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' BRIEF OPPOSING ADAKAI MOTION TO DISMISS

Plaintiffs (collectively Western) oppose the Motion to Dismiss filed by limited Patrick and Frank Adakai. Doc. 29. The motion challenges subject matter jurisdiction on two grounds: (I) the Interior Department decision on Western's right-of-way application is immune from judicial review because it is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2); and (II) the Navajo Nation is a required party that cannot be joined because it has sovereign immunity. The first contention is entirely new, not having been flagged in what the Court called the "barebones argument" in the intervention motion. Doc. 28 at 11. Neither contention is sound. Federal question jurisdiction exists under 28 U.S.C. § 1331, and the only required parties in this Administrative Procedure Act (APA) case are the federal defendants responsible for the administrative ruling. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001).

I. The challenged agency ruling is judicially reviewable under the APA.

The IBIA indisputably issued final decisions on behalf of the Interior Department overturning the BIA's 2010 renewal of Western's right-of-way for an unconditional twenty-year term. Doc. 1-1, & 1-2. As even the federal defendants responsible for those decisions agree, these final agency actions are judicially reviewable.

The Supreme Court has "long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651-53 (2015). Review is grounded in an APA "Right of review" provision that a person adversely affected by federal agency action "is entitled to judicial review thereof." 5 U.S.C. § 702; *see also* 5 U.S.C. § 704 ("Actions reviewable"). The Court thus has "read the APA as embodying a basic presumption of judicial review." *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (internal quotations omitted).

The section 701(a)(2) "committed to agency discretion" provision cited by the Adakais is a "narrow exception," *Payton v. U.S. Dep't of Agric.*, 337 F.3d 1663, 1168 (10th Cir. 2003), applicable only in "rare circumstances." *Lincoln*, 508 U.S. at 191. It may apply, for example, to agency decisions *not* to undertake enforcement action that is "generally committed to an agency's *absolute* discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (emphasis added). But in most cases "Congress has not left *everything*" to an agency's unreviewable discretion. *Mach Mining*, 135 S. Ct. at 1652 (emphasis in original). Judicial review normally is available unless "there is no law for the court to apply" in reviewing the challenged decision. *See City of Colo. Springs v. Solis*, 589 F.3d 1121, 1129 (10th Cir. 2009) (internal quotations omitted).

Here, there is ample "law for the court to apply" to Western's challenge to the right-of-way decision. *Cf. Aguayo v. Jewell*, 827 F.3d 1213, 1223-26 (9th Cir. 2016) (section 701(a)(2) exception inapplicable and APA review available even where tribal law was only law to apply). Notably, there are the two reported IBIA decisions, challenged by Western, to review. *See* 63 IBIA 41-54 (May 4, 2016) (filed as Doc. 1-1); 56 IBIA 104-10 (Jan. 8, 2013) (filed as Doc. 1-2). Those decisions extensively discussed—in ways the complaint contends were fundamentally wrong and impermissibly retroactive—federal statutes, federal regulations, and IBIA and judicial precedent.

While this is not the time for deciding the merits of Western's legal claims, there plainly is "law" for this Court to apply. The legal issues include at least the following:

- Was it impermissibly retroactive for the Interior Department to impose a new requirement—that right-of-way consents must be obtained not only from current owners but from contingent remaindermen—after Western obtained consents from a majority of current owners and paid full compensation? That this requirement is new is illustrated by the Interior Department's citing this case in the commentary to the new rules. *See* 80 Fed. Reg. 72492-01, 72498 (Nov. 19, 2015) (citing 2013 IBIA decision here). Whether this new requirement can be applied retroactively to Western will turn on Tenth Circuit case law, including major recent opinions of Judge Gorsuch. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *Stewart Capital Corp. v. Andrus*, 701 F.2d 846 (10th Cir. 1983).
- Is that new requirement of remaindermen consent contrary to the statute and then-existing regulation, 25 U.S.C. § 324(1), 25 C.F.R. § 169.3(c)(2) (2015), requiring right-of-way consent from present "owners" of allotted interests?
- Does this new requirement of remaindermen consent misconstrue general property law and the Native American "gift deeds" at issue here? In deciding this issue, the IBIA reasoned that "regulations governing rights-of-way across Indian trust lands do not address the effect of consent by the owner of a life estate," so it decided to "apply general principles of property law." 56 IBIA 108 (Doc. 1-2 at 5).
- Was the IBIA decision arbitrary and capricious, and hence contrary to the APA, for other reasons described in Western's complaint? *See* Doc. 1 at 7 ¶ 25(D).

The Adakais' attempt to immunize the agency's legal decisions from judicial review is belied by the Interior Department's own regulations that specifically contemplate APA review in cases challenging IBIA decisions. Interior Department regulations make clear that decisions issued by the IBIA exhaust an appellant's administrative remedies and are final agency actions subject to judicial review under 5 U.S.C. § 704. *See* 43 C.F.R. § 4.21(c)-(d); *see also* 43 C.F.R. § 4.314(a)-(b). Here, after Western indisputably exhausted administrative remedies through the IBIA appeals, there is "agency action subject to judicial review under 5 U.S.C. 704." 43 C.F.R. §§ 4.21(c), 4.314(a).

The Supreme Court has stated "administrative review was available, subject to ultimate judicial review under the APA" for cancellation of a right-of-way by the BIA. *Wilkie v. Robbins*, 551 U.S. 537, 552-53 (2007). Tribes, project applicants, and even individual Indian landowners have invoked the APA to seek review of Interior Department decisions regarding rights of ways. *See, e.g., Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287, 1289 (D. Utah 2010) (tribe and the right-of-way applicant "invoke[d] the Administrative Procedure Act ('APA') to obtain review" of Interior Department decision overturning a right-of-way application; court found it had jurisdiction, and vacated challenged action of Interior Department officials regarding right-of-way). In *Begay v. Public Service Company of New Mexico*, 710 F. Supp. 2d 1161 (D.N.M. 2010), individual Indian landowners brought suit challenging BIA's grant of certain rights-of-way, including grants to Western; Judge Browning recognized the availability of an APA challenge but cited the failure to exhaust administrative remedies as one ground for dismissing the complaint. *See id.* at 1187.

There thus is no force to the Adakais' new argument that APA review is unavailable. This Court plainly has federal question jurisdiction to review the APA claims.

II. The Navajo Nation is not a required party, and the APA action cannot be dismissed.

The Adakais also contend the Navajo Nation is a necessary party that cannot be joined because of its sovereign immunity. This argument, based on Fed. R. Civ. P. 19, fails for three reasons: (A) the Navajo Nation had no interest in the allotment at the relevant time; (B) neither it nor any allottee is a required party in any event; and (C) dismissal of this APA action would not be appropriate even if some required party could not be joined.

At the outset, it should be noted that the Adakais' joinder arguments are rule-based and not truly jurisdictional. *See Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013) ("Joinder is not itself jurisdictional," even where unjoined party is Indian tribe with sovereign immunity.); *compare* Fed. R. Civ. P. 12(b)(7) (dismissal motion for "failure to join a party under Rule 19"), *with* Fed. R. Civ. P. 12(b)(1) (dismissal for "lack of subject-matter jurisdiction"). Nonetheless, the issue is appropriate for consideration now, as a "court with proper jurisdiction" should consider (even on its own initiative) "the absence of a required party and dismiss for failure to join." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008); *see Davis v. United States*, 192 F.3d 951, 960-62 & n.13 (10th Cir. 1999) (suggesting joinder issue is not truly jurisdictional even though it is "not waivable" and court has independent duty to consider it).

The federal government properly notes that the Adakais "lack standing or authority to speak on behalf of the [Navajo] Nation of its interests." Doc. 30 at 13 n.5. Indeed, the Adakais' motion is particularly cynical given that the Adakais fought so strenuously to prevent the Nation from acquiring any interest in the allotment. *See Estate of Anita Adakai*, 61 IBIA 2, 9 & n.10 (June 4, 2015) (Adakais' arguments included that "the Navajo Nation 'is not ready to take the lead of [a statute's] tail end processing of any estate being turned over to them'"). The Adakais' current motion is nothing but a transparently misguided effort to obstruct judicial review.

A. The Nation had no allotted interest at the relevant time.

The relevant time for evaluating interests in fractionated tracts of Indian land is the date the right-of-way application is submitted. Current regulations confirm that BIA "will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the requisite consent based on our records *on the date on which the application is submitted* to us." 25 C.F.R. § 169.107(c) (eff. Apr. 21, 2016) (emphasis added).

Here, Western's right-of-way renewal application was submitted in 2009, and it was approved in 2010 before being overturned in the challenged IBIA decisions. *See* 64 IBIA 42 (Doc. 1-1 at 2). That is why the relevant Title Status Report (TSR), in the administrative record and cited by the agency, was from 2008. *See* 56 IBIA 105 (Doc. 1-2 at 2).

The Adakais improperly rely on a 2015 TSR. *See* Doc. 29-1. That TSR is irrelevant under current rules confirming that only interests existing at the time of application are considered, 25 C.F.R. § 169.107(c), because it lists interests, including that of the Nation, that indisputably did not exist at that time. *Compare* Doc. 25 at 4 (government's answer stating that Navajo Nation acquired its fractionated interest in June 2015 upon IBIA ruling), *with* Doc. 30 at 9 (now stating that Nation acquired interest "[e]ffective December 6, 2012," upon ALJ ruling). And it is not properly considered in this APA action because, as this Court explained, judicial review is based on "the administrative record already in existence, not some new record made initially in the reviewing court." Doc. 28 at 7 (internal quotations and citation omitted).

The 2010 BIA renewal of Western's right-of-way found that Western had obtained consents from a majority of owners at the time of its application. *See* Doc. 1 at 3 ¶ 11; 56 IBIA 105-06 (Doc. 1-2 at 2-3). Based on this determination, Western paid compensation distributed through BIA to all then-existing interest holders. Doc. 1 at 3 ¶ 12.

Chaos would ensue, gamesmanship would be encouraged, and the underlying statutes and regulations would be rendered illusory if (as the Adakais suggest) consent calculations and compensation payments constantly had to be redetermined based on later events further fractionating the allotment. If that were the case, whenever a right-of-way was granted over an allotment, a single allottee could assign an interest in the allotment (no matter how small) to the Nation and then challenge the grant on the grounds that the Nation had become an interest holder. Accordingly, for present purposes, the interest holders include only those with interests as of the 2009 application approved in 2010—and that does not include the Navajo Nation.

These untenable consequences are not hypothetical but are illustrated here by the situation that existed with the former Anita Adakai interest that was being disputed by the Adakais at the time of Western's right-of-way application. The Adakais' sister Anita died intestate in 2007, but because of contested proceedings brought by the Adakais, the disposition of her allotted interest was not finalized until 2015. *See Estate of Anita Adakai*, 61 IBIA 2 (June 4, 2015). A regulation governing consent to rights-of-way in 2009, when Western submitted its application, allowed BIA to grant the right-of-way without the consent of the heirs or devisees of a deceased owner when those heirs or devisees "have not been determined." 25 C.F.R. § 169.3(c)(4) (2015); *see also* 25 C.F.R. § 169.108(c)(1) (recently revised regulation clarifying that BIA can consent on behalf of Indian landowner if owner is deceased and heirs have not yet been determined, and that BIA's consent "must be counted in the majority interest" requirement).

Thus, for purposes of the agency actions under review in this APA case, the Navajo Nation had no interest in the allotment. To the contrary, as made clear in the federal government's answer, the Navajo Nation did not have any fractionated interest in the allotment when Western applied for (and BIA granted) the right-of-way renewal.

B. The Nation would not be a required party in any event.

The Navajo Nation would not be a "required party" to this APA action even if allotment interests were measured as of today rather than 2009. Notably, for the threshold inquiry—whether a fractionated interest holder is a "required party" under Fed. R. Civ. P. 19(a)(1)(A)—the inquiry would be the same for the Nation as for any allottee. Thus, if the Nation were required to be joined, so too would every other fractionated interest holder (including the Adakais). Not even the Adakais have made that extraordinary argument, and this Court's ruling allowing them only limited intervention implicitly refutes it.

It bears reemphasis that this is an APA action challenging only federal "agency action" under 5 U.S.C. § 702. As such, "the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. Indeed, "[a]ctions under the APA may be brought only against federal agencies." *Shell Gulf of Mexico, Inc. v. Ctr. for Biological Diversity, Inc.*, 711 F.3d 632, 636 (9th Cir. 2014). As the Tenth Circuit wrote, "[w]e know of no cases explicitly permitting a private suit under [APA] § 702 against a nonagency defendant, even in a case such as this in which the nonfederal actor, by its unrestrained actions, could defeat the objectives sought in the suit against the agency." *Sierra Club v. Hodel*, 848 F.2d 1068, 1077 (10th Cir. 1988). This is a much easier case than *Sierra Club* because no nonfederal actor could defeat the objectives sought in this APA action, so Western (unlike Sierra Club) does not seek or need to seek any relief against a nonfederal actor. Accordingly, there is no nonfederal actor that could have been or was required to be joined in this APA action. *See Midland Farms, LLC v. U.S. Dep't of Agric.*, 35 F. Supp. 3d 1056, 1062-65 (D.S.D. 2014) (nonfederal defendant could not be, and did not need to be, joined in APA action challenging agency decision).

Under Fed. R. Civ. P. 19(a)(1)(A), fractionated interest holders are not required parties because this Court can "accord complete relief" among existing parties by either reversing or upholding the challenged agency decisions. A case squarely on point is *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001). In the language of that Tenth Circuit decision, "[b]ecause [Western's] action focuses solely on the propriety of the Secretary's determinations, the absence of the [Navajo] Tribe does not prevent [Western] from receiving [its] requested declaratory relief" regarding the right-of-way renewal. *Id.* at 1258.

Nor are fractionated interest holders required under Fed. R. Civ. P. 19(a)(1)(B). The Navajo Nation has never "claim[ed] an interest relating to the subject of the action" (*id.*): whether BIA properly concluded in 2010 that Western obtained adequate allottee consent. Regardless, this APA action will neither impair any interest nor subject the Nation to inconsistent obligations. *See Sac & Fox Nation*, 240 F.3d at 1258-59 (finding no risks of impaired interests or inconsistent obligations even though the absent "Tribe ha[d] an economic interest in the outcome of th[e] case").

Even if the Navajo Nation had some legally protected interest, it would not be a required party because the federal government can adequately protect it. *Sac & Fox Nation*, 240 F.3d at 1259. Indeed, not only is the United States fully capable of defending the challenged agency action, it is legally charged with protecting allotted interests—which, after all, are held by the United States *in trust* for allottees. Here, there are no "conflicting interests" between the United States and Navajo Nation. *Contrast Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999 (10th Cir. 2001) ("conflicting interests" where "some tribes may gain, while some tribes may lose"); *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1997) (federal law created "a conflict between the interest of the United States and the interest of Indians").

C. Dismissal would offend equity and good conscience.

In no event should this APA action be dismissed. If the Navajo Nation somehow was a required party under Rule 19(a)—which it is not, for reasons shown above—the Court then would need to consider "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The relevant factors are (1) the extent to which a judgment rendered in the Navajo Nation's absence might prejudice it, (2) the extent to which any prejudice could be lessened or avoided, (3) the adequacy of a judgment, and (4) whether Western otherwise has an adequate remedy. *See id.*

The lack of prejudice to the Navajo Nation and the efficacy of a judgment in its absence are shown by the fact that "[t]he requested relief does not call for any action by or against the Tribe." *Manygoats*, 558 F.2d at 558-59. Instead, the relief would run wholly against the federal agency and would "not impose a coercive order" on the Navajo Nation. *See Alto v. Black*, 738 F.3d at 1129 (rejecting argument that tribe was required party in APA challenge).

Significantly, this APA "action is the only opportunity for plaintiffs to challenge…the Secretary's determinations." *Sac & Fox Nation*, 240 F.3d at 1260. Under these circumstances, "the absence of an alternative forum would weigh heavily, if not conclusively, against dismissal" for inability to join a required party. *Id.* (internal punctuation and quotations omitted). Thus, even if Rule 19 otherwise would require dismissal for inability to join a required party, the "'public rights exception' to traditional joinder rules" would dictate that this case seeking relief against the federal government for alleged violations of federal law proceed. *See Diné Citizens Against Ruining our Environ. v. U.S. Office of Surface Min. Reclam. & Enforcement*, No. 12-cv-1275-AP, 2013 WL 68701, *5 (D. Colo. Jan. 4, 2013) (citing cases including *S. Ut. Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 971 n.2 (10th Cir. 2008)).

The Adakais' arguments for dismissing this APA action rely on "condemnation proceedings and not APA review" actions, claiming this "is a distinction without a difference." Doc. 29 at 5. Contrary to the Adakais' attempted analogy, an APA action is markedly different than a condemnation action: an APA review proceeding seeks relief only against the federal government, not against the land or any individuals. The Rule 19 analysis—of which parties are required to be joined, and of whether dismissal is necessary if a required party cannot be joined—are entirely dissimilar in APA and condemnation actions. On this point, Western and the federal defendants are in accord. *See* Doc. 30 at 15-16 (condemnation cases relied on by Adakais are "distinguishable" as "[t]his is an APA suit, not a condemnation action").

III. The federal government's attempts to limit APA relief are premature and wrong.

The parties to this APA action—Western and the federal agency defendants—agree the Adakais' jurisdictional challenges (including joinder challenges, which are not truly jurisdictional) are wrong. The federal defendants, however, use the Adakai motion to invite the Court on a detour. They "construe [a] statement [in the Adakais' motion] to mean that, even if subject matter jurisdiction exists in this case, Plaintiffs have failed to state a valid claim for the mandamus relief" under the APA. Doc. 30 at 7.

The Court should decline the government's invitation to embark on a detour. Regardless of how one might "construe" the Adakais' advocacy, this Court "strictly circumscribed" their motion to addressing "the jurisdictional issue alone." Doc. 28 at 11-12. And, because the government answered Western's complaint without filing any Rule 12(b) motions, it cannot now raise merits challenges to limit possible APA relief.

While the government's backdoor attempts to limit possible remedies are premature, Western cannot leave them unaddressed. The government relies on several faulty premises.

A. The agency has exercised its discretion—*in favor of renewing* the right-of-way.

The government's brief is a paean to agency discretion. It quotes provisions on when rights-of-way "may" be granted to show the "discretionary" nature of the ultimate decision. Doc. 30 at 12-13 (quoting General Right-of-Way Act, 25 U.S.C. §§ 323-328, and regulations).

This ignores that the agency's discretion already has been exercised, in favor of renewing Western's right-of-way. The Interior Secretary delegated that discretionary decision to BIA. *See* 63 IBIA 42 (Doc. 1-1 at 2) ("The Secretary's authority is delegated to BIA.") (citing "25 C.F.R. Part 169," the regulations attached by the government at Doc. 30-1); 56 IBIA 104 (Doc. 1-2 at 1) ("BIA" was "exercising the authority of the Secretary of the Interior"). And, in 2010, BIA exercised that discretion by renewing Western's right-of-way for a full twenty-year term until instructed by the IBIA to do otherwise. *See id.*

The challenged agency decisions by IBIA in 2013 and 2016 involved no exercise of discretion over whether Western's right-of-way should have been renewed. Indeed, the IBIA made this point explicit in its most recent ruling: "We do not substitute our judgment for that of BIA with respect to the exercise of BIA's discretionary authority." 63 IBIA 47 (Doc. 1-1 at 7).

B. The decision must be based on ownership interests at the time of the application.

A second erroneous government premise is that, if the IBIA decisions are set aside, the agency could and indeed must consider Western's application based on property interests that did not exist when the application was submitted and approved. The government says it "necessarily" would need to consider the Navajo Nation's current allotted interest (and suggests it could not now renew the right-of way absent tribal consent), even though the Nation indisputably had no interest at the relevant time. *See* Doc. 30 at 10-11, 14, 16.

1. The government's position contradicts law and practice.

The government's position that Western now must obtain Nation consent to its 2009 application approved by BIA in 2010 ignores Interior Department regulations. As discussed above, *see supra* pp. 6-7, current regulations confirm that BIA "will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the requisite consent based on our records *on the date on which the application is submitted* to us." 25 C.F.R. § 169.107(c) (eff. Apr. 21, 2016) (emphasis added). While this regulation took effect after Western's application, it memorialized a prior procedural practice that would necessarily control any further review of the application were this case remanded.

The government's position also contradicts the statute, prior regulations, and agency decisions. The statute allows rights-of-way without individual consent where "the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof." 25 U.S.C. § 324. A regulation in effect when Western applied for renewal tracked that statute by allowing BIA to grant the right-of-way where "heirs or devisees of a deceased owner … have not been determined…." 25 C.F.R. § 169.3(c)(4) (2015) (Doc. 30-1 at 3). The IBIA long has recognized that "[b]oth the statute and the regulation authorize the Secretary to consent on behalf of undetermined heirs" and others whose interests are unknown at the relevant time. *Perry v. Navajo Area Director, BIA*, 31 IBIA 186, 188 (1997). The IBIA went even further by allowing the BIA to count consents it granted on behalf of undetermined heirs in calculating majority consent because doing otherwise "would significantly frustrate the continuing intent of Congress to facilitate the beneficial use of fractionated Indian lands." *Id.* at 188-89; *accord* 25 C.F.R. § 169.108(c)(1) (recently revised regulation expressly so providing).

The government's reliance on a 2016 TSR reflecting the Navajo Nation's new interest not in existence at the time of Western's 2009 application and the BIA's 2010 approval contradicts settled Interior Department practice. The IBIA's *Perry* decision underscores that the Department must rely on a single TSR as the relevant snapshot of interests in existence when the BIA made its decision. *See* 31 IBIA at 189 & n.4 (relying on July 1997 title report where BIA rendered its decision earlier that year only because there was no objection or suggestion interests had changed since BIA decision; IBIA cautioned, "The different figures for ownership interests used by the parties to this proceeding illustrate the need for all parties to be using the same title report, and for that report to be part of the administrative record."). Similarly, in the context of Indian land consolidation, the federal statute requires Indian co-owners' consent as "determined by the number of landowners and their interests identified in BIA records at the time the application is submitted to BIA." *Goodwin v. Pacific Regional Director, BIA*, 60 IBIA 46, 48 (2015) (citing Indian Land Consolidation Act, 25 U.S.C. § 2218(b)(2)(A)). Interior's practice is hardly surprising given that TSRs, by definition, are supported by a title examination showing "current ownership." 25 C.F.R. § 150.2(o).

Here, the relevant TSR—which, unlike the later TRSs filed as Docs. 29-1 & 30-2, is in the administrative record and was relied on by the agency, 56 IBIA 105 (Doc. 1-2 at 2)—is from 2008. Because that 2008 TSR is properly before this Court, we attach it as Exhibit 1 hereto. It confirms the indisputable fact that the Navajo Nation held no interest at the relevant time.[*]

[*] The Court need not decide whether the Nation first acquired its interest in 2012 (as the government now contends, Doc. 30 at 9) or in 2015 (as the government's answer stated, Doc. 25 at 4), because both are after the application and approval. Notably, however, Western obtained a TSR in 2013 that did not reflect any Navajo Nation interest in the allotment. No TSR in the administrative record reflects any interest held by the Navajo Nation, and it would be legally improper and fundamentally unfair to allow later-acquired interests to redetermine rights-of-ways on fractionated lands held in trust by the United States.

2. The government's argument is not supported by any Rule 19 concerns.

The government erroneously tries to suggest that its regulation-defying argument to consider the Nation's current interests is necessary to avoid potential joinder problems. *See* Doc. 30 at 14-16 (Rule 19 does not require dismissal of "entire suit" and "the case can proceed" because limited remedy of remand "would not prejudice the Nation."). But while the government's analysis is correct as far as it goes—it correctly concludes that Rule 19(b) would not warrant dismissal even if the Nation were a required party—the government never addresses the threshold issue of whether the Nation is a required party under Rule 19(a). *See Sac & Fox Nation*, 240 F.3d at 1258 ("[A] court must determine whether the party in question is necessary under Rule 19(a) before proceeding to decide whether the party is indispensable under Rule 19(b)."") (citing *Rishell v. Jane Phillips Episcopal Mem'l Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996)). As discussed above, the Navajo Nation (like other allottees) would not be a required party to this APA action even if it had held a fractional interest in the allotment at the relevant time. *See supra* pp. 8-9.

3. The government highlights the confusion and unfairness caused by retroactively changing right-of-way consent requirements.

The government's latest position only highlights the arbitrariness and unfairness of what has occurred here: Western obtained consents from a majority of then-existing owners in 2009; BIA approved the application and issued the right-of-way renewal in 2010; and all then-existing owners were compensated for the right-of-way. But in 2013, the IBIA retroactively changed the rules on which Western and BIA had relied, holding that Western also had to secure consents from those having no present ownership interest but only contingent future remainder interests. This new requirement was later made part of new regulations, but those have only prospective effect and concededly cannot apply to Western's right-of-way renewal.

Now the government compounds the retroactivity problem by raising the Navajo Nation's new interest, which indisputably did not exist at the time, as a potential bar to the right-of-way that was properly granted and fully paid for in 2010. This new government position not only is illegal but also makes no sense. If accepted, it would provide a blueprint for objectors holding small interests to block all rights-of-way. All those objectors would need to do, if the government were correct, is transfer a small fractionated interest to a tribe. That is both bad law and bad policy.

This case is a poster child of impermissibly retroactive agency adjudication. As Judge Gorsuch recently explained in two landmark decisions, building on a 1983 Tenth Circuit case invalidating a retroactive Interior Department ruling, there are "due process and equal protection concerns associated with retroactive application of [an agency's] new rules." *Gutierrez-Brizuela*, 834 F.3d at 1147; *see id.* at 1146-48 (discussing *De Niz Robles* and *Stewart Capital*).

C. This Court has remedial discretion to tailor its order setting aside the IBIA ruling.

The government wrongly tries to tie the Court's hands by limiting remedies for any violation. The seven-paragraph Prayer for Relief in Western's complaint sought various judicial declarations and the setting aside of the IBIA's 2013 and 2016 decisions. Doc. 1 at 7-8 ¶¶ A-G. The government homes in on the fifth paragraph, for an injunction requiring approval of the right-of-way renewal, arguing that such relief "in the nature of mandamus" is legally unavailable because Western cannot "identify any *discrete* action that Interior was *required* to take in connection with [this] right-of-way request." Doc. 30 at 12 (emphasis in original; relying on *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*")).

The government's arguments are misguided because this case involves "agency action" (overturning renewal of Western's right-of-way), which this Court indisputably may "hold

unlawful and set aside." 5 U.S.C. § 706(2). In contrast, *SUWA* involved "judicial review of agency *inaction*." 542 U.S. at 61 (emphasis added). Justice Scalia's opinion for the Court distinguished a "failure to act" (as involved there and remediable only under § 706(1)) from "discrete agency actions" (as involved here). *See id.* at 61-62. He explained, "A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request. The former is simply the omission of an action without formally rejecting a request…." *Id.* at 63.

The present case plainly involves discrete agency action rather than inaction. And the agency did not simply, in Justice Scalia's words, "say[] no to a request." *Id.* Instead, the agency decisionmaker with final *discretionary* authority over the request, said *yes* to it. That approval of Western's right-of-way renewal was reversed only after administrative judges concluded it was legally improper. Federal courts, of course, have the final word on that legal issue.

Now is not the time to prejudge what relief may be appropriate upon this Court's setting aside IBIA rulings for legal error. As explained by then-Judge Breyer (who later as an Associate Justice joined fully in the inapposite *SUWA* opinion relied on by the government), "the words 'set aside' [in section 706(2)] need not be interpreted narrowly. A court, where it finds unlawful agency behavior, may tailor its remedy to the occasion." *NAACP v. Secretary of HUD*, 817 F.2d 149, 160-61 (1st Cir. 1987). The government invokes the "ordinary" rule that the case should be remanded to the agency "for reconsideration." Doc. 30 at 14 (citing cases). But that does not foreclose the Court from mandating that any reconsideration of agency action it has set aside comply with judicial rulings and applicable law.

The government presumably would not dispute that section 706(2) remedies after agency action is set aside must be tailored to the circumstances of the case. Once this Court rejects the IBIA's legal reasons for overturning the BIA's 2010 unqualified renewal of Western's right-of-

way, no basis will remain for challenging that renewal. It may or may not be necessary formally to enjoin defendants to allow that 2010 renewal finally to take effect. But there is no basis at this threshold stage for tying this Court's hands on the appropriate remedy.

Conclusion

This Court has subject matter jurisdiction and should deny the motion to dismiss.

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I HEREBY CERTIFY that on the 19th day of December, 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:

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