

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

Case No. 1:16-cv-00442-WPL-GBW

WESTERN REFINING SOUTHEAST, INC.
and WESTERN REFINING PIPELINE, LLC,
Plaintiffs,

v.

US. DEPARTMENT OF THE INTERIOR;
SALLY NEWELL, in her official capacity as
Secretary of the Interior,

Defendants

**MOTION TO INTERVENE, ANSWER,
MOTION TO DISMISS, AND COUNTERCLAIM**

Motion to Intervene

COME NOW PATRICK AND FRANK ADAKAI, Movants-Intervenors herein, and move to intervene as a matter of right as Defendants pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 24. Movants-Intervenors are owners of real property interests which Plaintiffs seek to burden in this action (and seek to extinguish in a related action). *See, Western Refining Southwest, Inc., and Western Refining Pipeline, LLC, Civ. No. 1:14-cv-00804-KG-KK (D. NM).* In six years of bad faith trespass upon the real property interests of Movants, Plaintiffs may well have moved more than one billion dollars (\$1,000,000,000.00) worth of crude oil across Movants' real property without anything resembling fair compensation for the easement they have converted or otherwise arrogated unto themselves.¹ In this proceeding

¹ Plaintiffs in their Complaint in a related case pending before this Court have claimed they move approximately 15,000 barrels per day through the pipeline at issue here. Case No. 1:14-cv-00804, COMPLAINT at 8, filed Sept 9, 2014 (D.NM). 15,000 barrels per day x 365 days would result in 5,475,000 barrels per year transported. In six years at that rate 32,850,000 barrels of oil would have been transported across the former right-of-way. For much of that period, crude oil values exceeded \$100 per barrel. For illustrative purposes here, assuming a very conservative value of \$40 per barrel over the last six years, the value of crude oil transported across the expired right-of-way would be \$1,314,000,000 in value transported over the six years of knowing and willful trespass.

Plaintiffs seek to legitimize retroactively their six years of bad faith trespass upon the real property of Movants-Intervenors and their co-owners of the land involved. Movants-Intervenors respectfully assert that their ability to protect their interests in the real property at issue will as a practical matter be impaired or impeded unless they are permitted to join this action. In the alternative, Movants-Intervenors respectfully petition this Court to grant their intervention by leave of the Court pursuant to Rule 24(b). Fed.R.Civ.P. 24.

Movants'-Intervenors' ANSWER TO COMPLAINT

Movants-Intervenors, by and through their undersigned counsel, hereby submits the following Answer to Plaintiffs' Complaint.

1. Movants-Intervenors are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint, and therefore denies the same.
2. Movants-Intervenors admit that the Department of the Interior is a federal agency, and that Sally Jewell is the Secretary of the Interior and here sued in her official capacity. The remaining allegations in this Paragraph of the Complaint contain statements of jurisdiction and administrative authority, and Movants-Intervenors are without knowledge or information sufficient to form a belief as to the truth of those allegations. To the extent a response is necessary, Movants-Intervenors deny the remaining allegations of this Paragraph of the Complaint.
3. Movants-Intervenors admit that in a proper case this Court has jurisdiction under 28 U.S.C. 1334 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. Movants-Intervenors deny, however, that this is a proper case and that this Court has jurisdiction to adjudicate the claims in this Complaint.

4. Movants-Intervenors admit that, under 28 U.S.C., in a proper case involving these parties and the real property here involved, venue would lie in this District. Movants-Intervenors deny that this is such a proper case, however, and therefore deny the allegations in this Paragraph of the Complaint.
5. Movants-Intervenors are without knowledge or sufficient information to form a belief as to the truth of the allegations in this Paragraph, and therefore deny the same.
6. This Paragraph contains statements involving conclusions of law to which Movants-Intervenors do not have sufficient knowledge or information to form a belief as to their completeness or truth. Accordingly, Movants-Intervenors admit the pipeline in issue crosses privately owned Navajo allotments owned by individual Navajo Indians and by the Navajo Nation and denies the remainder of the allegations in this Paragraph.
7. This Paragraph contains statements of law as to which Movants-Intervenors do not possess sufficient knowledge or information to admit or deny them. Accordingly, Movants-Intervenors deny the allegations in this Paragraph.
8. Movants-Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in this Paragraph of the Complaint, and therefore Movants-Intervenors deny the same.
9. Movants-Intervenors are without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph, and therefore deny the same. Movants-Intervenors specifically deny the “likelihood” that much of the crude oil produced in the

Four Corners area would be foregone if the offending pipeline at issue in this action were not in operation.

10. Movants-Intervenors are without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph, and therefore deny the same. Movants-Intervenors specifically deny that the private way maintained and operated without authorization or consent sent across the real property of Movants-Intervenors serves a public purpose within the takings law of the United States or the State of New Mexico.
11. The facts alleged in this Paragraph presume conclusions of law which should be determined by a tribunal, not by conclusory allegations. Without knowledge or information sufficient to form a belief as to the underlying presumptions of these allegations, Movants-Intervenors deny the allegations contained in this Paragraph.
12. Movants-Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in this Paragraph relating to payments made to other individuals, and therefore deny the allegations in this Paragraph of the Complaint. Movants-Intervenors deny any implication that an appraisal conducted without regard to the uses to which a corridor property is to be put provides a basis for presuming, or for administratively providing, landowners' consent.
13. Movants-Intervenors are without sufficient knowledge or information to form a belief as to the initiative and reliance factors underlying the January 8, 2013 IBIA decision, and therefore deny the allegations regarding those subjective factors. Movants-Intervenors admit that the January 8, 2015 decision of IBIA vacated the earlier action of the BIA in putatively approving renewal of the right-of-way in question here.

14. While unable to confirm or deny Western's subjective motives, Movants-Intervenors on information and belief deny that all efforts to obtain landowner consents were conducted in good faith, but admit that Western subsequently attempted to schedule meetings with remainder interest holders of Navajo Allotment No. 2073. Further, Movants-Intervenors cannot confirm or deny the allegations of this Complaint, and therefore deny the same.
15. This Paragraph contains allegations regarding the thought processes of the BIA, which Movants-Intervenors can neither confirm nor deny. Accordingly, Movants-Intervenors deny the allegations of this Paragraph. Movants-Intervenors admit the BIA declined to approve Western's application for renewal of the right-of-way sought in this proceeding.
16. Movants-Intervenors are without knowledge or information sufficient to form a belief regarding the truth of the matter of law alleged in this Paragraph, and therefore deny the same. Movants-Intervenors admit that Western appealed BIA's decision to IBIA.
17. This Paragraph purports to characterize the May 4, 2016 decision of IBIA in a way that Movant-Intervenors cannot confirm or deny, and therefore deny the characterizations of the IBIA decision. Movants-Intervenors admit that the May 4, 2016 decision of IBIA denies Western's appeal.
18. Movants-Intervenors are without knowledge or sufficient information to form a belief as to the allegations in this Paragraph, and therefore deny the same. Specifically, Movants-Intervenors deny the allegation that co-owners of the real property at issue in this action have "demand[ed] an absurd and extortionate amount – some \$8.6 million -- for their consents."
19. Movants-Intervenors are without knowledge or sufficient information to form a belief as to the allegations in this Paragraph, and therefore deny the same.

20. Movants-Intervenors cannot confirm the conclusions of law and motives of lawmakers alleged in this Paragraph, and therefore deny the same. Movants-Intervenors point out that the statutes cited by Plaintiffs in this Paragraph do not include any reference to the Act of Congress codified at 25 U.S.C. 321, dealing specifically with rights-of-way for pipelines across Indian lands.
21. This Paragraph contains legal conclusions and regulatory history that Movants-Intervenors can neither confirm nor deny, and therefore deny the same.
22. Movants-Intervenors are without knowledge or information sufficient to form a belief as to the truth of allegations in Paragraph, and therefore deny the same.
23. Movants-Intervenors are without sufficient information to confirm the truth of the allegations in this Paragraph, and therefore deny them.
24. This Paragraph contains a legal conclusion that Movants-Intervenors cannot confirm or deny, and therefore deny them.
25. This Paragraph contains legal conclusions that Movants-Intervenors deny in their entirety, including sub-Paragraphs A-D.

Motion to Dismiss

Plaintiffs fail to disclose clearly that the Navajo Nation owns an undivided interest in Allotment No. 2073, the subject of this action. The statutes granting the Secretary authority, in limited circumstances not obtaining here, to approve rights-of-way across individually owned Indian allotments in the absence of consent of all interest holders do not authorize the Secretary to grant rights in tribal lands or real property of the Navajo Nation without the consent of appropriate officials of the Navajo Nation. To the extent that the COMPLAINT seeks relief which cannot be granted by the Court, the present action should

be dismissed for failure to state a claim for which relief can be granted. Fed.R.Civ.P. 12(b)(6).

To the extent that the COMPLAINT seeks an order to burden the real property interests of the Navajo Nation, the Nation is a necessary and indispensable party under Fed.R.Civ.P. 19 and by reason of sovereign immunity and Federal law cannot be joined to this action. Accordingly, this action should be dismissed for failure to join an indispensable party.

The COMPLAINT here seeks an order of this Court directing the Secretary to grant a right-of-way across tribal lands without tribal consent. Since no statute nor regulation purports to vest that authority in the Secretary, Movants-Intervenors respectfully move this Court to dismiss the instant action for lack of subject matter jurisdiction.

Counterclaim

To the extent that Rule 13 of the Federal Rules of Civil Procedure (Fed.R.Civ.P. 13) requires Movants-Intervenors to assert herewith as a compulsory counterclaim any claims they have against Plaintiffs arising out of the transaction or occurrence that is the subject matter of Plaintiffs' claims, Movants-Intervenors herewith submit and preserve the following claims against Plaintiffs.

1. Plaintiffs herein since 2010 and continuously for some six years have operated for private, pecuniary purposes a private way across and through the real property of Movants-Intervenors and their co-owners of Allotment No. 2073 in willful, bad faith, and continuing trespass upon the real property interests of Movants-Intervenors and their co-owners.

2. Plaintiffs have converted and treated as their own the private real property of Movants and their co-owners. In so doing, Plaintiffs have unjustly enriched themselves by their tortious conduct and in violation of applicable federal law and regulations.
3. In an effort to avoid notice to Movants-Intervenors and to deprive them of an opportunity to be heard, Plaintiffs have filed herein a separate and duplicative action to achieve virtually the same result that Plaintiffs seek in a related action that has been pending in this Court for two years, and in which Movants-Intervenors have been made parties to protect their own real property interests.
4. The amount apparently discussed as compensation in Paragraph 18 of the Complaint, and characterized by Plaintiffs as absurd and extortionate, represents less than one-half of one per cent of the value of crude oil transported by Plaintiffs across Movants'-Intervenors' real property in continuing, willful, and bad faith trespass ... in only six years, less than one-third of the period of easement contended for by Plaintiffs herein.
5. To determine the value of damages for Plaintiffs' continuing, willful, and bad faith trespass upon the real property interests of Movants-Intervenors and their co-owners, Movants-Intervenors demand jury trial to ascertain damages including punitive damages.

Prayer for Relief

WHEREFORE, Movants-Intervenors respectfully request that this Court:

- A. Dismiss the instant action for failure to join an indispensable party that cannot be joined; or

- B. Dismiss the instant action for failure to state a claim for which relief can be granted;
- or
- C. Consolidate the instant case with Case No. 1:14-cv-00804-KG-KK, presently pending in this Court and remand to the Secretary for proceedings in conformity with existing law and regulations; or
- D. Submit this case to mediation in accordance with this Court's alternative dispute resolution; or,
- E. In the event this Court chooses to retain jurisdiction, certify the result for interlocutory appeal, and
 - (1) Set the Counterclaims for trial by jury to ascertain damages and punitive damages; and
- F. Award attorneys' fees and costs in defending Movants'-Intervenors' real property interests against a vexatious and duplicative proceeding; and
- G. Grant such further relief as the Court deems just.

Respectfully submitted,

LAW OFFICES OF DAVID C. HARRISON

Electronically Filed

By: /s/ David C. Harrison, Attorney at Law
David C. Harrison (david@dcharrisonlaw.com)
4833 Charlotte Ct., NE
Albuquerque, NM 87109-3009
(505) 328-9771

*Attorney for Movants-Intervenors Patrick Adakai
and Frank Adakai*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Intervene, Answer, Motion to Dismiss, and Counterclaim was sent on this 13th day of June 2016 by electronic mail to each of the following:

John R. Cooney
P.O. Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, NM 87103-1000
(505) 848-1800
Fax (505) 848-9710
jrcooney@modrall.com

Deana M. Bennett
P.O. Box 2168
500 Fourth Street NW, Suite 1000
(505) 848-1000
Fax (505) 484-9710
Deana.bennett@modrall.com

*Attorneys for Plaintiffs Western Refining Southwest Ind., and
Western Refining Pipeline, LLC*

Stephanie Kiger
Department of the Interior,
Office of Regional Solicitor
Stephanie.kiger@sol.doi.gov
*Attorney for Secretary of the Interior
Sally Jewell*

Respectfully,

/s/ David C. Harrison

David C. Harrison
Law Offices of David C. Harrison
4833 Charlotte Ct., NE
Albuquerque, NM 87109
(505) 328-9771
david@dcharrisonlaw.com