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

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

Plaintiffs,

v. No. 1:16-cv-00442 JCH-GBW

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

Defendants.

PLAINTIFFS' RESPONSE OPPOSING MOTION TO INTERVENE

Introduction

Plaintiffs (collectively "Western") oppose the motion filed by putative intervenors Patrick and Frank Adakai to intervene. Doc. 16 (filed June 13, 2016) ("Intervention Motion"). The Intervention Motion improperly seeks to expand and transform this Administrative Procedure Act ("APA") action, which the federal Defendants' answer concedes is properly before the Court, *see* Doc. 25 (filed August 1, 2016"), into an entirely different private dispute between the putative intervenors and Western. Going far beyond the administrative record, the putative intervenors seek to dismiss this APA action and to file counterclaims for alleged tort and punitive damages against Western. *See* Doc. 16. Intervenors may not expand or transform an APA case in that manner. Allowing them to do so would only complicate and delay this matter and prejudice Plaintiffs' interests. On the matters properly before the Court in this APA action,

the putative intervenors' interests are adequately represented by the United States, which holds the lands at issue in trust for them and those similarly situated.

The applicable rule requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought," Fed. R. Civ. P. 24(c), and provides a putative intervenor no right actually to file a pleading itself before intervention is granted. But the Intervention Motion includes an "Answer, Motion to Dismiss and Counterclaim." Doc. 16. The putative intervenors' counsel acknowledged by his approval of Western's Notice of Agreed Extension to Respond to Motion to Intervene that the Intervention Motion included a "proposed Answer, Motion to Dismiss and Counterclaim." Doc. 19 (filed June 23, 2016) at 1 (emphasis added). Western accordingly will not respond to the motion to dismiss or the counterclaim unless and until the Intervention Motion is granted and the Court permits the putative intervenors to file the proposed pleadings.

For the above reasons, as more fully set forth below, the Intervention Motion should be denied. This APA case should be allowed to proceed with Plaintiffs and the federal Defendants as the only parties.

Background

Western has exercised its legal right to seek judicial review of agency decisions overturning and then limiting the 2010 renewal by the Bureau of Indian Affairs (BIA) of a right-of-way over an allotment of Indian land on which Western and its predecessor have operated a 0.52-mile segment of a 75-mile pipeline for decades. The rights-of-way for the remaining 74.48 miles have all been granted without issue. The challenged 2016 and 2013 decisions of the Interior Board of Indian Appeals (IBIA) are attached to Western's complaint. *See* Docs. 1-1 & 1-2.

This Court has jurisdiction to resolve APA challenges based on the administrative record. The federal Defendants "admit that the 2013 IBIA Order and the 2016 IBIA Order are subject to judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 702." Doc. 25 at ¶ 24.

With the filing of the United States' answer, the parties to the APA action have now framed the only issues properly before this Court. The legal issues involve whether the IBIA orders overturning BIA's 2010 renewal of Western's ROW were impermissibly retroactive (coming after Western already had compensated all present allotment holders for the interest), violated applicable statutes and regulations, and constituted arbitrary and capricious action that must be set aside under the APA. *See* Doc. 1 at 6-7 (listing legal infirmities in IBIA orders).

The putative intervenors, however, who hold very small minority fractionated interests in the allotment, seek to use this APA action to raise entirely different grievances against Western, far beyond the scope of what the IBIA decided in its orders. They also seek to contravene the ruling of Judge Gonzales, in the now-stayed condemnation action, that Western is entitled to bring this separate APA action, *Western Refining Southwest, Inc., et al. v. 3.7820 Acres of Land*, Case No.1:14-cv-00804-KG-KK, Doc. 172 (continuing stay of condemnation action and maintaining status quo during pendency of APA appeal), and to convert this APA action into a private case raising tort and punitive damages claims against Western. *See* Doc. 16 at 8-9.

Argument

I. Intervenors may not expand the issues raised in an APA case.

It is settled in APA cases that "[i]ntervenors may only argue issues that have been raised by the principal parties; they simply lack standing to expand the scope of the case to matters not addressed by the petitioners in their request for review." *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994) (citing *Ill. Bell Tel. Co. v. FCC*, 911 F.2d

776, 786 (D.C. Cir. 1990)). Similarly, the Supreme Court has ruled that "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues." *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944).

The Tenth Circuit likewise has held that "as an intervening party, the City may join issue only on matters brought before the court by the Authority as petitioner." *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217 n.4 (10th Cir. 2001). The Tenth Circuit relied on the Supreme Court's ruling in *Vinson* and the D.C. Circuit's holding in *Illinois Bell*.

Because a putative intervenor is not entitled to broaden an APA challenge, its intervention motion must be "[s]tripped of [any] attempts to broaden the suit." *Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1, 9 (D.D.C. 2001). Accordingly, in evaluating the Intervention Motion, the Court should not consider the putative intervenors' proposed motion to dismiss, their proposed affirmative defenses, their unfounded efforts to conflate this APA action with the separate condemnation action, or their proposed counterclaims seeking tort and punitive damages against Western. Those extraneous claims are irrelevant to the Intervention Motion because, even if intervention were allowed, the putative intervenors could not go beyond the administrative record and assert these extraneous claims in this APA action.

II. The putative intervenors should not be allowed to intervene.

The Intervention Motion, beyond calling the putative intervenors "owners of real property interests," Doc. 16 at 1, does not detail their interests. In fact, the allotted land is held in trust by the United States, and the putative intervenors hold only small fractionated interests in the allotment. *See* Doc. 25 at ¶ 13 (federal "Defendants aver that Patrick Adakai owns a 0.0038461 or 0.38461% interest in Navajo Allotment No. 2073."). An allotment is a tract of land held in trust by the United States for the benefit of individual Indian landowners and is

subject to restrictions on alienation. *See Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. 316, 331 (2008).

To intervene of right, the putative intervenors (whose motion was timely) must show that: (1) they have an interest in the allotted land that may be impaired by this litigation; *and* (2) the United States in defending against this lawsuit may inadequately represent that interest. *See Kane Cnty., Utah v. United States*, 597 F.3d 1129, 1133 (10th Cir. 2010) (synthesizing Fed. R. Civ. P. 24(a)(2)); *see, e.g., Tri-State Generation & Transmission Ass'n v. N.M. Pub. Reg. Comm'n*, 787 F.3d 1068, 1071-74 (10th Cir. 2015) (upholding denial of intervention of right where government agency adequately represented private party's interests). To intervene permissively, the putative intervenors' claims must also share a "common question of law and fact" with the APA claims, *and* the intervention *cannot* "unduly delay or prejudice the adjudication of the original parties' rights." *Id.* at 1074 (quoting Fed. R. Civ. P. 24(b)).

A. The putative intervenors may not intervene as of right because the federal government will adequately defend the challenged agency decision.

Tri-State and *Kane County* preclude intervention as of right here. In both those cases, the Tenth Circuit upheld intervention denials where there was no showing that governmental agencies might not adequately defend the agency actions being challenged in the lawsuits. *See Kane Cnty.*, 597 F.3d at 1133-35; *Tri-State*, 787 F.3d at 1071-74. Here, not only is the United States fully capable of defending the challenged agency decisions, it is legally charged with protecting the putative intervenors' interests in the allotted lands—which, after all, are held by the United States *in trust* for allottees.

To the extent the putative intervenors want to do more than simply defend against the APA challenge to federal agency action, this is not the proper case for doing so. As a federal court ruled in denying intervention in an analogous setting, the ultimate issue is "whether the

Department of the Interior is an adequate representative of the Freedmen's interests in *the present, narrowly framed action*." *Seminole Nation*, 206 F.R.D. at 10 (emphasis added). The court there explained that because its "review is constrained to the administrative record, the only potential for inadequacy in the representation of the DOI is the risk that the DOI will not vigorously defend itself against Plaintiff's APA claim." *Id.* It denied intervention because, as here, there was "no indication in the record that any such risk exists." *Id.* The only legitimate "litigation objective" that could be pursued on intervention is the same as the objective of the federal Defendants: affirmance of the IBIA decision. Because those objectives are identical, adequate representation is presumed absent a "concrete showing" that the federal Defendants' representation would not be adequate. *Tri-State,* 787 F.3d at 1073. The putative intervenors here have not even attempted to make such a showing.

B. Permissive intervention would unduly delay and complicate this APA case.

The alternative request for permissive intervention also fails. The Intervention Motion does not identify a common question of law and fact that the proposed complaint with counterclaims shares with the discrete legal claims raised in this APA case. Even assuming for sake of argument that there were some commonality (which there is not), permissive intervention should still be denied because the putative intervenors' participation as additional parties would "unduly delay or prejudice the adjudication of the original parties' rights." *Tri-State*, 787 F.3d at 1074 (quoting Fed. R. Civ. P. 24(b)).

Here again, the case for denying permissive intervention is even stronger than it was in *Tri-State*. There, the putative intervenor's interests were adequately represented, and its participation raised "the potential for burdensome or duplicative discovery." *Id.* at 1075.

Here, even more so than in *Tri-State*, the putative intervenors' participation as parties would unduly delay and prejudice consideration of Western's APA challenge. They not only seek to raise claims (including for punitive damages) going far beyond the administrative record but also expressly seek to delay this APA case—through an "interlocutory appeal," Doc. 16 at 9—if the Court allows the APA case to proceed as all the parties here (and Judge Gonzales in the related condemnation action) believe should occur. In the words of one court denying permissive intervention, "[c]ertainly to permit intervention which so broadens the scope of litigation would delay the adjudication of the discrete issues presented to the Court by the original parties." *Seminole Nation*, 206 F.R.D. at 11.

Conclusion

The Intervention Motion should be denied.

Sean Connelly (sconnelly@zonieslaw.com)
ZONIES LAW LLC
1900 Wazee Street, Suite 203
Denver, CO 80202
(303) 302-7849
Fax (720) 961-9252

and

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

Electronically Filed

By */s/ John R. Cooney*
John R. Cooney (jrcooney@modrall.com)
Deana M. Bennett (deana.bennett@modrall.com)
P. O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800
Fax (505) 848-9710

Thomas L. Sansonetti (tlsansonetti@hollandhart.com)
HOLLAND & HART LLP

6380 South Fiddlers Green Circle, Suite 500
Greenwood Village, CO 80111
(303) 290-1061
Fax (303) 778-8175

William G. Myers, III (wmyers@hollandhart.com)
HOLLAND & HART LLP
P. O. Box 2527
Boise, ID 83701
(208) 342-5000
Fax (208) 343-8869

Attorneys for Plaintiffs

I HEREBY CERTIFY that on the 16th day of August, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Attorneys for Defendant United States of America

Rebecca M. Ross (rebecca.ross@usdoj.gov)
Howard R. Thomas (howard.thomas@usdoj.gov)

Attorney for Proposed Intervenors Patrick Adakai and Frank Adakai

David Charles Harrison (david@dcharrisonlaw.com)

MODRALL SPERLING ROEHL
HARRIS & SISK, P.A.

By: */s/ John R. Cooney*
John R. Cooney