEPA's procedural requirements as a means of safeguarding against environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment." *Id.*; *see also S. Utah Wilderness Alliance v. Thompson*, 811 F. Supp. 635, 641 (C.D. Utah 1993) ("a presumption exists in favor of injunctive relief, especially when the NEPA violation is substantive").

In addition, implementation of the Rule would result in immediate and irreparable harm to Alliance members in at least three ways. First, the Rule's alteration of property rights, and most notably the provision permitting tribes and potentially individual Indian landowners to terminate federally-granted rights-of way, constitutes irreparable injury. Second, the Rule's allowance for taxation by tribes of non-Indians and non-Indian property within rights-of-way

presents the possibility of economic damages that could not later be recovered due to sovereign immunity. Finally, the Agencies' are unprepared and unable to implement the Rule's new procedures, thereby resulting in irreparable injury to the Alliance's membership.

The deprivation of a property right is well-recognized as irreparable harm. *See e.g., O'Hagan v. United States,* 86 F.3d 776, 783 (8th Cir. 1996) ("[M]onetary relief fails to provide adequate compensation for an interest in real property, which by its very nature is considered unique."). In this case, the Rule implicates property rights in several different ways, including: (i) permitting the federally-approved rights-of-way to be terminated without the involvement or consent of the grantor, the United States; (ii) altering the nature of the interest conveyed by rights-of-way by insisting that "title does not pass to the grantee;" (iii) preventing rights-of-way from being freely assignable, and precluding things like mortgages, without additional consents or approvals; and (iv) through the Rules imposition of tribal jurisdiction for disputes involving federally granted rights-of-way, subjecting grantees to tribal jurisdiction where every court that has examined the issue has found that no such jurisdiction exists. If enacted, each of these provisions of the Rule would deprive Alliance members of property rights and possibly subject Alliance members to adjudications in a forum that the Federal Courts have found improper in the right-of-way arena; thereby constituting irreparable harm sufficient to justify an injunction.

In addition, even if successful on the merits of its challenge to the Rule, sovereign immunity will likely prevent Alliance members from recovering economic damages from tribes that exercise the new taxation or right-of-way termination powers seemingly permitted by the Rule. The threat of unrecoverable economic losses is sufficient to warrant the issuance of a preliminary injunction. *See, e.g., Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996) ("threat of unrecoverable economic loss, however, does qualify as irreparable harm"). The

Alliance's challenge to the Rule is brought under the APA, which allows a party to challenge final agency action and seek "relief other than money damages." 5 U.S.C. § 702. Even if money damages were a potential remedy, sovereign immunity would undoubtedly preclude Alliance members from any recovery in this case. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

Finally, the irreparable harm to befall Alliance members stems from, and will continue to stem from, BIA's unpreparedness to implement the Rule in any speedy or appropriate fashion. As of the filing hereof, to the Alliance's knowledge, BIA has not: (i) performed sufficient internal training to prepare its employees to comply with or implement the requirements of the Rule; (ii) formulated, let alone issued, guidance to BIA employees on implementation of the Rule; (iii) developed the necessary new forms, submissions, approvals, and materials needed to implement the Rule's heretofore nonexistent requirements relating to the assignment or mortgaging of rights-of-way; or (iv) conducted sufficient outreach to persons holding or seeking Indian land rights-of-way as to how grantees will comply with the Rule's new requirements.

To further exacerbate the situation, on Tuesday March 1, 2016, the Agencies conducted a webinar training session for Indian landowners and right-of-way grantees concerning implementation of the Rule. The response to the webinar was extremely large, and when Alliance staff logged in to the webinar at the scheduled start time, there were already over 200 individuals logged into the online presentation. However, the conference call telephone line for the webinar reached its maximum capacity at 100 users. As a result, more than half of the individuals who attempted to participate in this external training session were prohibited from doing so. Perhaps more importantly with respect to the Agencies' readiness to incorporate the

Rule into their administrative process, the Alliance learned that a similar situation occurred when the Agencies attempted to conduct internal webinar training for BIA's regional and local personnel. Much like its external training webinar, the Agencies' internal training webinar exceeded capacity on the conference call telephone line and prohibited an unknown number of Agency employees from learning how the Rule was to operate and BIA's processes for implementation of the Rule. This failure of internal communication but further guarantees that the personnel who are supposed to oversee and administer the Rule by March 21, 2016, are clearly not prepared to do so.

In such a situation, it seems clear that BIA is unready to implement the Rule on its proposed effective date, and, more importantly, Alliance members will, as of the Rule's effective date, be unable to conduct business on those rights-of-way or acquire new rights-of-way with any degree of certainty or knowledge. These observations surely demand that the Agencies be enjoined from making the Rule effective at least until such time as the Agencies can actually administer the Rule, and provide to right-of-way holders the ability conform their business practices to whatever requirements may be in-place for actual implementation of the Rule.

D. The Equities Weigh in Favor of an Injunction.

As set forth herein, the Rule's implementation would result in drastic new changes to the rights-of-way approval procedure and a wholesale alteration of the world of Indian land right-of-way law; thereby resulting in irreparable injury – and likely economic damages, as well – to Alliance members. At the same time, the issuance of an injunction to maintain the status quo until the Alliance's challenge to the Rule can be adjudicated does not pose any threat to the Agencies. There has been no suggestion that a stay of the effective date would prejudice the Agencies, nor have they articulated any compelling need for the Rule to go into effect

immediately on March 21, 2016. To the contrary, the injunction will actually save the Agencies the presumably large administrative burden and expense of implementing a Rule that they are neither prepared for, nor may ultimately go into effect, if the Alliance is successful with its Complaint.

To further illustrate the lack of any need for urgency from the Agencies' perspective, it is noteworthy to recall the recent history of the prior proposed versions of the Rule. The Rule was originally issued for public notice and comment on June 17, 2014, where after the mandatory date for submission of comments thereon was extended on three separate occasions. Once acquiring comments from the public addressing the proposed content of the Rule, the Agencies spent approximately one year reviewing the same, not issuing the Rule in its supposed final form until November 2015. Had the Agencies believed there existed a true immediate need for implementation of the Rule, the Alliance suggests the Agencies would have moved on a much more expedited basis – and not delayed issuance of the Rule and the implementation date some 18 months after initial publication of the Rule's proposed provisions. This background strongly suggests that there is no pressing need for the Rule to become effective, and that any delay in implementation of the Rule will not act to impede the Agencies from responding to a situation that demands immediate regulatory action. Quite to the contrary, the Rule has no near term ills to remedy and as such, an injunction will not act to harm any interests the Agencies seek to address in the Rule.

E. The Public Interest Favors a Preliminary Injunction.

The public interest is best served by enjoining implementation of the Rule until the Court can hear the Alliance's challenge on the merits. As set forth above, that challenge is based in part on the argument that the Rule exceeds the Secretary's authority as delegated by Congress.

Clearly, there is a public interest in ensuring that federal "agencies do not extend their power beyond the express delegation from Congress." *First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 922 (D.S.D. 2011) (granting stay of implementation of amended federal regulations). Likewise, there is a public interest in avoiding the confusion and expense that would result from implementing a new rights-of-way process, only to have those regulations set aside shortly thereafter.

Additionally, the public, as a whole, has an interest in protecting and recognizing valid and existing property rights, and in ensuring that those rights are not destroyed or limited by regulatory fiat unauthorized by Congress. For that reason alone, the public interest weighs in favor of the Court determining whether the Agencies may validly alter the property rights of Alliance members in their existing Indian land rights-of-way.

CONCLUSION

In light of the foregoing, Plaintiff Western Energy Alliance respectfully requests the Court enter an Order enjoining implementation of the Rule pending a determination on the merits of its Complaint.

Dated this 11th day of March, 2016.

Respectfully submitted,

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