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

WESTERN REFINING SOUTHWEST, INC. et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	CIVIL ACTION NO. 1:16-cv-442-JCH-GBW

DEFENDANTS' RESPONSE BRIEF

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/s/ Electronically filed May 4, 2018
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

Congressional Materials

Other Authorities

Secondary Sources

GLOSSARY

"The 1948 Act" refers to the *Act to empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands or nations*, 62 Stat. 17 (1948), codified at 25 U.S.C. §§ 323-328.

"Agency" or "Interior" refers to the United States Department of the Interior.

"Allotment" refers to Allotment No. 2073 at issue in this suit.

"AR" refers to the Administrative Record, which was distributed to the Court and the Plaintiffs as a 2,329-page PDF. Individual pages are stamped with the prefix "AR[page number]." For example, page 582 of the PDF is stamped, and referenced herein, as "AR0582."

"BIA" refers to the Bureau of Indian Affairs, an entity within the United States Department of the Interior.

"IBIA" refers to the Interior Board of Indian Appeals, an entity within the United States Department of the Interior.

"OHA" refers to the Office of Hearings and Appeals, an entity within the United States Department of the Interior.

"2013 Decision" refers to the January 8, 2013 decision issued by the Interior Board of Indian Appeals in *Adakai v. Acting Navajo Reg'l Dir.*, published at 56 IBIA 104 (2013), and included in the Administrative Record at AR0582-88.

"2016 Decision" refers to the May 4, 2016 decision issued by the Interior Board of Indian Appeals in *W. Ref. Sw., Inc. et al. v. Acting Navajo Reg'l Dir.*, published at 63 IBIA 41 (2016), and included in the administrative record at AR0015-28.

"IBIA Decisions" refers to both the 2013 Decision and the 2016 Decision collectively.

INTRODUCTION

Federal agencies must routinely address legal questions left unanswered by statutes they are responsible for administering, including in the context of agency adjudications. Agencies are not only empowered to do so, they are expected to do so, and they are entitled to deference when they undertake this effort. It is in this context that Defendants the United States Department of the Interior ("Agency" or "Interior") et al., through its appellate entity the Interior Board of Indian Appeals ("IBIA"), issued two decisions that culminated in a denial of Plaintiffs Western Refining Southwest, Inc. et al.'s request for the renewal of a right-of-way crossing an allotment held in trust for multiple individual Indian landowners.

Plaintiffs insist that they are entitled to the renewal of their "right-of-way across Allotment No. 2073 [("Allotment")] for a fixed and unqualified 20-year term," Doc. No. 28 at 4, but the decision to grant or renew a right-of-way is discretionary, and is conditioned on several statutory and regulatory requirements. One pivotal requirement is sufficient landowner consent to the right-of-way, because absent such sufficient consent, the Bureau of Indian Affairs ("BIA") lacks authority to grant or renew a right-of-way.

After the IBIA concluded Plaintiffs failed to obtain such sufficient consent, the IBIA in 2013 vacated BIA's initial approval of Plaintiffs' request. *See Adakai v. Acting Navajo Reg'l Dir.*, 56 IBIA 104 (2013) (AR0582-88) ("2013 Decision"). And after Plaintiffs tried to obtain sufficient consent as required by the 2013 Decision, but failed to do so, the IBIA again concluded in 2016 that Plaintiffs were not entitled to an "unqualified" renewal of their right-of-way. *See W. Ref. Sw., Inc. et al. v. Acting Navajo Reg'l Dir.*, 63 IBIA 41, 41-54 (2016) (AR0015-28) ("2016 Decision").

Plaintiffs now argue for the first time that the IBIA should never have resolved the issue of sufficient consent at all, and that the Agency was in fact *prohibited* from resolving the issue altogether except through the promulgation of regulations. Plaintiffs also argue that the IBIA erred by looking to the common law to resolve the question, and that the IBIA's resolution of the question created a new agency rule that was impermissibly applied retroactively to them. Plaintiffs have waived most of the arguments they advance in this suit, but even if they had not, their arguments fail. The IBIA is fully authorized to reach and resolve questions of law presented to it, just as a court would. And like other agencies across the Federal government, the IBIA may look to the common law to resolve legal questions and can apply its determinations. The IBIA correctly concluded that Plaintiffs were not entitled to an "unqualified" right-of-way, and Plaintiffs' arguments to the contrary must be rejected. Defendants respectfully ask this Court to deny all of Plaintiffs' claims for relief.

BACKGROUND

I. Statutory and Regulatory Background

A. The 1948 Right-of-Way Act

In 1948, Congress enacted legislation "to simplify and facilitate [the] process of granting rights-of-way across Indian lands." *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston et al.*, 719 F.2d 956, 959 (8th Cir. 1983) (discussing enactment of 62 Stat. 17 (1948), codified at 25 U.S.C. §§ 323-328 ("1948 Act")).[1]

[1] "Prior to 1948, access across Indian lands was governed by an amalgam of special purpose access statutes dating back as far as 1875 . . . this statutory scheme . . . created an unnecessarily complicated method for obtaining rights-of-way." *Nebraska Pub. Power Dist.*, 719 F.2d at 958-59. *See also Rights of Way Through Restricted Indian Land: Hearing on H.R. 3322 Before the H. Comm. On Public Lands*, 80th Cong. 8-11 (1947) (statement of Rep. George Schwabe discussing the administrative burden imposed by the "hodge podge" of prior right-of-way statutes; the

The 1948 Act delegates broad authority to the Secretary of the Interior to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe" over lands held in trust for Indian tribes or individual Indians, as well as over lands held in fee by Indian tribes or individual Indians that are subject to restrictions on alienation. 25 U.S.C. § 323. Among other things, the 1948 Act conditions the right-of-way grant on consent from tribal and individual Indian landowners. *Id.* at § 324. The 1948 Act further provides that the Secretary may grant rights-of-way over individual Indian-owned land without the consent of all individual Indian owners if:

> (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) 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; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Id. The 1948 Act requires that all landowners (whether an Indian tribe or individual Indians) receive just compensation for the grant. *Id.* § 325. The 1948 Act further authorizes the Secretary "to prescribe any necessary regulations for the purpose of administering the provisions of [the 1948 Act]." *Id.* § 328.

B. Interior Regulations Governing Rights-of-Way Across Indian Lands

Current Interior regulations are codified at 25 C.F.R. pt. 169 and went into effect on April 21, 2016. *See* 81 Fed. Reg. 14,976, 14,976 (Mar. 21, 2016). The Interior regulations relevant to the IBIA Decisions, however, are those that were in effect in 2015. *See* 25 C.F.R. pt. 169

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financial cost to the tribe, including delayed compensation; and the dissatisfaction of both the tribe and the grantee under this system).

(2015).[2] Those applicable regulations included provisions that tracked the language of the 1948 Act, such as allowing the Secretary to grant rights-of-way over lands held in trust for individual Indians, with less than consent from all landowners, when "[t]he land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant." *Id.* § 169.3(c)(2) (Doc. No. 30-1 at 3).

The regulations also included several gap-filling provisions that facilitated implementation of the 1948 Act. For example, the regulations included definitions for certain terms, including "Individually owned land," which Interior defined as including "land *or any interest therein* held in trust by the United States for the benefit of individual Indians." 25 C.F.R. § 169.1 (2015) (Doc. No. 30-1 at 2-3) (emphasis added). The regulations also added provisions concerning landowner consent to conduct surveys, *id.* § 169.3 (Doc. No. 30-1 at 3), and the process for obtaining approval to conduct a survey, *id.* § 169.4 (Doc. No. 30-1 at 4). The regulations also made clear that consent from landowners was required both for initial rights-of-way grants, as well as renewals. *Id.* § 169.19 (Doc. No. 30-1 at 8). And, Interior expanded on the compensation provision in the 1948 Act, *see* 25 U.S.C. § 325, by requiring that tribal and individual Indian landowners were to be compensated for new and renewed rights-of-way at a rate that was "not less than but not limited to the fair market value of the rights granted." *Id.* § 169.12 (Doc. No. 30-1 at 6). Still, not every statutory gap was filled by the regulations. *See* 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (discussing need for and purpose of revising right-of-way regulations to address antiquated aspects of regulations).

[2] A copy of 2015 regulations are attached as Exhibit A to *United States' Response to Intervenor-Defendants' Motion to Dismiss for Want of Subject Matter Jurisdiction*. *See* Doc. No. 30-1.

C. The IBIA's Authority

The Office of Hearings and Appeals ("OHA") is a division within Interior that exercises delegated authority "to hear[], consider[], and decid[e] matters within the jurisdiction of the [agency] involving hearings, appeals, and other review functions of the Secretary." 43 C.F.R. § 4.1. The IBIA is an appellate entity within OHA, that, pursuant to the Secretary's delegated authority, is empowered to issue final decisions on appeals from "[a]dministrative actions of [BIA] officials issued under" Title 25 of the Code of Federal Regulations. *Id.* § 4.1(b)(1)(i).

IBIA decisions are issued in writing and set forth findings of fact and conclusions of law. *Id.* § 4.312. IBIA decisions "may adopt, modify, reverse, or set aside any proposed finding, conclusion or order of . . . [a] BIA official." *Id.* "Unless otherwise stated in the decision, rulings by the [IBIA] are final for [Interior] and must be given immediate effect." *Id.* The IBIA is fully vested with rulemaking authority, as its decisions add to the body of federal laws governing Interior and are binding on the Agency until and unless the decision is either "overturned by a superior court," *Gray v. Acting Aberdeen Area Director*, 33 IBIA 26, 27 (1998),[3] or superseded by subsequent agency actions.[4]

When reviewing a discretionary decision made by a BIA official, such as the decision to either approve or deny a request for a right-of-way under the 1948 Act and 25 C.F.R. pt. 169, the IBIA's review on appeal is limited and deferential. The IBIA does not substitute its judgment

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[3] IBIA decisions are available online, including on the Agency's website. *See* https://www.doi.gov/oha/organization/ibia/findingIBIA.

[4] *See, e.g.*, *State of N.Y. v. Acting E. Reg'l Dir.*, 58 IBIA 323, 334 n.7 (2014) (noting that M-Opinions, which are formal legal opinions issued by the Solicitor, are binding on the IBIA); *Van Mechelen v. Portland Area Dir.*, 35 IBIA 122, 124 (2000) (noting that prior IBIA precedent was superseded by promulgated regulations); *White Mountain Apache Tribe v. Acting Phoenix Area Dir.*, 21 IBIA 1, 1 (1991) (noting that applicable precedent had been superseded by a subsequent IBIA decision).

for that of the BIA official in such cases, but instead reviews the decision and the administrative record to "determine whether [the decision] comports with the law, is supported by substantial evidence, and is not arbitrary or capricious." *Adakai*, 56 IBIA at 107 (AR0585). This standard of review "is fully consistent with well-established principles of judicial review of agency actions under the Administrative Procedure Act." AR0376.

Except for arguments challenging the constitutionality of laws or regulations, the IBIA is fully authorized to review questions of law "and the sufficiency of the evidence *de novo*." *Adakai*, 56 IBIA at 107 (AR0585); *see also State of Alaska v. Alaska Reg'l Dir.*, 49 IBIA 290, 292 (2009). While administrative appeals before the IBIA are "limited to those issues that were before the . . . BIA official," the IBIA may nevertheless "exercise the inherent authority of the Secretary to correct a manifest injustice or error when appropriate." 43 C.F.R. § 4.318; *see also Adakai*, 56 IBIA at 108 (AR0586).[5]

II. Factual Background

A. BIA's 2010 Approval of Western's Right-of-Way Renewal Request

In 2009, Plaintiffs submitted an application to BIA seeking a twenty-year renewal of their subsurface right-of-way, which Plaintiffs use for an oil and gas pipeline. *Id.* at 105 (AR0583). The pipeline crosses 43 allotments on the Navajo Reservation, including the Allotment at issue in this suit. *Id.* On August 2, 2010, BIA approved the renewal request after Plaintiffs secured consent from eight individual Indian landowners who held a majority of the interests in the

[5] And "[a]lthough the language of [S]ection 4.318 vests authority in the [IBIA] to 'correct' manifest error or injustice, such language necessarily vests authority in the [IBIA] to avoid committing manifest error or injustice in rendering a final decision of the Secretary, and thus includes the authority to prevent it as well." *Estate of Levi Junnile Smith*, 49 IBIA 275, 280 (2009).

Allotment. *Id.* at 104 (AR0582). "BIA calculated the owners' consent to constitute, collectively, 60.26% of the undivided interests in the allotment." *Id.* at 105 (AR0583). "Of these eight consenting owners, five held 0.38% undivided interests, one held a 1.67% undivided interest, one held a 14.17% undivided interest, and one held a 42.5% undivided interest. The [Title Status Report for the Allotment] lists the 42.5%-interest owner as a "special interest holder," which means that he holds a life estate in the Allotment." *Id.*

B. IBIA's 2013 Decision Vacating BIA's 2010 Approval

i. Basis for Mr. Adakai's Administrative Appeal

Patrick Adakai, who owns a partial undivided interest in the Allotment and who objected to the renewal of the right-of-way, administratively appealed BIA's 2010 decision to the IBIA. *Id.* at 106 (AR0584). In that appeal, Mr. Adakai "question[ed] the procedures by which consents for the right-of-way renewal were obtained from the landowners, including whether the landowners were provided adequate information and assistance in understanding the process and their rights." *Id.* Mr. Adakai further objected to the amount of compensation paid to the landowners of the Allotment. *Id.* at 106-07 (AR0584-85).

ii. BIA's Defense of Its 2010 Approval

BIA defended its 2010 decision to renew Plaintiffs' right-of-way before the IBIA on several grounds. *Id.*; *see also* AR0663-78. Relevant here, BIA argued that sufficient consent had been obtained from individual landowners to warrant renewal of the right-of-way because collectively, the ownership interest of the eight owners "exceeded 60% of the ownership of the Allotment." *Id.* at 107 (AR0585); *see also* AR0673 (listing eight owners and their respective interests). BIA acknowledged that one of these owners, Mr. Tom Morgan, possessed a 42.5%

interest in the Allotment as part of a life estate in which he "retained his authority and the income from the land holdings for the remainder of his life." *Id.*; AR0672.

iii. The IBIA's Analysis and Holdings

On January 8, 2013, the IBIA issued its 2013 Decision vacating the BIA's 2010 Decision "on a single issue: the sufficiency of the owners' consent relied upon by BIA in granting the right-of-way renewal." *Adakai*, 56 IBIA at 108 (AR0586). The IBIA acknowledged that Mr. Adakai "did not squarely present the issue in his briefs," but that BIA's "answer brief addressed it by defending the sufficiency of the documentation relied upon by BIA." *Id.* at 108 (AR0586). The IBIA further explained that, "[e]ven if that were not the case, the [IBIA] would have authority to address the issue to correct manifest error." *Id.* (citing 43 C.F.R. § 4.318).

Because applicable regulations did not "address the effect of consent by the owner of a life estate," the IBIA turned to "general principles of property law" to resolve the question of whether life tenant consent sufficiently authorizes BIA to grant a right-of-way for a term that could potentially extend beyond that person's life. *Id.* The IBIA cited the common law principle that "[a] person holding an estate less than fee simple may create an easement only within the terms of his or her estate." *Id.* (citing 25 Am. Jur. 2d *Easements and Licenses* § 11 (2012)). Accordingly, "the owner of property whose interest is limited to the duration of his or her life may only grant, or give consent to, a right-of-way for the duration of his or her life." *Id.* Thus, the IBIA concluded, "[t]he holder of a life estate cannot bind, nor consent on behalf of, the owner of a remainder interest because that interest is not 'within the terms of' a life estate interest." *Id.* at 108-09 (AR0586-87) (quoting 25 Am Jur. 2d *Easements and Licenses* § 11).

Accordingly, the IBIA concluded that BIA manifestly erred when it relied upon Mr. Morgan's 42.5% interest in calculating ownership interests in the Allotment, because Mr.

Morgan's interest in the Allotment "was limited to his lifetime." *Id.* at 108 (AR0586).[6] Thus, without Mr. Morgan's remaindermen consent, it was arbitrary and capricious for [BIA] to grant" a "fixed *and unqualified*" right-of-way that could potentially encumber the Allotment beyond the duration of Mr. Morgan's life. *Id.* at 108-09 (AR0586-87) (emphasis in original).

C. BIA's 2014 Denial of Western's Right-of-Way Renewal Request

Following the 2013 Decision, BIA worked with Plaintiffs and the landowners "to address the issues raised in" the IBIA's 2013 Decision. AR0397. In a letter dated August 26, 2013, BIA advised Plaintiffs that in addition to Mr. Morgan, Ms. Mary B. Tom also held a life estate interest in the allotment. *Id.* Consistent with the 2013 Decision, therefore, Plaintiffs had to

> Obtain the necessary consents from the interest owners in the right of way. Specifically, [Plaintiffs] should contact the remaindermen for the life estates held by Tom A. Morgan and Mary B. Tom and seek their consent as part of the required consent for the interests represented by those life estates.

AR0398. At the time, Ms. Tom possessed a 14.16% life estate interest, and Mr. Morgan possessed a 42.5% life estate interest, in the Allotment. *Id.*

i. Plaintiffs' Efforts to Secure Sufficient Consent

As set forth in a letter dated March 7, 2014, *see* AR0457-63, Plaintiffs worked diligently to try to secure the necessary consents from landowners on remand. *See, e.g.*, AR0398 (discussing Plaintiffs' hiring of "right-of-way agents who spoke fluent Navajo and who were familiar with Navajo culture"; their hosting "of at least three meetings for the remaindermen"; their attempt "to meet personally with each of the life estate holders and their remaindermen";

[6] The IBIA acknowledged that the deed creating Mr. Morgan's life estate might have authorized him to encumber the property beyond the term of his life, but because the deed was not in the record before it, the IBIA could not confirm that. *Id.* at 108 n.6. The IBIA further noted that it was not "clear how the retention of such authority would be consistent with the creation of a life estate." *Id.*

and the "large number of attempts" they made to try to reach remaindermen through telephonic and written correspondence). Despite this effort, Plaintiffs only "obtained consents from all of Mary B. Tom's living remainder interest holders, and . . . four of eight of Tom A. Morgan's remainder interest holders." AR0458.

ii. Basis for BIA's 2014 Denial

In its decision letter dated April 8, 2014, BIA discussed the fact that Plaintiffs had secured Ms. Tom's and Mr. Morgan's consent in 2008, and had compensated both of them "in an amount equaling 2.5 times fair market value for [their] ownership interest." AR0398. After discussing the holding of the 2013 Decision, BIA explained why Plaintiffs did not seek remaindermen consent in 2008, stating hat "neither the statute concerning Indian rights-of-way [n]or the implementing regulations in 25 C.F.R. Part 169 mandate remaindermen consent." AR0398. BIA then found that while Plaintiffs were able to obtain consents from Ms. Tom and all of her living remaindermen, Plaintiffs were "only able to obtain the consent of four of the eight remaindermen" of Mr. Morgan. *Id.* Based on these facts, then-applicable regulations, and the 2013 Decision, BIA concluded that Plaintiffs "failed to obtain consent to the [right-of-way] renewal from a majority of the interests in [the Allotment]." AR0399. As a result, BIA concluded, Plaintiffs' "application for a renewal of its grant of right of way across [the Allotment] must be denied." *Id.*

D. The 2016 Decision Affirming in Part, and Reversing in Part, BIA's 2014 Denial

i. Basis for Plaintiffs' Administrative Appeal

Plaintiffs administratively appealed BIA's 2014 decision to the IBIA. AR0368-92. Plaintiffs argued that BIA misinterpreted and misapplied the 2013 Decision, including with regard to calculating majority consent. AR0388; AR0213; AR0079. Plaintiffs further asserted

that BIA failed to consider the language of Ms. Tom's and Mr. Morgan's gift deeds, in light of general property law principles as well as other statutory and regulatory schemes, which, in Plaintiffs' view, authorized Ms. Tom and Mr. Morgan to encumber their interests in the Allotment beyond the duration of their respective lives. AR0384-87; AR0211-14. Plaintiffs also argued that Mr. Morgan's 2013 withdrawal of his earlier consent to the right-of-way was invalid, AR0378-79, and that BIA erred by not granting Plaintiffs, in the alternative, a qualified right-of-way for the duration of Mr. Morgan's life, or twenty years, whichever is shorter. AR0213.

ii. Plaintiffs' Arguments in Support of the IBIA's Authority to Decide the Issues Presented by Their Appeal

In their appeal, Plaintiffs acknowledged that neither applicable regulations nor the 1948 Act "address[ed] whether remaindermen's consent is required." AR0381; *see also* AR0372 ("the IBIA recognized that both the governing statute and governing regulations were silent on the question of remainder men consent."). Plaintiffs stated that while the IBIA "took up the issue [of remaindermen consent] *sua sponte* without the benefit of the Gift Deeds or briefing by the parties" in the 2013 Decision, the subsequent administrative appeal filed by Plaintiffs

> puts the question [of remaindermen consent] squarely before the [IBIA] to determine under all the relevant facts of this case and in light of the Gift Deed language whether the life estate tenants had the right to consent to a right-of-way beyond their lives and retain all the income.

AR0077.

Plaintiffs never argued before the Agency, at any time, that the IBIA lacked authority to consider general property law principles in resolving this issue. Plaintiffs consistently argued instead that the IBIA should consider *different* principles of property law, which in their view confirmed that the Ms. Tom and Mr. Morgan were authorized to consent to an "unqualified" right-of-way. AR0077 (stating that the IBIA is "fully empowered to decide" "whether the life

estate tenants had the right to consent to a right-of-way beyond their lives and retain all the income"); AR0212 (urging BIA to consider provisions in both the then-proposed revised right-of-way regulations and in the leasing regulations codified at 25 C.F.R. pt. 162); AR0075-76 (urging BIA to consider provisions in the American Indian Probate Reform Act, 25 U.S.C. §§ 2201-06 ("AIPRA") and related regulations codified at 25 C.FR. pt. 179).

iii. BIA's Defense of Its 2014 Denial

BIA responded to Plaintiffs' appeal on several grounds. BIA argued that it reasonably required that, for each life tenant consent obtained, Plaintiffs also secure the consent of at least a majority of the life tenant's remaindermen to authorize the granting of the renewal request. AR0109-10. BIA further argued that neither Ms. Tom's nor Mr. Morgan's gift deeds, other statutory or regulatory schemes, nor general property law principles, squarely resolved the question of whether Ms. Tom or Mr. Morgan could encumber their interests in the Allotment beyond their lifetimes. AR0113-18; AR0122-24.

And, because BIA's authority under the 1948 Act and related regulations precludes the granting of a right-of-way renewal across individually-owned land unless consents are obtained from those possessing a majority of the interests therein, BIA argued that it reasonably denied Plaintiffs' renewal request after they failed to obtain such majority. AR118-19. BIA further stressed that Mr. Morgan's withdrawal should be given effect because the 2013 Decision vacating BIA's initial approval had the effect of nullifying prior consents. AR0120-22. Lastly, BIA argued that Plaintiffs failed to articulate a legal or factual basis upon which BIA could have deviated from the binding precedent set by the IBIA in the 2013 Decision. AR0124-25.

iv. The IBIA's Analysis and Holdings

In its 2016 Decision, the IBIA affirmed BIA's 2014 decision to deny Plaintiffs' renewal request in part, and also reversed with respect to certain elements of the decision. *See W. Ref. Sw., Inc. et al.*, 63 IBIA at 41-54 (AR0015-28).

1. The IBIA Concludes that Mr. Morgan's 2013 Withdrawal of Consent Was Ineffective

First, the IBIA clarified that the 2013 Decision "should not have been applied more broadly than the context required," and that in that decision, the IBIA "did not purport to set aside or invalidate [Mr.] Morgan's consent, nor did we question the [right-of-way] to the extent the duration was consistent with the authority of the life tenants whose consent formed a majority." *Id.* at 47-48 (AR0021-22). The IBIA held that "in the context of this case, [Mr.] Morgan could not effectively revoke his consent, at least when he failed to return the consideration he accepted for that consent." *Id.* at 48 (AR0022).

2. The IBIA Concludes that Ms. Tom's and Mr. Morgan's Deeds Did Not Reserve the Authority to Encumber the Allotment Beyond Their Lifetimes

Next, the IBIA considered and rejected Plaintiffs' argument that the language in Ms. Tom's and Mr. Morgan's deeds reserving "all income" impliedly meant that they reserved "the authority to effectively extinguish any value in the named grantees' future interests." *Id.* at 50 (AR0024). The IBIA analyzed the language of Ms. Tom's and Mr. Morgan's deeds, discussing that, while the instruments authorize them to retain "all income" from "any . . . source," such language concerns the "source of the income, not the nature of the encumbrance generally." *Id.* The IBIA was "not convinced that language reserving a right to income from any source is sufficient to reserve the broad authority that [Plaintiffs] contend is present here." *Id.*

3. The IBIA Distinguishes the Common Law Precedents Cited by Plaintiffs

The IBIA then considered and rejected the line of common law cases Plaintiffs cited in support of its contention that Ms. Tom and Mr. Morgan reserved the authority to encumber their interests in the Allotment beyond their lifetimes. *Id.* The IBIA found that in each case cited by Plaintiffs, "the life estate either granted or reserved to the life tenant more than the right to 'income.'" *Id.* The IBIA distinguished the cases Plaintiffs cited, stating that, unlike Ms. Tom's and Mr. Morgan's deeds, the other instruments discussed in those other cases "evidenced a clear intent by the grantor to authorize the life tenant to encumber the estate beyond the duration, of the life tenancy." *Id.* The IBIA again concluded that Ms. Tom and Mr. Morgan "lack authority to consent to [a right-of-way] for a duration beyond their lifetimes." *Id.* at 51 (AR0025).

4. The IBIA Clarifies the Method for Calculating Interests

Thereafter, the IBIA responded to Plaintiffs' and BIA's arguments concerning the calculation of consent interests. *Id.* at 52-54 (AR0026-28). The IBIA explained that "life tenants only hold a present interest in the Allotment" and thus their consent cannot be relied upon to grant a right-of-way extending beyond their lifetimes. *Id.* at 53 (AR0027). "Remaindermen hold a vested future interest in the Allotment, and therefore may consent to [rights-of-way] for the period following the life tenants' lifetimes." *Id.* Accordingly, "consenting life tenants must be included in the tally of present interests, the consenting remaindermen must be included in the tally of future interests, and those holding full (i.e., present and future) interests must be included in the tallies of both the present and future interests." *Id.*

The IBIA explained that when the property contains both present and future interests, and consent from the owner(s) of only the present interests is obtained, "then the [BIA] may grant a [right-of-way] for the lifetimes of the life tenants." *Id.* Only when the owner(s) of the majority

of both the present and future interests consent to the right-of-way, however, can the BIA "grant a [right-of-way] for an unqualified period of time." *Id.*

5. The IBIA Concludes Plaintiffs Failed to Obtain Consent from the Owners of the Majority of Both Present and Future Interests in the Allotment

The IBIA then tallied the future interests owned by Ms. Tom's "three surviving remaindermen, the four consenting remaindermen of [Mr.] Morgan, and the six consenting landowners" to conclude that 35.47% of those holding a future interest in the Allotment consent to the [right-of-way] renewal." *Id.* at 53-54 (AR0027-28). Even adding the future interest held by Ms. Tom's deceased remainderman, "the total consenting future interests in the Allotment only total 39.01%" and thus not a majority of the future interests in the Allotment overall. *Id.* at 54 (AR0028). Accordingly, the IBIA affirmed the portion of BIA's decision denying Plaintiffs' request for an unqualified twenty-year renewal of its right-of-way. *Id.* The IBIA nevertheless held that BIA "erred by not confirming the [right-of-way] grant" for a qualified duration limited to the life of Ms. Tom, Mr. Morgan, or twenty years, whichever is shorter, "as requested in the alternative by [Plaintiffs]." *Id.* at 42 (AR0016).

STANDARD OF REVIEW

I. Standard of Review Under the APA

Plaintiffs challenge the 2013 Decision and the 2016 Decision (collectively, "the IBIA Decisions") pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"). Under the APA, a court may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). An agency's decision is arbitrary and capricious if the agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the

agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgment." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009) (quoting *Utah Envtl. Cong. v. Troyer*, 479 F.3d 1269, 1280 (10th Cir. 2007)). "A presumption of validity attaches to the agency action and the burden of proof rests with the [plaintiff]s who challenge such action." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008).

The Court "may not substitute [its] own judgment for that of the agency. Thus, even though [it] may not agree with the agency's ultimate findings, [it] will not set them aside if they are supported by substantial evidence." *Hoyl v. Babbitt*, 129 F.3d 1377, 1383 (10th Cir. 1997) (citation omitted). In other words, the APA standard of review is "highly deferential." *Krueger*, 513 F.3d at 1176). "The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (footnote omitted). And, while courts "may not supply a reasoned basis for the agency's action that the agency itself has not given," courts must nevertheless "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285-86 (1974).

Under the APA, the reviewing court does not act as a fact finder, but instead "appl[ies] the appropriate APA standard of review based on the record the agency presents." *Fla. Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence,

not some new record made initially in the reviewing court."). Such review is based on "the whole record or those parts of it cited by a party." 5 U.S.C. § 706.

II. Standard of Review for Agency Interpretations of Statutes

Consistent with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a reviewing court defers to the agency's interpretation of a statute it is tasked with implementing "if (1) the statute is ambiguous or silent as to the issue at hand and (2) the agency's interpretation is neither arbitrary, capricious, nor manifestly contrary to the statute." *Flores-Molina v. Sessions*, 850 F.3d 1150, 1157 (10th Cir. 2017) (internal quotations and citations omitted). Such "[d]eference is warranted 'if Congress delegated authority to the agency generally to make rules carrying the force of law' and the agency's interpretation of the statute was issued pursuant to that authority." *Carpio v. Holder*, 592 F.3d 1091, 1096 (10th Cir. 2010) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). This delegation of authority "may be shown in a variety of ways," including through "an agency's power to engage in adjudication." *Id.* at 1097 (internal quotations and citations omitted). An agency's statutory interpretation made during the course of an adjudication is afforded *Chevron* deference when the interpretation has a precedential effect on the agency. *Id.*

Even absent the application of *Chevron* deference, the statutory canons applicable to Federal Indian law guide the reviewing court's analysis. Such canons "are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Accordingly, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*; *see also Pub. Serv. Co. of N. Mex. v. Barboan*, 857 F.3d 1101, 1108 (10th Cir. 2017) *cert. denied* 2018 WL 1994843 (Apr. 30, 2018) (extending Indian canon to interpretation of condemnation statute).

III. Standard of Review for Agency Interpretations of Its Regulations

Agency "[r]egulations are generally subject to the same rules of construction as statutes." *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1062 (10th Cir. 2014). "If the meaning is plain, it controls." *Id.* If the agency's regulations are ambiguous, however, courts must "defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk America v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011) (internal quotation marks omitted).

ARGUMENT

As Plaintiffs consistently acknowledged in their arguments before the Agency, *see* AR0381, neither the 1948 Act nor applicable regulations addressed whether life tenant consent was sufficient for the purposes of encumbering property for a term that could extend beyond the tenant's life. The Agency first confronted the issue in the context of the 2013 Decision, and addressed it again in the 2016 Decision after Plaintiffs put it "squarely before the [IBIA]" in the administrative appeal they filed in 2014. AR0077. At that time, Plaintiffs encouraged the IBIA to reconsider its 2013 Decision on the basis of different arguments from those they now advance in this suit. Plaintiffs argued that their interpretation of the language of the gift deeds creating the life estates in the Allotment, and their reading of certain common law principles, established that life tenants Ms. Tom and Mr. Morgan could consent to a renewal of Plaintiffs' right-of-way for a "fixed and unqualified 20-year term." Doc. No. 28 at 4. The IBIA disagreed. AR0025.

Having lost before the Agency, Plaintiffs now advance a series of arguments that if not waived, lack merit. Plaintiffs have failed to meet their burden under the APA.

I. The IBIA's Decisions Denying Plaintiffs An "Unqualified" Right-of-Way Are Reasonable and Should be Upheld

Plaintiffs ask the Court to set aside the IBIA's Decisions, Doc. No. 1 at 7, but the Court may only do so if the IBIA's Decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiffs contend the IBIA lacked authority to resolve the question of remaindermen consent, and that it erred in its effort to do so. Because Plaintiffs never made these arguments to the Agency, they have waived them. It is a "'well-known axiom of administrative law that if a [party] wishes to preserve an issue'" for review by the federal courts, "'he must first raise it in the proper administrative forum.'" *Silverton Snowmobile Club v. U.S. Forest Serv*., 433 F.3d 772, 783 (10th Cir. 2006) (*quoting Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004)); *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir.1985) ("'Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice.'") *(quoting United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952)).

Even if these arguments are not waived, they are incorrect. The IBIA is fully authorized to reach and resolve questions of law presented to it, and those determinations appropriately become binding precedent for the Agency. Plaintiffs' contrary propositions must be rejected.

A. The IBIA Appropriately Reached the Question of Remaindermen Consent

Plaintiffs contend that the IBIA impermissibly addressed the question of whether life tenant consent was sufficient as part of its 2013 Decision, because it was "an issue no one raised and no appellant had standing to raise." Doc. No. 44 at 16-17. The IBIA reasonably identified

this legal issue in the course of its 2013 Decision for two reasons. First, the appellant questioned the process by which consents were obtained and the BIA defended its decision in part by relying on the life tenant's consent to permit BIA to grant Plaintiffs' renewal request. AR0586.

Second, under the 1948 Act and applicable regulations, the BIA lacks legal authority to grant a right-of-way across individually-owned land unless the owners of at least a "majority of the interests" in the land consent to it. 25 U.S.C. § 324; 25 C.F.R. § 169.3(c)(2) (Doc. No. 30-1 at 3). Thus, if Plaintiffs failed to secure consent from at least a "majority of the interests" in the Allotment, then the IBIA could not uphold BIA's decision to grant Plaintiffs' renewal request. AR0585 (the IBIA's review of BIA's decision "determine[s] whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious").

As Plaintiffs consistently argued before the Agency, neither the 1948 Act nor applicable regulations addressed whether life tenant consent was sufficient to encumber the Allotment for a term that could exceed the term of the estate. AR0381. That statutory and regulatory silence does not mean that the IBIA was powerless to address the issue. The IBIA was well within its authority to fill the gap left by the 1948 Act and applicable regulations to resolve the question of whether Plaintiffs obtained sufficient landowner consent to the right-of-way renewal. Plaintiffs argue to the contrary, Doc. No. 44 at 9, 16-17, but it is a fundamental principle of administrative law that, when a "'statute is silent or ambiguous with respect to a specific issue,' then the court must determine "whether the agency's answer is based on a permissible construction of the statute.'" *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147 (10th Cir. 2011) (quoting *Chevron*, 467 U.S. 843). This is no less true when an agency's interpretation is made as part of an adjudication. *Id.*; *see also De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (binding federal appellate court precedent could be superseded by subsequent agency

interpretation made during the course of an agency adjudication). Plaintiffs fail to demonstrate that IBIA lacked authority to reach the question of remaindermen consent in its 2013 Decision.

B. The IBIA Appropriately Invoked Its Authority to Correct Manifest Error

Despite having urged the IBIA to invoke its authority to correct manifest error pursuant to 43 C.F.R. § 4.318 in the context of their own administrative appeal, AR0387, Plaintiffs now argue that the IBIA impermissibly invoked this authority altogether. Doc. No. 44 at 16-17. It is well-established, however, that the IBIA may invoke this authority to reverse BIA decisions where, as in the 2013 Decision, "there is an error of law and there is no room for discretion by BIA." *Cloud v. Alaska Reg'l Dir.*, 50 IBIA 262, 269 (2009).

Plaintiffs conflate the IBIA's inherent authority to correct manifest error under 43 C.F.R. § 4.318 with the circumstances that must exist for the IBIA to take certain actions pursuant to that authority. For example, in the IBIA decision cited by plaintiffs, the IBIA correctly stated that "[a]bsent extraordinary circumstances, our review of this appeal is limited to the issues that were before the [office which issued the challenged decision]." *Estate of David L. Moran*, 62 IBIA 180, 184 (2016). *See also Estates of John (Pete) and Emma Pixley*, 8 IBIA 70, 71 (1980) ("a [probate] estate closed for 50 years will not be reopened except in extraordinary circumstances to correct a manifest injustice"). In other words, an appellant must demonstrate that extraordinary circumstances must exist before the IBIA will consider new issues raised for the first time in an administrative appeal.

But the IBIA may invoke its Section 4.318 authority to correct an error of law, even when extraordinary circumstances are not present. *See e.g.*, *Hopi Tribe v. W. Reg'l Dir.*, 62 IBIA 315, 328 (2016) (computational errors and internal inconsistencies in the challenged BIA decision warranted IBIA to invoke its 43 C.F.R. § 4.318 authority to vacate decision on manifest error

grounds); *Cloud*, 50 IBIA at 269. (authority permits the IBIA to reverse erroneous BIA decisions); *Ward v. Billings Area Director*, 34 IBIA 81, 90 (1999) (mathematical miscalculation of damages in a timber trespass case is manifest error); *Estate of Paul Widow*, 17 IBIA 107, 114 (1989) ("omission of an heir or heirs is manifest error"). Here, the IBIA identified an error of law—BIA's reliance on a life tenant's consent to grant Plaintiffs' renewal request—and invoked its Section 4.318 authority to correct that error. Plaintiffs fail to demonstrate that the IBIA erred when it invoked its inherent authority to correct manifest error.

C. The IBIA Reasonably Relied on Common Law Principles in Resolving the Question of Remaindermen Consent

Plaintiffs contend that the IBIA erred by looking to common law principles to resolve whether life tenant consent was adequate to permit BIA to renew Plaintiffs' right-of-way and encumber the Allotment for a term that could exceed such tenant's life. Doc. No. 44 at 12-14. But as set forth below, the IBIA is entitled to deference because it was wholly appropriate and reasonable for the IBIA to turn to common law principles to resolve a question left unanswered by the 1948 Act and related regulations.

i. The IBIA Reasonably Consulted Common Law Principles to Resolve a Legal Question Not Answered by Statute or Regulations

Congress legislates in the backdrop of the common law, assumes that gaps will be filled, and implicitly delegated to Interior the authority to fill a gap in the statute by application of the common law. This is a bedrock principle of administrative law. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("'[S]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (ellipsis in original))). "In order to abrogate a common-law principle, the statute must

'speak directly' to the question addressed by the common law." *Id*. (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

Courts consistently uphold agencies turning to the common law, both for guidance and to decide matters in administrative proceedings, and courts themselves apply common law in deciding lawsuits when the applicable statute and regulations are silent.[7] And agencies have likewise long applied common law principles in deciding individual proceedings and in promulgating regulations or issuing guidance documents.[8] As with other agencies, reference to or reliance on a common law principle in an administrative appeal is in no way unusual for Interior. Interior's appellate entities have in fact done so in a variety of instances in which the applicable statute and promulgated regulations were silent.[9]

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[7] *See, e.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (applying common law to interpret statute). *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (applying common law of agency); *Frankel v. Bally, Inc*., 987 F.2d 86, 90 (2d Cir. 1994) ("the question of whether an individual is an 'employee' or an 'independent contractor' within the meaning of the ADEA must be determined in accordance with common law agency principles"); *Overnite Transportation Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1989) (common law properly applied in NLRB proceeding); *In re: Monitronics Int'l, Inc. Tel. Consumer Prot. Act Litig.*, 223 F. Supp. 3d 514, (N.D. W.Va. 2016), *aff'd sub nom. Hodgin v. UTC Fire & Sec. Americas Corp.*, 885 F.3d 243 (4th Cir. 2018) (applying Restatement of Agency to determine whether vicarious liability should be imposed, giving *Chevron* deference to FCC determination that agency principles may be applied).

[8] *See, e.g.*, *In re Rules Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 565 (2007); *In the Matter of the Joint Petition Filed by Dish Network LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules*, 28 FCC Rcd. 6574, 6591 (2013); *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, 1997 WL 33159161, at *5 (Dec. 3, 1997).

[9] *See, e.g.*, *Fredericks v. Great Plains Reg'l Dir.*, 63 IBIA 274, 276-77 (2016) (citing *Adakai*'s reliance on common law and applying common law to address sufficiency of life estate holder's consent to execution of an agricultural lease); *W. Va. Highlands Conservancy, Inc. v. Office of Surface Mining and Enf't*, 181 IBLA 31, 46-47 (2011) (looking to common law to define "causal nexus" between appeal and remand); *Hall-Houston Oil Co. et al. v. Acting W. Reg'l Dir.*, 42 IBIA 227, 232 (2006) (citing C.J.S. and Am. Jur. in applying common law contract principles to

ii. The IBIA Reasonably Consulted Common Law Principles to Resolve the Question of Remaindermen Consent Under the 1948 Act and Applicable Regulations

The 1948 Act was enacted in the backdrop of federal common law and legislation that recognizes a strong federal interest in and comprehensive responsibility for Indian rights-of-way. The 1948 Act delegates broad authority to the Secretary to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe" over lands held in trust for Indian tribes or individual Indians, as well as over lands held in fee by Indian tribes or individual Indians that are subject to restrictions on alienation. 25 U.S.C. § 323. To be sure, the 1948 Act deviates from some common law rules so as to address specific problems, namely to address the practical difficulties of obtaining consent from all landowners of highly-fractionated lands. 25 U.S.C. § 324 (authorizing rights-of-way across individually-owned land with less than consent from all landowners, provided specific conditions are met). That does not mean, however, that the 1948 Act created inherently inferior landowner rights as Plaintiffs suggest, Doc. No. 44 at 13, such that the common law of property can never be applied by either the courts or the Agency to address issues not specifically resolved by the statute or related regulations.

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determine whether extrinsic evidence should be considered); *Cherokee Nation v. Muskogee Area Dir.*, 29 IBIA 17, 24 (1995) (using property law to determine when a remainder is subject to complete defeasance, and whether authority to assign remainder interest was properly exercised): *Kearny Street Real Estate Co., L.P. v. Sacramento Area Dir.*, 28 IBIA 4, 15 (1995) (contract law to decide whether cancellation of lease of Indian land constituted forfeiture, and consequence of same); *Delgado v. Acting Anadarko Area Dir.*, 27 IBIA 65, 80 (1994) (stating that "Federal contract law, including contracts involving trust or restricted lands, is governed by the same principles as general contract law."); *Okie Crude Co. et al. v. Muskogee Area Dir.*, 23 IBIA 174, 180 (1993) (defining "bona fide selling price" and "offered price" through general contract law); *Hazel Hawk Visser v. Portland Area Dir.*, 7 IBIA 22, 28 (1978) (examining property law to ascertain the time of sale of property); *Whatcom Co. Park Bd. v. Portland Area Dir. et al.*, 6 IBIA 196, 206 (1977) (citing property law treatise to interpret easement).

The 1948 Act, like other specific and general right-of-way statutes pertaining to Indian lands, was intended to protect Indians from "improvident grants of rights-of-way," *Loring v. U.S.*, 610 F.2d 649, 651 (9th Cir. 1979), and to "fully . . . protect Indian interests." *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 552 (9th Cir. 1983). The 1948 Act made consultation and consent mandatory, conditioning the right-of-way grant on consent from landowners. 25 U.S.C. § 324. It requires that the landowner receive just compensation for the grant, *id*. § 325; does not repeal prior rights-of-way statutes, *id*. § 326; and authorizes the Secretary to promulgate regulations to carry out the broad authority delegated by the 1948 Act, *id*. § 328. *See generally Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1056-58 (9th Cir. 1988); *S. Pac. Transp. Co.*, 700 F.2d at 554; *Coast Indian Cmty. v. United States*, 550 F.2d 639, 649-52 (Ct. Cl. 1977) (discussing role of tribal consent).

If anything, the 1948 Act creates a regime that is even more protective of landowners in certain respects than the common law. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.09[4], at 1064-65 (Neil Jessup Newton ed., 2012) ("Unless there has been compliance with a right-of-way statute, the user of a right-of-way over Indian lands obtains no interest in those lands . . . [No] interest can be acquired in tribal lands by long-continued use, adverse possession, or prescription, nor may states condemn Indian lands to establish state highway easements.") (citing *United States v. S. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976)). Moreover, it is a "federal crime to induce a restricted Indian owner to attempt to attempt to convey any interest except as authorized by law, although the statute has seldom been applied in practice." COHEN, § 15.08[1], at 1046-47 (citing 25 U.S.C. § 202).

Because Congress was silent on the specific issue addressed by the IBIA, that silence demonstrates an intent that common law principles be applied, unless the Agency decided

otherwise. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); *see also* NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 50:1, at 143 (7th ed. 2012) ("All legislation is interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment.").[10] There is simply no valid basis for Plaintiffs' argument that because the 1948 Act provides a limited deviation from the common law requirement that all landowners consent to a right-of-way, that the Agency (or any court) is altogether prohibited from consulting the common law to fill gaps left in, or otherwise interpret provisions of, the 1948 Act and related regulations.

iii. Interior's Subsequent Rulemaking Does Not Alter the Analysis

The fact that Interior subsequently promulgated revised right-of-way regulations that would, if applied to Plaintiffs, have achieved the same result is irrelevant as to the IBIA's authority to apply common law in its 2013 Decision. Interior had sole discretion to determine how it would address the issue of remaindermen consent following the 2013 Decision. For example, rather than ultimately adopting a regulation, Interior could have continued to proceed to apply the common law principle through individual adjudications. *See SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007)

[10] Plaintiffs' suggest the IBIA's reading of the consent requirement will complicate the process for securing rights-of-ways, and also contradicts prior agency precedent. Doc. No. 44 at 14. First, the standard is whether the Agency's interpretation is reasonable, not whether it poses practical issues for Plaintiffs. Second, in the *Perry* decision cited by Plaintiffs, the IBIA properly rejected a reading of the 1948 Act and regulations that would have disallowed consideration of the consent obtained by BIA on behalf of "undetermined heirs, owners whose whereabouts are unknown, owners who are non compos mentis, and owners who are minors" to reach majority consent. *Perry v. Navajo Area Dir.*, 31 IBIA 186, 188 (1997). In *Perry*, unlike this case, there was no question of authority to consent for the full duration of the right-of-way grant.

("agencies have very broad discretion whether to proceed by way of adjudication or rulemaking.") (internal citations omitted).

Or Interior could have, through rulemaking, later rejected the common law principle applied in the IBIA decision. When the common law fills a gap in a statutory scheme, the agency that administers the statute may without limitation supersede the common law. In other words, Interior could have decided that a different rule should apply, in its sole discretion. *See United States v. Chestman*, 947 F.2d 551, 558 (2d Cir. 1991) (common law did not preclude agency from defining a term inconsistent with the common law); *Prussner v. United States*, 896 F.2d 218, 225 (7th Cir. 1990) (determining that while "common law supplementation of the tax code and regulations" can be appropriate, "a power of judicial supplementation should not be used to nullify valid regulations"). And Interior could, alternatively, chosen the course undertaken here. But, again, the mere fact that Interior subsequently promulgated a rule addressing remaindermen consent did not mean that IBIA was powerless to act in the absence of that specific regulation. It simply illustrates the discretion vested in Interior when a statute leaves a gap that can be filled with the common law.

iv. The IBIA Decisions Are Entitled to Deference

Plaintiffs contend that the IBIA's analysis is entitled to no deference because "it has no special expertise in general property law and was acting[,]" in Plaintiffs' view, "under a legal misconception" because the IBIA looked to common law principles to guide its analysis. Doc. No. 44 at 12. Plaintiffs are not only incorrect that the IBIA could not look to common law principles as set forth above, they apply the wrong deferential standard.

Just as the choice whether to consult the common law, promulgate a regulation that adopted a common law principle, or issue a rule rejecting the common law was entirely Interior's

to make, the IBIA's application of common law in its 2013 Decision is entitled to deference. Deference is due because it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead Corp.*, 533 U.S. at 229. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 92-94 (1995) (deference appropriate when an agency interprets and applies a common law term). This Court's task is to determine whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 844. Congress did not, and thus the Court should not impose its own construction of the statute, but instead ask "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. Here, both the IBIA's answer, as well as its consideration of common law in resolving the question, are entitled to deference.

D. Neither the Gift Deeds Creating the Life Estates Nor AIPRA Resolve the Question of Remaindermen Consent in Plaintiffs' Favor

Plaintiffs argue that the IBIA further erred with respect to its consideration of the language of Ms. Tom's and Mr. Morgan's gift deeds. Doc. No. 44 at 14-16. Plaintiffs argue that such deeds are not, in fact, deeds, but instead should be viewed as wills that only devise property to heirs upon death while the grantor—or "testator," in Plaintiffs' view—"maintain[s] full control over th[e] property." *Id.* at 16. This argument, if not advanced for the first time in this suit and thus waived, is a variation of a theme the IBIA considered and properly rejected. Plaintiffs argued before the IBIA that such language impliedly meant that they reserved "the authority to effectively extinguish any value in the named grantees' future interests." *Id.* The IBIA rejected Plaintiffs' interpretation of the deeds, explaining that "all income" from "any . . . source," concerns the "source of the income, not the nature of the encumbrance generally." *Id.*

Plaintiffs failed to convince the IBIA that the "language reserving a right to income from any source is sufficient to reserve the broad authority that" Plaintiffs asserted was present in the deeds. *Id.* Plaintiffs identify no error with the IBIA's analysis, have waived the ability to do so on reply, and thus have failed to demonstrate that the IBIA's 2016 Decision was unreasonable in this regard.

Plaintiffs next argue that AIPRA and related regulations are "directly on point" and that Ms. Tom's and Mr. Morgan's life estates are "life estate[s] without regard to waste" as defined by those legal authorities. *Id.* at 15. AIPRA was enacted in 2004 "to better meet the trust reform goals for land consolidation articulated in [the Indian Land Consolidation Act.]" 73 Fed. Reg. 67,256, 67,257 (Nov. 13, 2008). To that end, AIPRA enacted "a new uniform Federal probate code [to] govern descent and distribution of trust and restricted property." *Id.* at 67,272. Such Federal probate code directed that "life estates without regard to waste" would be created in probate proceedings by operation of law, under certain conditions. 25 U.S.C. § 2206(a)(2). AIPRA defines "life estates without regard to waste" as providing "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." 25 U.S.C. § 2201(10).

Interior's regulations implementing AIPRA, *see* 25 C.F.R. pt. 179, track these statutory provisions, and make clear that the regulatory provisions concerning life estates only refer to those "created by operation of law under AIPRA after June 20, 2006." 73 Fed. Reg. at 67,272. Interior explained that the regulations adopted to implement AIPRA pose "no change with respect to life estates created before June 20, 2006, or life estates created by conveyance documents on or after June 20, 2006." *Id.*

The life estates at issue here were created entirely outside the AIPRA framework, and thus Plaintiffs' contention that AIPRA is "directly on point" is incorrect. Mr. Morgan's life estate was created in 2003, before AIPRA was enacted. AR0413. And while it is true that Ms. Tom's life estate was created in 2007 after AIPRA was enacted, AR0416, it was nevertheless "created by conveyance documents on or after June 20, 2006," 73 Fed. Reg. at 67,272. Accordingly, it cannot be said that AIPRA's provisions concerning the creation of "life estates without regard to waste" control the interpretation of the language contained in either Ms. Tom's or Mr. Morgan's gift deeds. The IBIA correctly rejected Plaintiffs' reading as unsupported by the plain text of the deeds. Plaintiffs identify no error with the IBIA's analysis in either of the IBIA Decisions and thus have failed to meet their burden of demonstrating any arbitrary or capricious decision making.

E. The IBIA Correctly Concluded That A "Qualified" Right-of-Way, if Granted, Should Be Limited to Present Interests

In its 2016 Decision, the IBIA concluded that as an alternative to an "unqualified" renewal of the right-of-way, Plaintiffs were entitled to a "qualified" right-of-way "for 20 years, or the life of Morgan, or of the other life tenant, Mary Tom, whichever is the shortest period." AR0016. Plaintiffs contend that IBIA erred in this finding, asserting that such qualified right-of-way should not be limited at all by Ms. Tom's life because she "and all her living remaindermen *did consent to* (and received payment for) a full twenty-year easement." Doc. No. 44 at 17 (emphasis in original). Plaintiffs argue that the IBIA's holding "makes no sense under any mechanism for 'tallying of consents.'" *Id.* The IBIA's tallying of interests in the Allotment is reasonable, and Plaintiffs' bare assertions fail to demonstrate otherwise.

As the IBIA explained, applicable regulations condition BIA's authority to grant a right-of-way over individually-owned land on the owner(s) "of a *majority of the interests therein* consent[ing] to the grant." AR0026 (emphasis added). The IBIA identified those who held life estates in the Allotment as possessing present interests; those who held remainder interests in the Allotment as possessing future interests; and those who held "full" interests as possessing both present and future interests. AR0027. To calculate consents "of a majority of the interests" in the Allotment, therefore, the IBIA explained that

> the consenting life tenants must be included in the tally of present interests, the consenting remaindermen must be included in the tally of future interests, and those holding full (i.e., present and future) interest in the Allotment must be included in the tallies of both the present and future interests.

Id.

The IBIA's analysis is consistent with the 1948 Act and applicable regulations, as both require securing consent from the owners of a *majority of the interests* in the land, and present interests are distinct from future interests, as Plaintiffs acknowledge. *See* AR0077-78. The IBIA's decision is also rational because unless the deed creating the life estate allows the life tenant to encumber the property beyond their lives (and the gift deeds at issue here do not, as set forth above), those holding future interests (i.e., the remaindermen) would be adversely affected by actions the life tenant takes that could interfere with their future use.

Thus, only if consents are obtained from the owner(s) of a majority of the present interests in the Allotment, and also from the owner(s) of a majority of the future interests in the Allotment, can BIA grant a right-of-way "for an unqualified period of time." AR0027. And where, as here, Plaintiffs only secured consent from the owners of a majority of the *present* interests in the Allotment, they were only entitled to a qualified right-of-way limited to those

present interests. Plaintiffs contend that at a minimum, they were entitled to a qualified right-of-way that would be limited only to Mr. Morgan's life, because "Mary Tom and all her living remaindermen" consented to the right-of-way. Doc. No. 44 at 17. But just as the number of owners who consent is irrelevant to calculation, so too is the fact that all of Ms. Tom's remaindermen consented to the renewal. What is necessary (and thus relevant) is whether the owners of a *majority* of the future interests in the Allotment consented to the renewal to allow *any* future interests in the Allotment to be encumbered by an "unqualified" right-of-way. Ms. Tom's living remaindermen collectively possess 14.16% of the future interests in the Allotment, AR0019, well below the majority required. The consent from all of Ms. Tom's remaindermen does not transform Ms. Tom's present interest into something else. The IBIA correctly held that any "qualified" right-of-way, if granted, would be limited to the lives of those owners of present interests who consented to the right-of-way.

II. The IBIA's Decisions Pose No Retroactivity Concerns

A. As Agency Adjudications, the IBIA Decisions Appropriately Have Retroactive Effect

The IBIA Decisions, like adjudications generally (and typically unlike rulemakings) appropriately had retroactive effect, because Interior was deciding an issue with regard to the parties that were presently before it. *See Chenery*, 332 U.S. at 203 ("[e]very case of first impression has a retroactive effect"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) ("retroactivity is not only permissible but standard" in adjudications); *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921 (D.C. Cir. 2013) ("[I]t is black-letter administrative law that adjudications are inherently retroactive."). Because Plaintiffs cannot complain that the IBIA Decisions were, by their very nature, impermissibly retroactive, since

retroactivity is the norm in adjudications, they are forced to assert that that they detrimentally relied on what they contend were "existing rules and BIA practices" concerning remaindermen consent. Doc. No. 44 at 9. That contention cannot form the basis of their retroactivity argument, however, because "[i]n reaching its order, the [IBIA] did not overrule or disavow any controlling precedent." *Borden, Inc. v. NLRB*, 19 F.3d 502, 510 (10th Cir.1994) (holding that there are no retroactivity concerns when an agency's ruling does not "overrule [ ] any controlling precedent upon which [petitioner] relied to its detriment")." *Farmers Tel. Co. Inc. v. F.C.C.*, 184 F.3d 1241, 1250 (10th Cir. 1999).

B. The IBIA Decisions Appropriately Apply to Plaintiffs

The 2013 Decision was issued following an administrative adjudication in which the IBIA had to resolve an issue of first impression, as Plaintiffs concede. Doc No. 44 at 11. The 2016 Decision was issued following an administrative adjudication to which Plaintiffs were a party. *Id.* at 8. Although not relevant to the Court's inquiry, even if the factors relevant to a retroactivity analysis are applied here, they demonstrate that it is entirely appropriate to apply the IBIA Decisions' holdings to Plaintiffs.

Those factors are:

> (1) "[w]hether the case is one of first impression;" (2) "[w]hether the new rule is an abrupt departure from well-established practice or merely an attempt to fill a void in an unsettled area of law;" (3) "[w]hether and to what extent the party against whom the new rule is applied relied on the former rule;" (4) "[w]hether and to what extent the retroactive order imposes a burden on a party;" and (5) "[w]hether and to what extent there is a statutory interest in applying a new rule despite reliance of a party on an old standard."

Farmers Tel. Co., 184 F.3d at 1251 (quoting *Williams Nat. Gas Co. v. Fed. Energy Regulatory Comm'n*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

If, as Plaintiffs contend, any agency adjudication that resolved a question of first

impression constituted a new, impermissible rule that could not be applied to the case out of retroactivity concerns, no administrative appellate entity could ever resolve cases of first impression. This is why the courts draw a "basic distinction . . . between (1) new applications of law, clarifications and additions, and (2) substitution of new law for old law that was reasonably clear." *Id.* (quoting *Williams Nat. Gas Co.*, 3 F.3d at 1554). "[R]etroactivity in the former case is natural, normal, and necessary, a corollary of an agency's authority to develop policy through case-by-case adjudication." *Id.* (citation and internal quotation marks omitted). *See also Beazer East, Inc. v. United States EPA*, 963 F.2d 603, 610 (3d Cir.1992) ("As Justice Scalia has recently said, 'where legal consequences hinge upon the interpretation of statutory requirements, and where no preexisting interpretive rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication.'" (citation omitted)).

In the 2013 Decision, the question of remaindermen consent in the right-of-way was an issue of first impression for the IBIA. The IBIA's resolution of a case of first impression during the course of an adjudication can certainly be applied to the parties to that adjudication, *Williams Nat. Gas Co.*, 3 F.3d at 1554, and appropriately binds the Agency going forward, *Gray*, 33 IBIA at 27. The IBIA's reference to and reliance upon common law was to fill a gap left by the 1948 Act and related regulations, not to abruptly announce a shift from a previously announced position on the specific issue. *Farmers Tel. Co., Inc.*, 184 F.3d at 1251 ("we believe that this case falls squarely within the precedents authorizing retroactivity for agency rules that do not represent a shift from a clear prior policy"). Thus, the first, second, and fifth retroactivity factors set out in *Farmers Tel. Co., Inc.* fail to demonstrate any error in applying the IBIA Decisions to Plaintiffs. *See, e.g.*, *Qwest Servs. Corp.*, 509 F.3d at 540 ("Clarifying the law and applying that

clarification to past behavior are routine functions of adjudication" and thus do not pose retroactivity concerns).

Plaintiffs similarly fail to satisfy the third retroactivity factor, because as a case of first impression, there was no former rule concerning remaindermen consent specifically set forth that Plaintiffs could have relied on. And as the *Farmers Tel. Co*. panel pointed out, the mere assertion by a plaintiff that it relied is, alone, meaningless. 184 F.3d at 1252. That is because

> for reliance to establish manifest injustice, it must be reasonable—reasonably based on settled law contrary to the rule established in the adjudication. The mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified.

Qwest Servs. Corp., 509 F.3d at 540. To the extent the Plaintiffs detrimentally relied on anything, it was to merely their own "rather convenient assumption" that the IBIA's ruling in their appeal would be favorable. Plaintiffs are expected to know the law, including the common law and the commonplace application of common law by agencies in adjudications, so there could have been no true surprise, much less "manifest injustice," when the IBIA turned to the common law in the 2013 Decision to decide an issue not specifically addressed in the applicable statute and regulations. That Plaintiffs had the opportunity to persuade the IBIA to its position in its appeal, but failed to do so, does not mean that they can now claim detrimental reliance on some unidentified pre-*Adakai* position they contend the Agency held.[11]

[11] To the extent Plaintiffs cite language from the BIA to suggest that prior to the 2013 Decision, Interior's position was that neither the 1948 Act nor applicable regulations required remaindermen consent, Doc. No. 44 at 9, such characterization must be rejected. The IBIA Decisions control the position of the Agency as to any pre-*Adakai* position regarding remaindermen consent, as the IBIA is the entity authorized to issue final decisions for the Agency, including on questions of law. 43 C.F.R. § 4.312; *see also infra* pp. 5-6. And those IBIA Decisions reveal that, until the 2013 Decision, Interior had not confronted nor resolved the

Plaintiffs also fail to satisfy the fourth retroactivity factor, concerning whether a "retroactive order imposes a burden on a party." *Farmers Tel. Co.*, 184 F.3d at 1251. Plaintiffs assert the 2013 Decision imposed burdens on them, because following that decision, Plaintiffs "had to pay additional compensation to seven future interest holders." Doc. No. 44 at 12. But as extensively detailed in the Administrative Record, instead of seeking judicial review of the 2013 Decision when it was issued, Plaintiffs chose to try to obtain the necessary consents. AR0457-63. Plaintiffs, in this effort, refused to consider pursuing additional landowner consents to try to reach majority, insisting instead on working with the eight landowners who originally consented to their right-of-way renewal, as well as Ms. Tom's and Mr. Morgan's remaindermen. AR0419.[12]

When BIA denied their renewal request, Plaintiffs had a full opportunity to present *all* of their arguments to the IBIA concerning the adequacy of the 2013 Decision. In their appeal, Plaintiffs did not advance several of the arguments they now raise in this suit—*e.g.*, Plaintiffs never raised retroactivity concerns with the 2013 Decision; never challenged the IBIA's authority to reach the issue of remaindermen consent; and never alleged that the IBIA could not rely on common law to resolve it. Plaintiffs tried, but failed, to secure the consents required from remaindermen following the 2013 Decision, then failed to persuade the IBIA to reconsider its 2013 Decision during the course of their own appeal. Any burdens Plaintiffs suffered

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issue, and thus the Agency had no pre-*Adakai* position on remaindermen consent upon which Plaintiffs could have relied.

[12] Plaintiffs may still pursue a renewal of their right-of-way from the BIA following the IBIA Decisions, either by seeking a qualified right-of-way as the 2016 Decision held, or by obtaining additional landowner consents.

following the 2013 Decision were of their own making. In sum, Plaintiffs' protests about retroactivity should be rejected.

CONCLUSION

The APA requires Plaintiffs to demonstrate that the IBIA Decisions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Plaintiffs have failed to meet this burden. For the foregoing reasons, the United States respectfully requests that the Court deny all of Plaintiffs' claims for relief in this suit.

Dated: May 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 4, 2018 the foregoing DEFENDANTS' RESPONSE BRIEF was filed electronically through the CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Rebecca M. Ross
/s/ Roberto D. Ortega

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