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

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

Plaintiffs,

v.

Civ. No. 16-442-JCH/GBW

U.S. DEPARTMENT OF THE INTERIOR; and
RYAN KEITH ZINKE, in his official capacity as
Secretary of the Interior,

Defendants.

PLAINTIFFS' OPENING BRIEF

Sean Connelly
CONNELLY LAW, LLC
3200 Cherry Creek So. Dr., Suite 720
Denver, CO 80209
(303) 302-7849
sean@sconnellylaw.com

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

Deana M. Bennett
John R. Cooney
MODRALL, SPERLING, ROEHL, HARRIS & SISK, PA
P.O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800
deanab@modrall.com
jrcooney@modrall.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

REFERENCES TO PARTIES AND RECORD

"Western" is the collective reference to Plaintiffs Western Refining Southwest, Inc., and Western Refining Pipeline, LLC, which own and operate the 75-mile pipeline at issue here.

"Interior" is the U.S. Department of Interior.

"BIA" is Interior's Bureau of Indian Affairs, which in 2010 (through its Acting Navajo Regional Director) issued a twenty-year renewal of Western's right-of-way easement for 0.52 miles of the buried pipeline running through Allotment 2073.

"IBIA" is the Interior Board of Indian Affairs, which in 2013 and 2016 decisions overturned and then limited BIA's twenty-year renewal of Western's right-of-way easement.

"AR" is the Administrative Record filed with this Court, which this brief cites by page number (e.g., AR 582 is page 582 of the Administrative Record).

The 2013 IBIA decision overturning the BIA's renewal is at AR 582-88 and was attached as Exhibit 2 to the Complaint (Doc. 1-2). It is cited here by its reported volume and page number: 56 IBIA 104 through 110.

The 2016 IBIA decision limiting the BIA's twenty-year renewal to the lifetimes of one of two current owners is at AR 15-28 and was attached as Exhibit 1 to the Complaint (Doc. 1-1). It is cited here by its reported volume and page number: 63 IBIA 41 through 54.

INTRODUCTION AND STATEMENT OF ISSUES

The IBIA, an adjudicatory board with no rulemaking authority, improperly overturned the BIA's 2010 renewal of Western's easement on a half-mile of allotted Indian land on which a short segment of a 75-mile pipeline has run for decades. The IBIA did so (a) in a 2013 decision that without notice created a new rule requiring remaindermen consent for rights-of-way; and (b) in a 2016 decision that continued to make up rules limiting the easement's duration.

Western and the BIA had relied on then-existing law and regulations allowing rights-of-way on allotted Indian lands if a majority of current interest holders consented and fair market value was paid. Western obtained the requisite consent and paid above-market compensation to current allotment owners. But the two unprecedented IBIA decisions, creating and retroactively applying new rules, denied Western the twenty-year easement for which it more than fully paid.

This Court's thorough opinion affirming its subject matter jurisdiction in this APA case identified the "law to apply" in reviewing the IBIA decisions. Doc. 32 at 8. The legal issues are:

(1) Did the IBIA violate Western's rights by retroactively applying a new remaindermen consent rule, after Western relied on existing law by securing consents from a majority of current interest owners and paying above-market compensation to all current interest owners?

(2) Did IBIA erroneously (a) import "general principles of property law" contrary to the statutory purposes of rights-of-way on Indian allotments held in trust by the federal government, and (b) restrict the retained powers of Native American gift deed donors?

(3) Was it arbitrary and capricious for the IBIA to (a) resolve with no notice an issue no one raised and no appellant had standing to raise, and (b) limit the easement's duration to the lifetime of Mary Tom even though she and all her living remaindermen consented to the full term?

STATEMENT OF CASE AND FACTS

A. Western operates a 75-mile pipeline, including a half-mile under Allotment 2073.

This Court well summarized the case history when it denied a motion to dismiss filed by two nonparties who collectively hold less than a one percent fractionated interest in "Allotment 2073" (the allotted Indian land at issue here). As the Court explained, Western operates a buried oil pipeline transporting crude oil 75 miles from the San Juan Basin to its refinery near Gallup. The pipeline traverses tribal, federal, state and private lands, and Western continues to hold rights-of-way across 74.48 miles of the pipeline. The pipeline runs for just 0.52 miles under four acres of Allotment 2073: a 160-acre parcel held by the United States in trust for individual members of the Navajo Nation, in which the principal objector (Patrick Adakai) holds less than a one-half of one percent interest. Doc. 32 at 1-2; *see* AR 369, 439-41, 1133; 56 IBIA 105; 63 IBIA 42-43.

B. BIA in 2010 renewed a twenty-year easement on Allotment 2073 based on consents from current owners holding a majority of interests, and Western paid above-market compensation to all current owners.

In 2009, Western applied to renew its existing rights-of-way for the 75 mile pipeline over 43 Navajo allotments, including Allotment 2073. It obtained consents from a majority of current interest holders, as required by then-existing law, regulations and practice. Though the BIA-approved appraisal valued a twenty-year easement under Allotment 2073 at $2,650, Western agreed to pay $6,656—some 2.5 times above fair market value. Doc. 32 at 2; AR 369, 1033-34.

On, August 2, 2010, the BIA granted Western's application for a twenty-year renewal of its right-of-way running under Allotment 2073. Doc. 32 at 2; *see* AR 369, 439-41. Western paid, BIA distributed, and all payees have retained the agreed-upon compensation of more than 2.5 times the easement's fair market value. AR 670.

C. The IBIA created new rules and applied them retroactively.

1. The IBIA in 2013 overturned the renewal by creating a new rule requiring consent not just from current owners but also from their remaindermen.

Patrick Adakai, who owned a less than one-half of one percent (0.38461%) interest in Allotment 2073, challenged the renewal before the IBIA. Doc. 32 at 2. His insubstantial challenges—that consenting owners had not understood their rights and that Western's above-market compensation was "very low" (56 IBIA 106)—were easily refuted by the BIA (AR 663-81) and never accepted by the IBIA.

No one ever suggested remaindermen consent was required to renew this right-of-way, and the IBIA ruled that objector Adakai "lacks standing to assert the interests of other owners." 56 IBIA 110. Nonetheless, the IBIA overturned the BIA's renewal of Western's twenty-year easement based on a new theory it concocted with no notice or briefing. This Court succinctly summarized the IBIA ruling overturning this twenty-year right-of-way renewal:

> On January 8, 2013, the IBIA vacated the renewal of the easement on an issue it raised *sua sponte*: that because [Tom] Morgan and [Mary] Tom had only a life estate in the property and had bequeathed future remainder interests to others (referred to as "remaindermen") through "gift deeds," their consent was legally insufficient without additional consents from these "remaindermen." The decision rested in the theory that as holders of life estates only, Morgan and Tom lacked authority to encumber the Allotment beyond their lifetimes. The IBIA remanded the matter to the BIA.

Doc. 32 at 2-3 (summarizing 56 IBIA 104-10).

The IBIA cited no federal statute or rule requiring consent from anyone other than current owners, and it even acknowledged that then-existing "regulations governing rights-of-way across Indian trust lands do not address the effect of consent by the owner of a life estate." 56 IBIA 108. Instead, it decided to "apply" its own understanding of "general principles of property law." *Id.*

2. In 2014-2015, Interior first conducted rulemaking on whether remaindermen consent should be required for rights-of-way.

As this Court correctly observed, it was only after this 2013 IBIA decision that Interior "revised its regulations, for the first time requiring consent not only from the holder of a life estate, but also from the holders of the remainder interest." Doc. 32 at 3. Significantly, as this Court further noted, those "revised regulations went into effect in April of 2016." *Id.*

Underscoring that this was an area of developing new rules, Interior made varying and inconsistent proposals before settling on a final rule. Interior's 2014 proposed rule covered cases where "there is a life estate on the land proposed to be subject to a right-of-way." 79 Fed. Reg. 34463 (June 17, 2014) (proposed rule that would have been codified as 25 C.F.R. § 169.003(b)). It would have allowed life estate holders to consent for the duration of their estates. *Id.*

The 2015 final rule, effective for right-of-way applications *after April 2016 (not for this 2009 right-of-way application approved in 2010)*, was different than the proposed rule. It provides, "If there is a life estate on the tract that would be subject to the right-of-way, the applicant must get the consent of both the life tenant and the owners of the majority of the remainder interest known at the time of the application." 80 Fed. Reg. 72541 (Nov. 19, 2015) (25 C.F.R. § 169.109).

3. On remand from the 2013 decision, Western made extensive good faith efforts to comply with the IBIA's new remaindermen consent requirement.

The BIA noted that Western had not originally sought remaindermen consent "[b]ecause neither the statute concerning Indian rights-of-way [n]or the implementing regulations in 25 C.F.R. Part 169 mandate[d] remaindermen consent." AR 398. While Western objected to the new requirements, it undertook extensive "good faith efforts" to obtain further consents from the remaindermen of Tom Morgan and Mary Tom. *Id.*

All three of Mary Tom's living remaindermen and four of Tom Morgan's eight remaindermen consented, but Mr. Morgan's four other remaindermen did not consent. This resulted in seven of the eleven total remaindermen having consented. AR 398-99. Two of the non-consenting Morgan remaindermen joined with Patrick Adakai and his brother Frank to make extortionate demands for the right-of-way renewal. These individuals, who collectively owned less than one percent of current interests in Allotment 2073—for which all current owners collectively had been paid 2.5 times fair market value—demanded *$8.6 million* for renewal of an easement with an appraised fair market value of just $2,650. AR 473-74.

On remand, the BIA Regional Director concluded that Western's right-of-way renewal "must be denied" under the 2013 IBIA decision. AR 399. Western timely appealed that decision to the IBIA, arguing that the full twenty-year renewal issued in 2010 should be upheld or at the very least that renewal should be allowed for Tom Morgan's lifetime. AR 272-79, 368-92.

4. The IBIA in 2016 limited the easement to the lives of two current owners.

In 2016, "the IBIA denied Western's appeal in part by refusing to require the BIA to renew the right-of-way across Allotment No. 2073 for a fixed and unqualified term. Rather, the IBIA concluded that Western was entitled to a *qualified* right-of-way for 20 years or the life of Morgan or Tom, whichever is the shortest period." Doc. 32 at 3 (summarizing 63 IBIA 41-54).

Western timely filed this APA lawsuit challenging the agency actions denying it an unqualified twenty-year-renewal of a right-of-way easement to continue running its pipeline under Allotment 2073. This Court has rejected the intervention motions of Patrick and Frank Adakai (Doc. 28) and has rejected their argument that there is no subject matter jurisdiction to review the legality of the agency actions under the APA. Doc. 32.

ARGUMENT

I. The IBIA illegally created a new rule requiring remaindermen consent—after Western secured the requisite majority consent from, and paid above-market compensation to, current owners.

Tenth Circuit opinions invalidating retroactive agency adjudications, authored by current Justice Gorsuch, require invalidating the IBIA decisions. *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). Western relied on existing rules and BIA practices in renewing a right-of-way necessary to continue operating a sixty-year old pipeline. But the IBIA blindsided Western (and the BIA) by changing the rules—after Western followed all required renewal procedures, after the BIA Regional Director approved the renewal, and after Western paid above-market compensation to all current owners.

A. Agency adjudications cannot apply new rules to overturn reliance interests.

There are limits, rooted in "due process and equal protection principles," on imposing "new and retroactively applicable general rules through administrative adjudicatory proceedings." *De Niz Robles*, 803 F.3d at 1175. Thus, "the more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct." *Id.* at 1172.

The IBIA is an adjudicatory body with no rulemaking power. *See Pres. of Los Olivos v. Pac. Reg'l Dir., BIA*, 58 IBIA 278, 300 (2014) (IBIA is "limited to an adjudicatory format" and has no "authority" to make rules on anything but its own procedures) (internal quotations omitted). It nonetheless used these adjudications to create new rules: previously, as the BIA Regional Director explained, "neither the statute concerning Indian rights-of-way [n]or the implementing regulations in 25 C.F.R. Part 169 [had] mandate[d] remaindermen consent." AR 398.

This case highlights why agency adjudicatory bodies lacking rulemaking authority cannot create new rules through adjudication: not only is there no notice and comment (or in this case not even simple notice) but the new rule then is applied retroactively to overturn past actions. That retroactivity problem does not exist when an agency properly promulgates a "rule," which by definition is "an agency statement of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis added). Thus, as this Court correctly observed, when Interior promulgated its 2015 rule "for the first time requiring consent not only from the holder of a life estate, but also from the holders of the remainder interest," that new Interior rule applied only prospectively from April 2016 forward. Doc. 32 at 3: *see* 25 C.F.R. § 169.7(b) & (c)(2).

B. This case violates every protection against retroactive agency adjudication.

Then-Judge Gorsuch's 2015 and 2016 anti-retroactivity opinions referenced the five-factor test adopted in *Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 848 (10th Cir. 1983). *Stewart Capital*, in rejecting retroactive application of Interior Department adjudicatory decisions, articulated five factors on whether an order "should be applied prospectively only." *Id.* These factors are (1) whether the case "is one of first impression," (2) whether the new rule "represents an abrupt departure from well established practice," (3) the extent to which the party "relied on the former rule," (4) the "degree of burden which a retroactive order imposes on a party," and (5) the "statutory interest in applying a new rule despite reliance of a party on the old standard." *Id.*

This Court, like current Supreme Court Justice Gorsuch, has recognized that a right-of-way grant must be based on then-existing circumstances. It cited the need for "finality in decision making" to hold that the relevant "ownership interests" must be those existing at the time of the BIA decision without regard to later changes. *See* Doc. 32 at 3.

The retroactive remaindermen consent requirement created by the IBIA cannot withstand judicial scrutiny. Indeed, it violates all five *Stewart Capital* factors.

First, this 2013 IBIA decision adopting this new remaindermen consent requirement was "one of first impression." 701 F.2d at 848. Interior had never before required remaindermen consent for rights-of-way, nor was the IBIA decision supported by statute or rule. Only in the new 2015 regulations did Interior create rules "for the first time requiring consent not only from the holder of a life estate, but also from the holders of the remainder interest." Doc. 32 at 3.

Second the new remaindermen consent requirement "represent[ed] an abrupt departure from well established practice" rather than "merely attempt[ing] to fill a void in an unsettled area of the law." 701 F.3d at 848. Settled practice limited right-of-way consents to current owners. The IBIA's 2016 decision for the first time devised a new formula for tallying consents by future interest holders. *See* 63 IBIA 53-54. When Western filed its renewal application in 2009 and the BIA approved it in 2010, there was not even any means for dividing compensation among current and future interest holders; Interior's new 2015 rules had to prescribe the compensation formula. *See* 25 C.F.R. § 169.121(b).

Third, Western justifiably "relied on the former rule," *id.*, in obtaining consents and paying full compensation. After having obtained consents from current owners holding a majority of present interests, and in return for a twenty-year renewal, Western paid above-market compensation (2.5 times fair market value) that the BIA distributed to all current owners. AR 374.

Fourth, retroactive application of the new judicially created requirements imposes a high "degree of burden" on Western. 701 F.3d at 848. Even the IBIA acknowledged that the "presence of multiple owners of fractional interests, as well as both present and future interest owners,

undoubtedly may complicate Western's ability to obtain the necessary consent." 63 IBIA 53. Imposing this new requirement *retroactively*, seven years after the requisite current owner consents had been obtained and above-market compensation had been paid for a twenty-year easement, created even greater burdens. After (and because of) the retroactive 2013 IBIA decision, Western had to pay additional compensation to seven future interest holders. Still worse, that retroactive IBIA decision emboldened a small minority of two other future interest holders to join an extortionate demand that Western pay $8.6 million for a right-of-way (with an appraised value of just $2,650) running under 3.78 acres of an allotment in which the remaindermen may never even obtain a current interest affected by the right-of-way. AR 473-74.

Fifth, here there is no "statutory interest in applying a new rule despite reliance of a party on the old standard." 701 F.3d at 848. The IBIA could not properly even resolve the issue in the first instance, as no party had raised it. *See* 56 IBIA 107-08. The issue should have been left for prospective rulemaking, rather than singling out Western for retroactive application.

Ultimately, these factors grounded in due process and equal protection concerns seek "uniformity" as "all [parties] should receive the benefit of the law as it existed at the time they made their administrative applications." *De Niz Robles*, 803 F.3d at 1180. Western alone has been denied the "benefit" of such "uniformity." That is patently unfair and manifestly illegal.

II. The IBIA decision was constructed on legally erroneous foundations ignoring that Indian allotment ownership has little in common with general property law.

The IBIA supposedly applied "general principles of property law." 56 IBIA 108; *see also* 63 IBIA 48-51. Because it has no special expertise in general property law, and was acting under a legal misconception, its decision gets no judicial deference. *See Flores-Molina v. Sessions*, 850 F.3d 1150, 1157 (10th Cir. 2017); *Ibarra v. Holder*, 736 F.3d 903, 918 n.19 (10th Cir. 2013).

A. Property law does not strictly apply to consents of allotment interests held in trust.

The General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, has never turned on individual property law rights. If it did, an easement could not be granted over objection of even one individual allottee. *See* Restatement (Third) of Property (Servitudes) § 2.3 (2000) ("If fewer than all of the owners of an estate attempt to create a servitude burdening that estate, the attempt does not create a servitude…."). In contrast to privately-owned property, "lands allotted to Indians [are those] in which the United States *holds title in trust*." *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206, 213 (1943) (emphasis added). Because the federal government holds the lands in trust, the BIA can approve rights-of-way based on simple majority consent. And the 1948 Act enumerates several circumstances where rights-of-way "may be granted without the consent of the individual Indian owners"—not only upon majority consent but also where (among other situations) the heirs of a deceased owner are undetermined. 25 U.S.C. § 324; 25 C.F.R. § 169.4(c) (2015); *see also* Doc. 32 at 10 (citing similar regulation in effect when BIA approved Western's right-of-way renewal in 2010). Consequently, the IBIA's resort to general property law principles was inapt.

The 1948 General Right-of-Way Act sought "simplification and uniformity" to facilitate rights-of-way over fractionated Indian land allotments. S. Rep. No. 823, 80th Congress, 2d Sess., reprinted in 1948 U.S. Code Cong. & Ad. News 1036 (1948) (attaching letter from Interior Secretary). The IBIA thwarted these goals when it created new non-statutory rules in an adjudicatory proceeding that (1) complicated the right-of-way process by requiring separate consents from current owners and their gift-deeded heirs, and (2) created non-uniformity in which Western alone has suffered retroactive application of these new rules.

The IBIA previously had rejected any "reading of the [right-of-way] statute and regulation [that] would significantly frustrate the continuing intent of Congress to facilitate the beneficial use of fractionated Indian lands." *Perry v. Navajo Area Director*, 31 IBIA 186,189 (1997). *Perry* held that even where a right-of-way applicant obtained consents from *less* than a majority of current allotment owners, the Area Director could consent on behalf of nonvoting owners who were minors, incompetent or at unknown locations upon determining that "the right-of-way would not cause substantial injury to the land or the owner." *Id.* at 186-91.

The IBIA thus erred by importing general property law concepts to allotted Indian lands. In doing so it made the consent process more burdensome and caused this process to further fractionate allotments into present and future interests. Changing the rules to require remaindermen consent, as Interior ultimately did in 2015, should be done only prospectively through rulemaking rather than through a retroactive adjudication importing property law concepts to an area where by statute those concepts do not strictly apply.

B. Native American "gift deeds" are simply a way of creating heirs, without limiting current owners' rights to consent to easements.

The IBIA compounded its legal error by concluding that Tom Morgan and Mary Tom lost their right to grant full consent to the right-of-way when they "gift deeded" their posthumous interests to their heirs. That restrictive construct of current owners' rights ignored the manner in which the "life estates" were created. Here, for nothing but "love and other considerations," the current owners used gift deeds to convey their posthumous interests to their children and grandchildren. *See* AR 1452, 1455. At the same time, under the BIA-approved form, the current owners *retained for themselves* a life estate in "*all income including surface, subsurface leases, and any other sources*." *Id.* (emphasis added).

Properly construed, these gift deeds created a "life estate without regard to waste," as provided for in the American Indian Probate Reform Act (AIPRA). *See* 25 U.S.C. § 2201(10) ("'without regard to waste' means, with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen"). The reservation language in both gift deeds closely tracked this AIPRA definition. The BIA's Regional Director briefing to the IBIA correctly explained that if Tom Morgan and Mary Tom were "life estate holders without regard to waste, it would not appear that the consent of remaindermen to leases and/or rights-of-ways would be required under AIRPA." AR 116-17. Inexplicably, however, in its discussion and application of "general property law," the IBIA ignored the federal statutory law directly on point.

Interior's own AIPRA regulations provide life estate holders like Tom Morgan and Mary Tom far more power than the power (wrongly denied them by the IBIA) simply to consent to twenty-year renewal of a preexisting easement. The regulations ask the question: "May the holder of a life estate without regard to waste deplete the resources?" 25 C.F.R. § 179.202. The answer, in short, is "Yes." *Id.* The explanation is this: "The holder of a life estate without regard to waste may cause lawful depletion or benefit from the lawful depletion of the resources." *Id.*

Native American gift deeds—a common, non-testamentary means of devising interests to family members, *see* AR 276—are, in essence, wills. Gift deeds are on standard Interior Department forms and must be "approved" by the BIA to take effect. *See* AR 1455-56. They are given "for love and other considerations." *Id.* There is no indication at the time Tom Morgan gifted his future interests that either he or the BIA believed he was removing his power to consent to a twenty-year right-of-way renewal and receive all the compensation for that full term.

Under "general" property law principles, an owner such as Tom Morgan who devised specific property to loved ones upon his death would continue to maintain full control over that property. His devisees or heirs could not restrict his right to control that property but would simply take whatever remained of that property, "in its original or in a changed form," upon his death. *See generally* Restatement (Third) of Property: Wills & Donative Transfers § 5.2(a) (1999). Because Indian gift deeds are more akin to wills rather than true deeds, the IBIA decision was wrong even under general property law.

III. The IBIA decision was arbitrary and capricious for additional reasons.

A. The IBIA wrongly reached out with no notice to decide an issue no one raised.

The IBIA had no basis to reach and decide remaindermen consent issues to overturn the BIA's decision granting a twenty-year renewal of Western's right-of-way easement. It acknowledged that its "scope of review is usually limited to the issues raised before the" BIA, 56 IBIA 108, and these issues not only were not raised before the BIA, they were never raised before the IBIA and no appellant there even had standing to raise them. While the IBIA sought to justify raising and deciding these issues *sua sponte* "to correct a manifest injustice or error where appropriate" (43 C.F.R. § 4.318), it is only allowed to utilize this authority sparingly, in "extraordinary circumstances." *Estate of David L. Moran*, 62 IBIA 180, 184 (2016). The IBIA has held that "an error is 'manifest' [only] when it is obvious." *Id.* at 186; *cf. United States v. Olano*, 507 U.S. 725, 733-37 (1993) (unpreserved arguments in criminal appeals are reviewed only for "obvious" error creating manifest injustice).

The BIA committed no error, much less "obvious" error, in following its standard practice to renew a six-decade-old easement based on the consent of current owners holding a majority of

interests in the allotment. Nor did the grant of that renewal create any "manifest injustice." Tom Morgan consented to the renewal (for which his pro rata share of compensation of more than $2800 exceeded the fair market value of the entire easement) and none of his heirs claimed he lacked power to consent. And, because the gift deeds were not in the original appellate record, *see* 56 IBIA 106 n.6, the IBIA had no basis to consider or decide Tom Morgan's retained powers.

The manifest injustice has run only one way—to Western, whose reliance interests were upset by the IBIA's reaching out with no notice improperly to impose new requirements. Creating this new rule out of the blue, after Western already had renewed the easement by paying full compensation (at 2.5 times above market value), compounded the injustice. The IBIA decision suddenly empowered a small number of future interest holders in one allotment under which one-half mile of pipeline runs to attempt to veto the entire 75-mile pipeline right-of-way. In so doing, it fueled an extortionate demand that Western pay another $8.6 million for an easement (appraised at just $2,650) running under 3.78 acres of an allotment in which remaindermen may never even have an interest affected by the renewal. AR 473-74.

B. The IBIA wrongly limited the renewal to the lifetime of Mary Tom even though she and all her living remaindermen consented to a twenty-year renewal.

Finally, the IBIA decision reached a substantively arbitrary result even under its illegal new rule requiring remaindermen consent for an easement to extend beyond the life of a current owner. Indisputably, Mary Tom and all her living remaindermen *did consent* to (and received payment for) a full twenty-year easement. *See* 63 IBIA 46; AR 374. Inexplicably, however, the IBIA limited the easement based on these full consents to Mary Tom's lifetime if it is shorter than Tom Morgan's lifetime. 63 IBIA 42-43. This makes no sense under any mechanism for "tallying of consents." 63 IBIA 53. It further illustrates the IBIA's lawlessness and irrationality.

CONCLUSION

The Court should set aside the IBIA decisions overturning the twenty-year renewal of Western's right-of-way and confirm the BIA's renewal of that right-of-way.

s/Sean Connelly

Sean Connelly (sean@sconnellylaw.com)
CONNELLY LAW, LLC
3200 Cherry Creek So. Dr., Suite 720
Denver, CO 80209
(303) 302-7849

Deana M. Bennett (deana.bennett@modrall.com)
John R. Cooney (jrcooney@modrall.com)
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
P. O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800
Fax (505) 848-9710

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

CERTIFICATE OF SERVICE

I certify that on this 5th day of March, 2018, I filed the foregoing electronically through the CM/ECF system, which caused all parties of record to be served.

s/Sean Connelly
Sean Connelly