

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 JEWEL, in her official capacity as
Secretary of the Interior,

Defendants.

**PROPOSED INTERVENORS' REPLY TO PLAINTIFFS'
RESPONSE OPPOSING MOTION TO INTERVENE**

Plaintiffs offer several objections to the proposed Intervenors' Motion to Intervene and to present their counterclaims against Plaintiffs in this action. Plaintiffs in their Response have chosen not to address Proposed Intervenors' motion to dismiss and and counterclaims pending this Court's ruling on the Motion to Intervene. For purposes of judicial economy, proposed Intervenors here renew their motion to dismiss and their counterclaims, but here Reply only to Plaintiffs' Response Opposing Motion to Intervene.

Plaintiffs respond that Proposed Intervenors' Motion to Intervene should be denied because the federal government will adequately defend the challenged agency decision, Plaintiffs' Response at 5. (Doc. 26), and because their intervention would unduly delay and complicate this APA case, *Id.*, at 6. Plaintiffs, who named these Proposed Intervenors as Respondents in their related condemnation action, nevertheless urges here that Proposed Intervenors must show that they have an interest in the allotted land that may be impaired by this litigation, and that the United States might inadequately represent that interest in this action. *Id.*,

at 5. The Proposed Intervenors here acknowledge that the United States has appeared to defend the challenged agency action in this matter but aver that the responsive pleading of the federal government has not affirmatively sought dismissal of this action, as have the Proposed Intervenors, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). The federal government might raise those defenses, but Proposed Intervenors should not be left to wager their real property interests on the sovereign prerogatives of the United States in defending its own administrative decisions. Likewise, the Court itself may well, *sua sponte*, take notice of its own lack of subject matter jurisdiction based upon the tribal ownership interest noted in the government's Response, Doc. 25 at 3, and the sovereign immunity of the Navajo Nation.

Presently, however, only these Proposed Intervenors themselves have sought to protect their real property interests implicated in this action by pointing out to the Court the procedural and substantive, legal barriers to the relief Plaintiffs seek here. Plaintiffs seek an Order of this Court enjoining Defendant United States Department of the Interior "to approve renewal of Western's 20-year *unqualified* right-of-way over Allotment 2073." Complaint at 1 (*emphasis added*). In support of that prayer for relief, Plaintiffs devote much of their Response to a detailed review of the law regarding the permissible scope of any intervention and to the government's adequacy of representation of Proposed Intervenors' interests in this action. The matter of the adequacy of the government's representation is as much a matter of fact, however. In support of their Motion, Proposed Intervenors suggest respectfully that the government's interests are not sufficiently aligned in this litigation to represent adequately the legitimate, cognizable interests of Proposed Intervenors and other landowners in light of the extraordinary, equitable relief Plaintiffs seek.

Adequacy of Government Representation

Proposed Intervenors do not challenge the adequacy of the government's representations of its own interests in this matter. Proposed Intervenors do, however, question the adequacy of the government's representation of the landowners' interests in this matter.

- a) **Proposed Intervenors' ownership interests are *undivided* interests in the real property.** Co-owners cannot consent to burden the Proposed Intervenors' rights to use, cross, and otherwise exercise all the incidents of ownership of their land without their consent. The property at issue in this case, Navajo allotment number 2073 is owned by individuals and the Navajo Nation in interests that have not been partitioned or otherwise divided. Each owner or each estate of a deceased owner owns an interest in the entire property. No right-of-way across any part of the property can be granted that does not burden the interest owned by the Prospective Intervenors. The Secretary has not made a finding that the terms proposed by Plaintiffs are in the best interests of the landowners. In any event, the interest owned by the Navajo Nation cannot be burdened without the consent of the Navajo Nation in its sovereign capacity. Granting the relief sought by Plaintiffs, namely an Order enjoining the Secretary to approve an unqualified, 20-year right-of-way, would violate the regulations governing rights-of-way on Indian lands found in 25 CFR Part 169.
- b) **The expired right-of-way which Plaintiffs seek to resuscitate by this action was first granted at least sixty years ago, Complaint at 2, long before the law or regulations required any attention whatsoever to environmental matters.**

Notwithstanding such intervening laws as the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321, *et seq*; the Federal Water Pollution Control Act (FWPCA) of 1972, 86 Stat. 816; the Clean Water Act (CWA) of 1977, 33 U.S.C. 1251, *et seq*; the Safe Drinking Water Act (SWDA) of 1974, 42 U.S.C. 1401, *et seq*; the Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. 6901 *et seq*; the Toxic Substances Control Act (TSCA) of 1976, 15 U.S.C. 2601, *et seq*; the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9601, *et seq*; the Superfund Amendments and Reauthorization Act (SARA) of 1986, *Id*; and including most recently the Protecting our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016, Pub. L. 114-183, 130 Stat. 514 (June 22, 2016). Proposed Intervenors here have been made aware of absolutely no inquiry, investigation, or findings regarding compliance with the requirements of these environmental statutes by the government in its representation of landowners including Proposed Intervenors in this matter. Proposed Intervenors do not allege here that Plaintiffs are in violation of any these statutes. They do point out in support of their Motion to Intervene that there is no evidence the government has made appropriate inquiry on their behalf to ensure their property, health, and safety, are adequately considered before a right-of-way for transport of hazardous and flammable substances across their land is granted. Proposed Intervenors should be permitted to intervene to ensure any equitable relief granted in this matter does not deprive them of the protections afforded by these statutes as they have been amended from time to time,

c) **There is nothing in the record that suggests the government has adequately represented interests of Proposed Intervenors and their co-owners with respect to safety measures during operation or eventual cessation of operation of the pipeline in question.** Proposed Intervenors are not aware of safety measures in place or contemplated for operation of the subject pipeline which will transport hazardous and flammable materials across their land for many years. The pipeline is more than sixty years old. Complaint at 2. Proposed Intervenors are not aware of the age of the actual pipe underlying their land at the present time, how often it has been replaced, or of any plans for replacement. For that matter, Proposed Intervenors are not aware of the current safety or testing regime employed by Plaintiffs to maintain integrity of the pipeline. Whether the internal surfaces of the pipe are routinely examined by cathodic inspection or other appropriate form of testing and on what schedule; whether the pipeline is monitored routinely for leaks or methane emissions; or whether adequate containment and clean-up equipment are maintained within reasonable distance of the pipeline as it traverses Proposed Intervenors' property are all matters on which Proposed Intervenors have not been sufficiently apprised to form an informed consent to its continued operation. Proposed Intervenors have not been advised of Plaintiffs' intent upon eventual cessation of operation and abandonment of the pipeline. Proposed Intervenors do not know whether Plaintiffs plan to take up the pipeline and, if so, to reclaim, restore, recontour, and reseed the disturbed land, or to abandon it in place. If the pipeline is to be abandoned in place, Proposed Intervenors do not know for how long and on what schedule Plaintiffs plan to purge the line, to monitor for leaks, spills, or methane

emissions. Proposed Intervenors are not aware of any bonding requirements or other conditions the government or this Court is prepared to impose upon any relief Plaintiffs might be granted here. Proposed Intervenors do advise the Court, however, they believe the government's representation of their interests in this matter is currently inadequate to protect their interests. For all the record now shows, Plaintiffs might boldly plan eventually to cease operations, bankrupt the wholly owned subsidiary pipeline corporation, and simply walk away, leaving both the government and the landowners with any and all remaining liability. Should that or some similarly unsatisfactory, unfair, and inequitable result attend cessation of operations, Proposed Intervenors might well be left without any meaningful remedy. They should be permitted in order seek appropriate conditions or limitations on any relief this Court might conceivably grant Plaintiffs. Proposed Intervenors should be permitted to intervene to protect their own interests which are not presently adequately represented by an existing party to the action.

- d) **Proposed Intervenors' interests are neither speculative nor adequately represented by existing parties.** Proposed Intervenors respectfully request the Court to take judicial notice of the natural gas pipeline explosion that claimed the lives of twelve members of a family in southern New Mexico on August 19, 2000. Although that event involved a natural gas pipeline and not a crude oil pipeline as is here involved, oil pipelines have also caused significant environmental and property damage. "In recent years, there have been significant hazardous liquid pipeline accidents, most notably the 2010 crude oil spill near Marshall, Michigan, during which almost one million gallons of crude oil were spilled ..." Pipeline and Hazardous

Materials Safety Administration, Notice of Proposed Rulemaking, 80 FR 61609, Oct. 13, 2015. Proposed Intervenors respectfully suggest that the scope of relief sought by Plaintiffs, namely an Order granting approval of an *unqualified* right-of-way for a 20-year period, *see* Complaint at 7, in this matter should be denied summarily. Intervention to represent landowners' interests set forth herein does nothing to expand the scope of the litigation as it stands. Plaintiffs' Motion to Intervene should be granted.

CONCLUSION

Plaintiffs seek as a matter of law extraordinary, equitable relief while ignoring all the hornbook maxims of equity. Plaintiffs are not a disinterested party in assessing the adequacy of the government's representation of the interests of Proposed Intervenors. Plaintiffs seek equity while denying equity to the Proposed Intervenors. Plaintiffs offer only conclusory allegations regarding adequacy of the government's representation of the interests of Proposed Intervenors without more. The Proposed Intervenors have put forth substantial, cognizable, protectable interests which the government has so far not raised in their behalf. Proposed Intervenors should be permitted to participate in this matter that seeks to burden their property interests with an inherently hazardous enterprise with little or no consideration of their interests in the matter. Proposed Intervenors make no disparagement of the government's appearance here to date, but do urge the Court to take notice of the government's notable silence regarding the landowners' interests to this point in the litigation. The Proposed Intervenors should be permitted to join the action, represent their own interests, seek appropriate conditions or limitations on any relief granted to Plaintiffs,

and, should they choose, to place a value on their informed consent in light of the value sought to be conferred by them and of the risks they are asked to accept in return. Intervention should be permitted.

Respectfully submitted,
David C. Harrison (david@dcharrisonlaw.com)
LAW OFFICES OF DAVID C. HARRISON
4833 Charlotte Ct., NE
Albuquerque, NM 87109
(505) 328-9771
ATTORNEY FOR PROPOSED INTERVENORS

Electronically Filed

I HEREBY CERTIFY that on the 24th 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.

Attorneys for Defendant United States of America

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

Attorneys for Plaintiffs

John R. Cooney (jrcooney@modrall.com)
Sean Connelly (sconnelly@zonielaw.com)
Deana M. Bennett (deana.bennett@modrall.com)
Thomas L. Sansonetti (tlsansonetti@hollandhart.com)
William G. Myers, III (wmyers@hollandhart.com)

LAW OFFICES OF DAVID C. HARRISON

By: /s/ David C. Harrison
David C. Harrison