

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

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

vs.

Civ. No. 16-442 JH/GBW

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

**PATRICK ADAKAI; FRANK ADAKAI,
Intervenors-Defendants**

MOTION TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION

Come now Patrick Adakai and Frank Adakai, Intervenors-Defendants (hereinafter “Intervenors”) by and through their undersigned counsel and move the Court to dismiss this action for lack of subject matter jurisdiction.

INTRODUCTION

On November 29, 2016 this Court entered an Order granting in part and denying in part Intervenors’ Motion to Intervene. Doc. 28 at 12. The Court invited Intervenors to file a Motion to Dismiss, raising only the matter of subject matter jurisdiction. *Id.* at 11-12. Plaintiffs have urged the Court to set aside two decisions of the Interior Board of Indian Appeals; to declare a valid and enforceable 20-year right-of-way across Navajo allotment No. 2073; and to enjoin the federal Defendants to approve renewal of Plaintiffs’ expired right-of-way. Complaint at 7. Navajo allotment No. 2073 is held in trust by the United States for beneficial trust interests, including not only Intervenors but also the Navajo Nation. *See*, Attachment A, Title Status

Report at 1. Intervenor is owners of undivided trust interests in Allotment No. 2073, as is the Navajo Nation. *Id.* at 2. For the reasons below, Intervenor urge the Court to dismiss this action for want of subject matter jurisdiction.

PLAINTIFFS HAVE NOT DEMONSTRATED JURISDICTION IN THIS COURT

As a court of limited jurisdiction, this Court must presume no jurisdiction unless the party asserting jurisdiction can allege facts essential to show jurisdiction and support those facts by competent proof. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189. *Penteco Corp. v. Union Gas System, Inc.* 929 F. 2d 1519, 1521 (10th Cir. 1991). Plaintiffs here assert jurisdiction in this Court but fail to show any source of this Court's jurisdiction to order the Secretary to grant a right-of-way across the Navajo Nation's trust land without the consent of the Navajo Nation acting in accordance with federal and tribal law. In a case similarly involving a dispute over a right-of-way on Navajo trust lands, the Federal District Court for this district has recently held that "Congress can direct a statute to govern actions of Indian tribes, but Congress must also expressly abrogate an Indian tribe's sovereign immunity for enforcement suits." *Public Service Company of New Mexico v. Approximately 15.49 Acres of Land, et al.*, Civ. No. 15-501, Doc. 101, Dec. 1, 2015 (D.NM), citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Plaintiffs here have failed to demonstrate that Congress has enacted any statute that either governs the Navajo Nation in this matter or that waives the sovereign immunity of the Navajo Nation. Indeed, the federal government argued successfully in *Public Service Company* that "... a right-of-way (as here requested by Plaintiffs) cannot be granted absent Tribal consent and Secretarial approval." *Public Service Company, supra*, Doc. 25 parentheses in original.

The statutes relied upon by Plaintiffs to support jurisdiction in this action contain no suggestion or authority for this Court to grant a right-of-way across the Navajo Nation's trust land here involved absent Tribal consent and Secretarial approval. Intervenor's do not dispute that this Court has jurisdiction to review cases or controversies involving federal questions under 28 U.S.C. 1338; to provide declaratory relief under 28 U.S.C. 2201; and to set aside unlawful agency action under the Administrative Procedure Act 5 U.S.C. 553, 702, 705, and 706, all as pleaded by Plaintiffs. Complaint at 2. Plaintiffs provide no authority, however, for this Court's jurisdiction over the Navajo Nation in this matter absent the Navajo Nation's consent or an act of Congress abrogating the Navajo Nation's sovereign immunity. Nor do Plaintiffs provide any authority for the Secretary's grant of a right-of-way across land held in trust for the Navajo Nation without the consent of the Navajo Nation.

Navajo Allotment No. 2073 is clearly *tribal land* within the context of and as defined in 25 CFR 169.2(3) (1916). The Navajo Nation, whose real property interest in Allotment 2073 would be burdened by the relief Plaintiffs seek, is a necessary and indispensable party to this action under Fed. R. Civ.P. 19, and cannot be joined to this action under any applicable federal law, certainly not under any law identified by Plaintiffs, and by virtue of sovereign immunity. This Court, therefore, is without jurisdiction over all necessary parties, cannot grant the relief requested, and should dismiss the action or remand the dispute to the Secretary to exercise her discretion in the matter in light of all applicable laws and regulations governing rights-of-way across Indian lands.

PLAINTIFFS' REQUESTED RELIEF GOES WELL BEYOND APA REVIEW

The statute authorizing the grant of rights-of-way across Indian lands authorizes the Secretary of the Interior to make such grants "... subject to such conditions as he [sic] may prescribe..." 25 U.S.C. 323, 62 Stat. 17 (1948). The authorizing statute, thus, expressly commits this authority to agency discretion. The Administrative Procedure Act, on the other hand, expressly excludes from its purview matters committed to agency discretion. "This chapter applies, according to the provisions thereof, except to the extent that - ... (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2).

To whatever extent the Administrative Procedure Act authorizes this Court to set aside the Secretary's action, it does not authorize the Court to issue an order enjoining the Secretary to approve a right-of-way across Indian land. The Court might set aside agency action it finds arbitrary, capricious, or otherwise not in accordance with law. Intervenor respectfully suggest, however, that the Court may not order the Secretary to approve a right-of-way if she deems such approval to be inadvisable, or contrary to law, or otherwise not in accord with the trust responsibility she owes to Indian landowners.

Even if their concerns with, *inter alia*, compliance with applicable environmental laws, safety issues, reclamation considerations, and other factors relating to the health, safety, and welfare of landowners, sportsmen, herdsman, and others who will be upon the land from time to time are not properly placed before the Court by Intervenor in this Motion to Dismiss, these Intervenor, nevertheless, respectfully suggest this Court should not displace the discretionary authority vested by statute in the Secretary to take all these matters into consideration in the exercise of her discretion.

CONCLUSION

Other federal courts reviewing rights-of-way disputes involving Indian tribal land have found that a tribe owning a beneficial interest in trust land is a necessary party to adjudication of the tribe's interest. *See, e.g., Nebraska Public Power District v. 100.95 Acres of Land in City of Thurston*, 719 F. 2d 956, 961(8th Cir. 1983) (tribal land treated differently from individually owned trust land and tribal consent required); *see also, Enable Oklahoma Intrastate Transmission, LLC v. a 25-Foot Wide Easement and right-of-way*, Civ. No. 15-1250-M, Doc. 55 (Aug. 8, 2016) (WD OK). Some of those cases such as *Nebraska Public Power*, (*id.*, and *Public Service Company*, *supra*, have involved condemnation proceedings and not APA review as is involved here. That is a distinction without a difference, however, as the court's jurisdiction in those cases, as here, turns on the indispensability to the proceedings of a non-consenting tribal owner of the land sought to be burdened. The Court here is without jurisdiction to abrogate the sovereign immunity of the Navajo Nation or to burden the Navajo Nation's real property without the Tribe's consent or participation in the proceedings. Because of the Navajo Nation's sovereign immunity, the tribe cannot be compelled to participate. The Court simply does not have jurisdiction to compel the Navajo Nation's joinder. Dismissal for want of subject matter jurisdiction is required.

Even were the Court granted jurisdiction to adjudicate Plaintiffs' claims against the Navajo Nation's real property interests in this case, the Court is not, without more, authorized to grant the extraordinary equitable relief requested by Plaintiffs. Plaintiffs pray for an order enjoining the Secretary to approve an unqualified, 20-year renewal of their expired right-of-way, notwithstanding that governing laws, regulations, and policies have changed in substantial and numerous ways since their former right-of-way was approved. One dispositive fact has not

changed, however. Decisions to grant approval for rights-of-way across Indian land are, perhaps wisely and for the very reasons implied here, vested by statute in the discretion of the Secretary. Matters expressly committed to agency discretion by statute are not subject to APA review by the Courts. *See*, 5 U.S.C. 701(a)(2). Even if the Secretary's decisions challenged here are subject to review, the extraordinary equitable relief requested is committed to her discretion and not to the Court's.

A necessary party is absent and cannot be brought before the Court. The gravamen of Plaintiffs' requested relief is expressly denied to this Court by the statutes purportedly relied upon by Plaintiffs. Intervenor respectfully urge the Court to dismiss this action for lack of subject matter jurisdiction or in the alternative to remand the matter to the discretion of the Secretary where the authority to act has been expressly lodged by Congress.

Respectfully submitted,

ELECTRONICALLY FILED
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Dismiss with attached Title Status Report was sent on this 5th day of December, 2016 by electronic mail to each of the following:

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