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. 1:16-cv-050

COMPLAINT

Plaintiff Western Energy Alliance (the "Alliance"), by and through its undersigned counsel, respectfully submits this Complaint seeking declaratory and injunctive relief against Defendants United States Department of the Interior ("DOI"), Secretary Sally Jewell, the Bureau of Indian Affairs ("BIA," and collectively with DOI, the "Agencies"), and BIA Director Michael S. Black, and states as follows:

NATURE OF THE CASE

1. This case, brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA"), arises out of the Agencies' improper promulgation of a final rule entitled *Rights-of-Way on Indian Land*, 80 Fed. Reg. 72492-72549 (Nov. 19, 2015) (the "Final Rule").

2. The Final Rule exceeds the authority of the Secretary of DOI (the "Secretary") as legislatively granted under the 1948 Rights-of-Way for All Purposes Act, 25 U.S.C. § 323-328

(the "1948 Act"), is contrary to existing federal law regarding jurisdiction, taxation, and property rights within federally granted rights-of-way on Indian Lands, and is both arbitrary and capricious.

3. The Agencies have also failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA").

4. Accordingly, the Alliance brings this action seeking a declaration that the Final Rule violates the APA, and a preliminary and permanent injunction should be issued to prevent its implementation.

THE PARTIES

5. The Alliance represents more than 450 members involved in all aspects of exploration, production, and transportation of oil and natural gas on federal and Indian lands in North Dakota and across the western United States.

6. DOI is an agency of the United States within the meaning of the APA. 5 U.S.C. § 551(1).

7. Defendant Salley Jewell is the Secretary of DOI and has ultimate responsibility for the Final Rule.

8. BIA is an agency of the United States within the meaning of the APA. 5 U.S.C. § 551(1). BIA is charged with administering the provisions of the Final Rule on behalf of the federal government.

9. Defendant Michael S. Black is the Director of BIA and has ultimate responsibility for administering the Final Rule.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and the APA, 5 U.S.C. § 702 (judicial review of final agency action). This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

11. Venue is proper in the U.S. District Court in this District, pursuant to 28 U.S.C. § 1391(e), because, *inter alia*, the Final Rule impacts real property in this District and the Alliance has members incorporated, residing and transacting business within this district.

GENERAL ALLEGATIONS

STATUTORY BACKGROUND

12. 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). In response to the proposed legislation, the Senate requested the Secretary's insights, and the Secretary responded by providing new proposed legislation that was applicable to all Indian lands. *Id.* at 3-4. Specifically, the Secretary proposed legislation wherein Congress would vest the Secretary with the authority to "grant" rights-of-way to applicants over all Indian lands. *Id.* Prior to 1948, Congress has vested the Secretary with authority to grant use-specific rights-of-way over Indians lands – *i.e.* 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 all purposes. 25 U.S.C. § 323.

13. Rights-of-way granted in accordance with the 1948 Act are transfers of a real property interest by the fee landowner, the United States, to an applicant. *Reservation Tel. Co-*

op v. Henry, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003); *see also Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063-64 (9th Cir. 1999), *as amended on denial of reh'g* (Jan. 6, 2000) ("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. . . . A right-of-way created by Congressional grant is a transfer of a property interest"). Rights-of-way granted pursuant to the 1948 Act do not establish a consensual relationship between the applicant/grantee and the owner of the beneficial interest in the land, the Indian landowner; rather, 1948 Act grants only establish a consensual relationship between the fee interest owner, the United States, as the "Grantor" and the applicant/grantee. *Big Horn Cty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 1999); *see also Red Wolf*, 196 F.3d at 1064.

14. Generally, therefore, Indian tribes do not possess jurisdiction to regulate the activities or conduct of non-Indians within federally granted 1948 Act rights-of-way. *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997); *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1112 (9th Cir. 1999). Nor do Indian landowners possess the authority to unilaterally terminate 1948 Act rights-of-way without the involvement and consent of the Secretary. *Kuykendall v. Phoenix Area Dir., BIA*, 8 IBIA 76, 88 n.20, 1980 WL 26390, at *4 (1980) (collecting case).

THE PROPOSED RULE

15. On June 17, 2014, the Agencies published in the Federal Register a proposed rule entitled: "Rights-of-Way on Indian Land." *See* 79 Fed. Reg. 34455 (the "Proposed Rule").

16. The Proposed Rule was vastly different than the right-of-way regulations currently implementing the 1948 Act. Specifically, contrary to existing federal judicial precedent, the Proposed Rule attempted to state DOI's new position that 1948 Act rights-of-way

did not transfer an interest in real property to applicants/grantees, that 1948 Act rights-of-way established consensual relationships between applicants/grantees and the beneficial interest owner, and that Indian tribes retained jurisdiction over non-Indian activities and conduct within federally granted rights-of-way, including the right to unilaterally terminate such rights-of-way.

17. In fact, the Proposed Rule very closely mirrored regulations previously promulgated by the Secretary to implement Indian lands surface leases. *See* 77 Fed. Reg. 72440 (Dec. 5, 2012) (now 25 C.F.R. Part 162). The legislation authorizing the Secretary to review and approve Indian land surface leases, however, is vastly different than the 1948 Act.

18. In response to the Proposed Rule, the Alliance submitted extremely detailed comments to the Agencies on November 26, 2014. The Alliance's public comment included a thorough redline of the entire Proposed Rule identifying the Alliance's suggested modifications to the Proposed Rule, as well as a detailed analysis concerning the Alliance's views on the legality of certain provisions included within the Proposed Rule. In addition, the Alliance also met with the Agencies to discuss and address the Alliance's concerns with the Proposed Rule on or about September 29, 2014. Despite the Alliance's detailed comments and meeting with the Agencies, the Agencies did not have any further discussions with the Alliance regarding the Proposed Rule or Final Rule until after the Final Rule was published.

19. On November 19, 2015, the Agencies published the Final Rule in the Federal Register. *See* 80 Fed. Reg. 72492.

20. On November 17, 2015, the Alliance requested an extension of the Final Rule's effective date, and again reiterated that request in a meeting with the Agencies on December 9, 2015. Based on the Alliance's request, and requests from others including tribal representatives, the Final Rule's implementation date was extended 90 days, until March 21, 2016.

21. On March 3, 2016, after again attempting to work with the Agencies to reform the Final Rule, the Alliance requested an additional extension of the effective date. The Agencies, however, have not agreed to further delay implementation of the Final Rule.

22. The Final Rule's effective date is currently scheduled for March 21, 2016.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment – Final Rule Exceeds Delegated Authority)

23. The Alliance hereby re-alleges and incorporates by this reference all allegations contained in Paragraphs 1 through 22 of this Complaint as though fully set forth herein.

24. The APA empowers 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). In addition, the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*. empowers the Court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

25. The Final Rule purports to be promulgated pursuant to the 1948 Act.

26. Indian tribes are not empowered to regulate non-Indian activity within rights-of-way granted under the 1948 Act.

27. Nevertheless, the Final Rule improperly seeks to: (i) recognize the applicability of tribal law to 1948 Act rights-of-way; (ii) bestow tribes with jurisdiction over non-Indians within the same; and (iii) permit tribal law to supersede the Final Rule.

28. The Final Rule would further permit tribes, and potentially Indian landowners, to terminate 1948 Act rights-of-way without the Secretary's involvement or consent.

29. There is no authority or support for these provisions of the Final Rule in the 1948 Act.

30. The Alliance is entitled to a declaration from the Court that the Final Rule exceeds the Agencies' statutory authority under the 1948 Act, and therefore must be set aside, pursuant to 5 U.S.C. § 706.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment – Final Rule is Contrary to Law)

31. The Alliance hereby re-alleges and incorporates by this reference all allegations contained in Paragraphs 1 through 30 of this Complaint as though fully set forth herein.

32. The APA requires an agency action to be set aside if it is "not in accordance with law." 5 U.S.C. § 706(2)(A).

33. Under the 1948 Act, rights-of-way create, in the grantee, an interest in real property equivalent to alienated, non-Indian land.

34. Nevertheless, the Final Rule suggests 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.

35. The Final Rule further authorizes tribal jurisdiction over BIA-granted rights-of-way.

36. These provisions are directly contrary to existing case law confirming 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 – such as rights-of-way.

37. The Alliance is entitled to a declaration from the Court that the Final Rule is contrary to law, and therefore must be set aside, pursuant to 5 U.S.C. § 706.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment – Final Rule is Arbitrary and Capricious)

38. The Alliance hereby re-alleges and incorporates by this reference all allegations contained in Paragraphs 1 through 37 of this Complaint as though fully set forth herein.

39. The APA empowers the Court to set aside the Final Rule if it is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

40. Where an agency rule lacks sufficient explanation for its decision or failed to consider an important aspect of the problem, the agency action is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41-44 (1983).

41. The Final Rule represents a significant departure from prior policies of the Agencies that recognized that: (i) federal jurisdiction is supreme within rights-of-way; (ii) BIA is not bound by tribal decisions involving the validity or enforceability or federally granted rights; and (iii) rights-of-way are freely assignable and may be mortgaged without additional consents or approvals.

42. The Agencies have provided no explanation or justification to explain the departure from these prior policy positions.

43. The Alliance is entitled to a declaration from the Court that the Final Rule is arbitrary and capricious, and therefore must be set aside, pursuant to 5 U.S.C. § 706.

FOURTH CLAIM FOR RELIEF
(Declaratory Judgment – Final Rule Violates NEPA)

44. The Alliance hereby re-alleges and incorporates by this reference all allegations contained in Paragraphs 1 through 43 of this Complaint as though fully set forth herein.

45. NEPA requires federal agencies to prepare Environmental Impact Statements for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

46. NEPA applied to the Agencies when promulgating the Final Rule.

47. The Agencies decision not to undertake an Environmental Assessment violates NEPA.

48. The Alliance is entitled to a declaration from the Court that the Final Rule violates NEPA, and therefore must be set aside.

FIFTH CLAIM FOR RELIEF
(Permanent Injunction)

49. The Alliance hereby re-alleges and incorporates by this reference all allegations contained in Paragraphs 1 through 48 of this Complaint as though fully set forth herein.

50. Implementation of the Final Rule as currently scheduled on March 21, 2016, will cause the Alliance and its membership immediate and irreparable harm that arises from the Agencies' inability to handle the administrative burden attendant with implementation of the Final Rule, as well as from the Final Rule's impact on property rights, and the resulting economic damages that that are unrecoverable due to sovereign immunity.

51. In light of the extensive list of improprieties with the Final Rule as currently drafted, the Alliance is likely to succeed on the merits and establish that the Final Rule should be set aside, pursuant to 5 U.S.C. § 706.

52. A permanent injunction will not result in any injury to the Agencies, as there currently exists (and has existed for the past 30 years) a system for addressing rights-of-way on Indian lands that comports with the 1948 Act. It does not constitute prejudice to the Agencies to have to follow the law in endeavoring to update the rights-of-way regulation. Particularly when compared to the irreparable harm and economic injury to the Alliance and its membership, the balance of harms weighs in favor of injunctive relief.

53. The public interest favors resolving the Alliance's challenges to the Final Rule before implementing sweeping changes to the rights-of-way process.

PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing, Plaintiff Western Energy Alliance respectfully requests that the Court enter judgment in its favor and against the Agencies on each Claim for Relief set forth herein, and issue the following relief:

(a) For declaratory relief, decreeing:

(i) The Final Rule exceeds the Secretary's authority as delegated by Congress;

(ii) The Final Rule is contrary to existing federal law;

(iii)The Final Rule is arbitrary and capricious;

(iv) The Agencies violated NEPA in promulgating the Final Rule.

(b) For an Order setting-aside and vacating the Final Rule.

(c) For preliminary and permanent injunctive relief, precluding the Agencies from implementing the Final Rule as scheduled on March 21, 2016; and

(d) For any further, necessary, or proper relief that the Court deems appropriate.

Dated this 11th day of March, 2016.

Respectfully submitted,

s/ *Jeffrey M. Lippa*
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