

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

WESTERN REFINING SOUTHWEST, INC.
and WESTERN REFINING PIPELINE, LLC,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR;
SALLY JEWELL, in her official capacity as
Secretary of the Interior,

Defendants.

**COMPLAINT FOR JUDICIAL REVIEW AND
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Western Refining Southwest, Inc. and Western Refining Pipeline, LLC (collectively Western) seek judicial review of final decisions of the Interior Board of Indian Appeals (IBIA) issued on May 4, 2016, and January 8, 2013, as well as declaratory and injunctive relief against the Department of the Interior and its Secretary. *See* Attachments 1 & 2 hereto (2016 and 2013 IBIA decisions).

PARTIES, JURISDICTION AND VENUE

1. Western Refining Southwest, Inc. is an Arizona corporation, lawfully doing business in New Mexico, that owns and operates an oil refinery, finished product terminals, and pipeline and logistics assets. Western Refining Pipeline, LLC is a New Mexico limited liability company that owns, operates, develops and acquires pipelines and other logistics assets.

2. The Department of the Interior is a federal agency. Sally Jewell (sued in her official capacity) is the Secretary of the Interior who is charged with administering the federal laws at issue here while exercising supervisory control over the IBIA, Bureau of Indian Affairs

(BIA), and the Office of Hearings and Appeals. The IBIA is authorized by the Secretary to issue final decisions for the Department of the Interior.

3. This Court has jurisdiction under 28 U.S.C. § 1331 to review federal questions, to provide declaratory relief under 28 U.S.C. § 2201, and to set aside unlawful agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 702, 705, and 706.

4. Venue is proper in this District under 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claim occurred here and the property that is the subject of the action is situated here.

CASE BACKGROUND

5. For at least sixty years, Western or its predecessors have operated a six-inch buried pipeline (the West Pipeline) transporting crude oil 75 miles from the San Juan Basin of New Mexico to a refinery near Gallup, New Mexico. The West Pipeline was built in the early 1950s for El Paso Natural Gas Company and was later conveyed to a Western predecessor, and ultimately to Western.

6. The West Pipeline traverses tribal, federal, state and privately-owned land, including six “allotments,” which are lands held in trust by the United States and allotted to individual citizens of the Navajo Nation.

7. Western continues to hold easements for rights-of-way across 74.48 miles. This dispute involves a 0.52-mile segment traversing Navajo Indian Allotment No. 2073. No other segment of the West Pipeline is at issue here or in any other proceeding.

8. The West Pipeline is one of only two pipelines that transport crude oil from the Four Corners Area to the Gallup Refinery. The Gallup Refinery, in turn, is one of only two oil refineries in New Mexico; it refines the crude oil into gasoline, diesel, and other refined products

that are distributed to hundreds of gas stations throughout New Mexico, the Navajo Nation, and the Southwestern United States.

9. If the West Pipeline were not in operation, much of the crude oil production from the Four Corners Area would likely be shut in, resulting in lost jobs, taxes, and royalty revenues.

10. Western's operations facilitated by the West Pipeline make important contributions to the state, federal and tribal economies. Western employs over 1700 employees in New Mexico, over 200 of which are employed at the refinery. The pipeline and refinery support oil and gas development essential to New Mexico and its economy. The West Pipeline generates or supports substantial revenue for New Mexico State government though New Mexico Gross Receipts tax payments in the annual amount of approximately \$300,000 and New Mexico property tax payments in the approximate amount of \$19,000 annually.

11. On August 2, 2010, the Bureau of Indian Affairs (BIA) issued a twenty-year renewal of the right-of-way, including that 0.52 mile portion over Allotment No. 2073. This right-of-way was based on consent of the owners of a majority of the interests of Allotment No. 2073, including consents from Tom Morgan (owner of a 42.5% interest); and Mary B. Tom (owner of a 14.16% interest).

12. Western compensated Mr. Morgan, Ms. Tom, and all other allottees—in payments distributed through the BIA immediately upon BIA approval of the renewal—2.5 times the appraised fair market value.

13. On January 8, 2013, however, acting on an appeal of a much smaller fractionated interest holder (Patrick Adakai), the IBIA vacated the renewal based on an issue it raised *sua sponte* with no briefing. Relying on the fact that Mr. Morgan had bequeathed remainder interests to eight relatives through a “gift deed” (which upon information and belief is a type of form

commonly used by Native Americans and Navajo members in lieu of wills), the IBIA held his consent legally insufficient without additional consents from his “remaindermen.”

14. While disagreeing with the IBIA’s reasoning imposing a new requirement of remaindermen consent, at the BIA’s request Western undertook “good faith efforts” (as found by the BIA) to obtain such consent from Mr. Morgan’s remaindermen, as well as the remaindermen of Ms. Tom (whom Western learned on remand had issued a similar gift deed creating future remainder interests in four heirs, one of whom had predeceased her). Western scheduled meetings with those remainder interest holders, and was able to secure consents from all three of Ms. Tom’s living remaindermen (a majority even counting the one other predeceased heir) but was able to obtain consents from only four of Mr. Morgan’s eight remaindermen.

15. On April 8, 2014, the BIA, believing itself constrained by the 2013 IBIA decision, denied Western’s right-of-way renewal on Allotment No. 2073 because Western obtained consent from only four of Mr. Morgan’s eight remaindermen.

16. Western timely appealed the BIA’s decision to the IBIA, arguing it was legally entitled to an unqualified 20-year renewal of its right-of-way.

17. On May 4, 2016, the IBIA partially denied Western’s appeal by refusing to require the BIA to renew the right-of-way across Allotment No. 2073 for an unqualified 20-year term. Instead, the IBIA concluded that Western was entitled only to a “qualified” right-of-way “for 20 years … or the life of [Mr.] Morgan or [Ms.] Tom, whichever is the shortest period.”

18. Loss of the right-of-way would irreparably harm Western and its consumers (including members of the Navajo Nation) and the public by jeopardizing continued operation of the West Pipeline that has transported crude oil for the past six decades. Recognizing this, the

main objectors, including two Morgan remaindermen refusing to consent, have formed a task force demanding an absurd and extortionate amount—some \$8.6 million—for their consents.

19. This Court should set aside the IBIA requirement of remaindermen consent as improperly retroactive and as contrary to law, in excess of statutory jurisdiction, arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence. Since this case, the Interior Department has promulgated new and revised federal regulations purporting to require such consent, which are prospective only. Western submits to this Court that the promulgation of these new regulations, incorporating this remainderman consent requirement demonstrate that no such requirement existed before the promulgation of these new regulations.

STATUTORY AND REGULATORY BACKGROUND

The General Right-of-Way Act, 25 U.S.C. §§ 323-328, and Regulations

20. This case arises under the General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, also known as the 1948 Act. Recognizing the highly fractionated ownership interests in certain lands, that Act provides that “[r]ights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners.” 25 U.S.C. § 324.

21. As relevant here, the Act provides for grants of rights-of-way without the consent of the individual Indian owners where “the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant.” 25 U.S.C. § 324(1). The applicable Interior Department regulations simply tracked this statutory language. 25 C.F.R. § 169.3(c)(2) (2015).

22. At no time prior to this case had the IBIA ever required that ROW consent be obtained not merely from the current “owner(s)” of the land but also from their remaindermen, who had no present interest whatsoever. That requirement was first imposed on Western in the

2013 appeal vacating the BIA’s renewal of its right-of-way in Allotment No. 2073. It was imposed *sua sponte* with no chance for Western or anyone to address it.

23. Only after the IBIA’s unprecedented 2013 denial of Western’s ROW renewal did the Interior Department revamp its ROW regulations to require for the first time consent from remaindermen. *See* “Rights-of-Way on Indian Land,” 80 Fed. Reg. 72492-01 (Nov. 19, 2015) (promulgating new rules originally effective Dec. 21, 2015, but since delayed twice until taking effect April 21, 2016). Those new rules are prospective only.

DEFENDANTS’ VIOLATIONS OF THE 1948 ACT AND THE APA

24. The IBIA’s 2013 and 2016 decisions overturning renewal and then denying unqualified 20-year renewal of Western’s right-of-way on Allotment No. 2073 are final agency actions reviewable under the APA.

25. Those final agency decisions are contrary to law, in excess of statutory jurisdiction, arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence because (among other things):

- A. The IBIA’s decisions retroactively imposing the new requirement of remaindermen consent, with no prior notice, unlawfully abridged Western’s reliance interests in paying compensation to the current allotment owners for the 20-year right-of-way.
- B. The IBIA’s requirement to obtain remaindermen consent is contrary to statutory and regulatory provisions requiring consent only from a majority of “owners,” 25 U.S.C. § 324(1); 25 C.F.R. § 169.3(c)(2) (2015).
- C. The IBIA’s determination that current owners who conveyed “gift deeds” could not consent (without remaindermen approval) to the 20-year right-

of-way has no statutory or regulatory grounding and imports misplaced and erroneous notions of real property law.

D. The IBIA decisions were arbitrary and capricious in critical respects, including in describing how consents are to be tallied, how compensation is to be divided among current and future interest holders, and how to address the administrative complications, confusion, and uncertainty as to title caused by this newly-imposed IBIA requirement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that the IBIA's new requirement of remaindermen consent, imposed for the first time after Western had obtained the requisite consents from a majority of current owners and paid all current owners (in payments distributed through the BIA) more than twice fair market value for a 20-year right-of-way, was impermissibly retroactive, contrary to law, and arbitrary and capricious;

B. Declare that consent of the majority of current "owners" and not their remaindermen is all that was required under the 1948 Act and the then-existing regulations governing Western's renewal applications to authorize BIA to renew the right-of-way;

C. Declare that the BIA's 2010 renewal of Western's right-of-way over Allotment No. 2073 for a 20-year term is valid and enforceable;

D. Set aside the IBIA's 2016 and 2013 decisions;

E. Enjoin Defendants to approve renewal of Western's 20-year unqualified right-of-way over Allotment No. 2073;

F. Award attorneys' fees and costs incurred in pursuing this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and any other applicable authorities; and

G. Grant such further relief as the Court deems just.

Respectfully submitted,

MODRALL SPERLING ROEHL HARRIS & SISK, P.A.

Electronically Filed

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