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' REPLY BRIEF

Introduction

The answer brief ignores how unfairly and arbitrarily the Interior Department, through its IBIA, defeated Western's reliance interests in a right-of-way renewal. Specifically:

- The IBIA overturned the BIA's right-of-way renewal after Western secured consents from a majority of current owners and after Western relied on the BIA's approval by paying all current owners above market compensation.
- The IBIA did so only by creating a new rule requiring remaindermen consent.
- This new IBIA rule adopted through adjudication, unlike the subsequent Interior rule created through rulemaking, was applied retroactively to Western.
- Western had no prior notice or opportunity to argue against the new rule before the IBIA announced it *sua sponte* in an otherwise frivolous appeal by a party who had not raised (and had no standing to raise) remaindermen rights.

The Administrative Procedure Act precludes such arbitrary, capricious, lawless, and fundamentally unfair agency action. This Court should set aside the unlawful IBIA decisions overturning the twenty-year renewal of Western's right-of-way and confirm the BIA's 2010 renewal of that right-of-way.

Reply Argument

I. The IBIA wrongly chose, with no notice, to decide an issue no one had raised.

The answer brief offers no good defense of the IBIA's lawless action raising and deciding remaindermen consent issues with no notice to anyone. The brief cites no remotely comparable case and no justification for the IBIA's clear transgression not only of agency rules but of fundamental fairness.

A. The IBIA egregiously violated its own regulations.

Due process precludes, and regulations do not countenance, unilaterally reversing a right-of-way renewal on grounds no party raised. The IBIA did so by invoking an inapplicable rule, which applies only where there was "manifest injustice or error." 43 C.F.R. § 4.318.

The rule invoked by the IBIA allows reaching unpreserved claims only where an error is "manifest," *id.*, and the IBIA has held that "an error is 'manifest' [only] when it is obvious." *Estate of David L. Moran*, 62 IBIA 180, 186 (2016). This IBIA rule thus functions like federal plain error rules (*e.g.,* Fed. R. Civ. P. 51(d)(2); Fed. R. Crim. P. 52(b)), which allow appellate courts *after notice* to reverse on unpreserved arguments only for "obvious" error creating manifest injustice. *United States v. Olano*, 507 U.S. 725, 733-37 (1993). For rules like these to apply, the error must have been "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009).

Any error here, even assuming it existed, was not obvious and did not meet this standard. The answer brief acknowledges the "statutory and regulatory silence" regarding "an issue of first impression." Doc. 45 at 27, 40 [20, 33]. Indeed, according to the brief, "Interior could have decided that a different rule should apply, in its sole discretion." *Id.* at 34 [27].

There can be no clear or obvious error on "an issue of first impression." The Tenth Circuit has held that "a matter of first impression will generally preclude a finding of plain error." *United States v. Turrietta*, 696 F.3d 972, 981 (10th Cir. 2012) (citing cases); *see also United States v. Munoz*, 812 F.3d 809, 814 (10th Cir. 2016) ("In light of the lack of precedent invalidating this condition, we conclude that the district court did not commit an obvious error (if any)."). That is especially true here, where the government concedes the outcome was compelled neither by statute nor regulation and supposedly rested within the agency's "sole discretion."

The IBIA's *sua sponte* decision created rather than cured injustice. Current owner Tom Morgan, who had gift deeded his remainder interests in lieu of using a will, had consented to the renewal (for which his pro rata compensation over $2800 exceeded the entire easement's fair market value) and no one had claimed he lacked power to consent. Indeed, because the gift deeds were not in the 2013 record, *see* 56 IBIA 106 n.6, the IBIA had no basis to decide his retained powers. *See* 43 C.F.R. § 4.24(a) (IBIA's "Basis of Decision" limited to evidence in "Record").

While reaching out without notice to correct a purported error that was not raised by anyone and that was not obvious, the IBIA ignored the corresponding injustice to Western's reliance interests after Western fully compensated all current owners at above market rates to obtain the renewal. Creating this new rule out of the blue suddenly empowered a small number of remaindermen who had acquired their future interests by gifts and never before objected that their benefactor lack power to consent to the renewal. Now, empowered by the IBIA, some of these gift deed recipients with no present rights in the Allotment sought to cash in on an extortionate $8.6 million demand for an easement with an appraised fair market value, approved by the Office of Special Trustee, of just $2,650. AR 473-74.

B. The answer brief does not justify the IBIA's violation of its own regulations.

The answer brief cites no IBIA case applying the "manifest injustice or error" rule (43 C.F.R. § 4.318) in circumstances remotely similar to these. It begins by citing *Cloud v. Alaska Reg'l Dir.*, 50 IBIA 262, 269 (2009), for the unremarkable point that the IBIA may correct errors of law. Doc. 45 at 28 [21]. But *Cloud* did not make that unremarkable point for *unpreserved* claims; there, it simply paraphrased the manifest error rule: "*See also* [43 C.F.R.] § 4.318 (Board's scope of review is limited to the issues that were before BIA, although the Board has the inherent authority to redress manifest injustice or error)." 50 IBIA 269.

The answer brief is reduced to citing cases correcting obvious "computational errors," or a "mathematical miscalculation," or "omission of an heir." Doc. 45 at 28-29 [21-22] (citing *Hopi Tribe v. W. Reg'l Dir.*, 62 IBIA 315, 328 (2016); *Ward v. Billings Area Dir.*, 34 IBIA 81, 90 (1999); *Estate of Paul Widow*, 17 IBIA 107, 114 (1989)). Those cases, where the existence of an obvious error cannot seriously be disputed, are not analogous to this unprecedented case, which unilaterally created and applied a wide-ranging new rule that upset reliance interests.

Lacking any supporting case, the answer brief attempts to offer two justifications for the IBIA's *sua sponte* action: "First, the appellant [Adakai] 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.… Second, ... 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." Doc. 45 at 27 [20]. Neither attempted justification withstands scrutiny.

The first justification—that appellant Adakai had raised a question requiring the BIA to rely on life tenant Tom Morgan's consent—ignores that no one questioned Tom Morgan's power to consent. It also ignores that the IBIA itself has ruled that appellant Adakai "lacks standing to assert the interests of other owners." 56 IBIA 110. The first justification fails.

The second justification, a circular notion that the IBIA had to effectuate the majority consent requirement (Doc. 45 at 27 [20]), would eviscerate the rule limiting the IBIA to deciding preserved issues after notice and opportunity to be heard. As this Court previously noted, the BIA had granted renewal "based on consent from the owners of what BIA calculated to be 60.26% of the individual Indians who held interests in Allotment No. 2073." Doc. 32 at 2. The IBIA overturned that renewal only by changing the consent rules, holding for the first time that consent from those holding the majority of current interests was not sufficient. That rule change could not properly occur on an unpreserved issue with no notice or opportunity to be heard—especially given the answer brief's ultimate concession that the Interior Department was not legally compelled to require remaindermen consent. *See* Doc. 45 at 34 [27] ("Interior could have decided that a different rule should apply, in its sole discretion.").

II. The IBIA impermissibly applied its new rule retroactively.

A. This case flunks all five factors of the Tenth Circuit's retroactivity test.

The answer brief never comes to grips with the Tenth Circuit's anti-retroactivity case law, including two leading opinions by current Justice Gorsuch. Only in passing, for a different point, does it cite *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015). And the answer brief entirely ignores *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), as well as *Stewart Capital Corp. v. Andrus*, 701 F.2d 846 (10th Cir. 1983).

This case falls squarely under the Tenth Circuit's case law invalidating agency decisions that unforeseeably create and then retroactively apply new rules to overturn reliance interests. Here, Western relied on existing rules and BIA practices to renew a right-of-way necessary to continue a sixty-year old pipeline. But the IBIA blindsided not only Western but also the BIA by changing the rules after the fact.

Remarkably, the answer brief contends that Western somehow should have assumed the IBIA would have invalidated the right-of-way renewal by reaching out to decide a remaindermen consent issue that the BIA had not foreseen and that no party raised or even had standing to raise. *See* Doc. 45 at 42 [35] ("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.") (quoting *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007)). But in *Qwest*, the adjudicatory ruling the D.C. Circuit made retroactive had "been long the subject of active debate." 509 F.3d at 540. Here, in contrast, no one had even thought to "debate" whether remaindermen consent was required for a right-of-way renewal.

Here, all relevant factors point strongly against retroactivity. *See* Doc. 44 at 10-12. The answer brief's discussion of those factors, Doc. 45 at 40-44 [33-37], is unpersuasive. Its discussion ignores then-Judge Gorsuch's enforcement of "due process and equal protection principles," preventing agencies from 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 answer brief concedes the first factor, by admitting that the issue the IBIA reached out to decide was one of "first impression," but contends this cannot be dispositive because otherwise "no administrative appellate entity could ever resolve cases of first impression." Doc. 45 at 40-41 [33-34]. While some cases of first impression may have been the subject of "active debate," *see id.* at 42 [35] (quoting *Qwest*, 509 F.3d at 540), such that the parties would have been on full notice of the potentially retroactive application, this is not one of those cases.

The answer brief only weakly challenges the second factor of whether the new requirement was "an abrupt departure from well established practice." *Stewart Capital*, 701 F.3d at 848. Unable to deny an "abrupt departure," it tries to change the focus from whether there was a shift in "practice" to whether there was a shift in "policy." *See* Doc. 45 at 41 [34]. But *Stewart Capital*, which the answer brief ignores, precludes that distinction. The Tenth Circuit there struck down retroactive application of a decision by the Interior Board of Land Appeals (IBLA) (a sister body of the IBIA) defeating "good faith reliance by [parties] on the prior [agency] *practice* of accepting [documents] filed with stamped facsimile signatures and doing so without requiring that they be accompanied by separate statements of the agent and offeror." 701 F.3d at 847 (emphasis added).

For similar reasons, the third factor likewise supports Western, which justifiably "relied" on the BIA's practice by obtaining consents from and paying full compensation to current owners rather than any remaindermen. All the answer brief offers on this third point is that "there was no *former rule* concerning remaindermen consent *specifically set forth*." Doc. 45 at 42 [35] (emphases added). Again, however, that distinction ignores the *Stewart Capital* teaching that there can be "good faith reliance" where, as here, parties acted in accordance with settled agency "practice" that they had no reason to foresee might later be questioned.

The fourth factor also cuts strongly against retroactivity, as the new IBIA rule imposed a high "degree of burden" on Western. 701 F.3d at 848. The answer brief ignores the indisputable burdens Western incurred to obtain BIA's approval in the first place; by the time the IBIA entered the picture in 2013, Western already had paid and BIA already had distributed full above-market consideration to all current owners—compensation never returned to Western, which now has paid for but no longer has its twenty-year easement. Having ignored that burden, the answer brief then minimizes the burdens Western incurred in trying to secure the new, additional consents under the new IBIA rule, writing: "Any burdens Plaintiffs suffered following the 2013 Decision were of their own making." Doc. 45 at 43-44 [36-37]. That argument, which improperly faults Western for trying to comply with the new IBIA rule (under protest), contradicts the BIA's praising of Western's extensive "good faith efforts" to obtain the further consents required by the new IBIA rule. AR 398. Indeed, it contradicts the answer brief's earlier acknowledgement that Western "worked diligently to try to secure the necessary consents from landowners on remand." Doc. 45 at 16 [9]. By any fair measure, the new IBIA rule greatly burdened Western.

The answer brief has little to say on the fifth and final factor regarding any "statutory interest in applying a new rule despite reliance of a party on the old standard." 701 F.3d at 848. Given the answer brief's concessions that the new rule is not even compelled by statute, *see* Doc. 45 at 27, 34, 40 [20, 27, 33], there is no "statutory interest" favoring retroactivity. As a matter of agency policy, Interior now finally has settled on new rules governing remaindermen consent regarding rights-of-way, but those rules apply only prospectively from April 2016 forward. *See* Doc. 32 at 3: 25 C.F.R. § 169.7(b) & (c)(2). The only "statutory interest" here is in not applying new rules retroactively to Western and Western alone.

B. Western did not "waive" its right to raise the issue of retroactivity.

Unable to satisfy the Tenth Circuit's case law, the answer brief resorts to arguing that Western "waived" any challenge on that ground. Doc. 45 at 26 [19]. It purports to rely on the "general rule," based on "[s]imple fairness," that parties must "preserve an issue" for judicial review by first raising it at the administrative level. *Id.* (citing and quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006); *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir.1985)).

Here, where Western exhausted all its administrative remedies, and no statute or rule supports a waiver argument, the government necessarily must rely on "a judicially imposed issue-exhaustion requirement" created by "analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000). This prudential rule, which is subject to "exception," seeks "to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

No judicially-created waiver rule can apply here, as Western had no opportunity to be heard on the new rule before the IBIA announced it *sua sponte* without notice. Finding waiver under these circumstances would defeat, not promote, "the ends of justice" and "simple fairness."

1. Western had no notice of, or opportunity to challenge, the new rule before the IBIA announced it in 2013.

The issue-waiver doctrine requires that parties had prior notice and opportunity to raise an issue at the administrative level before losing there. The D.C. Circuit thus has referred to the "well-established doctrine of issue waiver, which permits courts to decline to hear arguments not raised before the agency *where the party had notice of the issue*." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (emphasis added).

There thus is no waiver where it would be "inequitable to require [a party] to have made an argument" on an issue on which it had no prior notice. *See Forest Guardians v. U.S. Forest Service*, 641 F.3d 423, 433-34 (10th Cir. 2011) (en banc). It is settled in judicial proceedings, from which the issue-exhaustion doctrine emanates, *Sims*, 530 U.S. at 108-09, that there can be no waiver where the challenged decision was issued before a party had an opportunity to object. Federal rules expressly provide, "Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made." Fed. R. Civ. P. 46; *see also* Fed. R. Crim. P. 51 ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). There thus can be "neither waiver nor forfeiture" where a party had "no opportunity to object" before a ruling on an issue raised "*sua sponte*." *Marlin v. Moody Nat. Bank, N.A.*, 533 F.3d 374, 379-80 (5th Cir. 2008).

2. Western was not required to seek reconsideration to preserve its challenges.

Because there was no prior notice or opportunity to challenge the new rule announced in 2013, the answer brief apparently implies that Western thereafter was required to ask the IBIA to reconsider the rule. But the regulations and law do not require this.

On this point the IBIA's own regulations are clear: "The filing of a petition for reconsideration is not required to exhaust administrative remedies." 43 C.F.R. § 4.314(c). This accords with the APA, 5 U.S.C. § 704 ("Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined … any form of reconsideration…."). *See Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (APA "relieve[s] parties from the requirement of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute)").

Likewise, in cases where a judicial ruling is issued *sua sponte*, parties need not move for reconsideration to preserve issues challenging the ruling. *See United States v. Lindsey*, 527 F. App'x 700, 703 (10th Cir. 2013); *United States v. Burrell*, 622 F.3d 961, 966 (8th Cir. 2010). As the Eighth Circuit explained in *Burrell*, "if a party does not have an opportunity to object when the court ruling is made or sought, … the absence of an objection does not later prejudice the party." 622 F.3d at 966. The Tenth Circuit approvingly cited *Burrell* for the proposition that a motion for reconsideration is not required to preserve an argument that a party had no chance to raise prior to the decision. *See Lindsey*, 527 F. App'x at 703.

While not required to move for reconsideration to preserve its APA challenges, Western did more than required by first seeking (under protest) to satisfy the new IBIA rule. As the BIA recognized, Western made extensive "good faith efforts to satisfy the Region's directives regarding remaindermen consent." AR 398. The answer brief thus must concede that Western "worked diligently to try to secure the necessary consents from landowners on remand. Doc. 45 at 16 [9].

These good faith efforts to comply with a new rule, with which Western disagreed, cannot constitute waiver. Western always made clear to the BIA that it disagreed with the IBIA's 2013 decision. *See* AR 424-29 (arguing to the BIA on remand from the 2013 IBIA decision regarding why the IBIA decision was legally wrong and manifestly unjust and therefore not binding as "law of the case"). BIA ultimately took the position, however, that the law of the case doctrine required it to follow that decision. AR 124-25. Similarly, in the appeal leading to the IBIA's 2016 decision, Western made clear that it disagreed with the 2013 decision. *See* AR 389-90 (arguing that 2013 decision was issued "without statutory or other authority" and was "unworkable and unjust"). Good faith efforts to comply with the rule did not waive any challenge to the rule.

3. The waiver argument fails for additional reasons.

For the reasons above, there is no basis for holding that Western waived anything, much less that imposing a waiver bar is required as a matter of "simple fairness" to the government. And there are two other problems with this misguided waiver argument.

a. The government has waived, or forfeited, the waiver argument.

First, the government's "waiver" argument based on purported non-exhaustion raises an affirmative defense that, to be preserved, must be pleaded in an answer. Fed. R. Civ. P. 8(c)(1) (listing "waiver" as affirmative defense); *see Jones v. Bock*, 549 U.S. 199, 212 (2007) (recognizing "'failure to exhaust' as an 'affirmative defense'") (internal punctuation omitted). Here, however, even though the complaint clearly raised a retroactivity challenge, *see* Doc. 1 at 5-7 ¶¶ 19, 22-23, 25 & Prayer A, the answer nowhere raised an affirmative defense of non-exhaustion or waiver; to the contrary, the government admitted that both the 2013 and 2016 IBIA decisions were subject to judicial review. *See* Doc. 25 at 2, 7 ¶¶ 2, 24. It thereby waived, or at least forfeited any such defense. An "affirmative defense, once forfeited, is excluded from the case…." *Wood v. Milyard*, 566 U.S. 463, 470 (2012) (internal punctuation omitted).

b. Retroactivity is a legal issue on which the agency gets no deference.

Second, the government's waiver argument is especially weak because a "retroactivity" challenge "raises a pure question of law" that courts "assess de novo." *De Niz Robles*, 803 F.3d at 1168. The Tenth Circuit is least likely to accept an agency's argument that an issue was waived where the issue is one within "the specialization of the courts, not the agencies." *See Sinclair Wyoming Refining Co. v. EPA*, 887 F.3d 986, 996 n.6 (10th Cir. 2017) (citing *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369, 371 (10th Cir. 1980)).

C. The IBIA has no general "rulemaking" authority.

The answer brief advances a staggeringly broad conception of IBIA authority at odds with even the IBIA's prior recognition of the limits of its power. According to the answer brief, "The IBIA is fully vested with rulemaking authority…." Doc. 45 at 12 [5] (citing *Gray v. Acting Aberdeen Area Dir.*, 33 IBIA 26 (1998)). That incorrect assertion finds no support in the cited IBIA decision, which simply said that an IBIA "ruling" (like a lower court ruling) "is the law unless and until that ruling is overturned by a superior court." *Gray*, 33 IBIA at 26.

Contrary to the answer brief, the IBIA itself previously has recognized its lack of rulemaking authority on policy issues. The IBIA has explained that it plays a "limited role" more akin to a court than an agency rulemaking body. *Pres. of Los Olivos v. Pac. Reg'l Dir., BIA*, 58 IBIA 278, 300-301 (2014). The IBIA described its "adjudicatory" role as follows:

> The role of the Board is different from the broader policy and programmatic role of "administrative agencies" …. Like courts, the Board is confined to the resolution of particular disputes in an adversary setting, is limited to an adjudicatory format, and must wait for an appellant to file an appeal. The Board does not have resources (nor authority) for establishing broad, prospective policies (except to the limited extent its procedural rules create policy through notice-and-comment rulemaking)…. *The Board only has authority to consider and decide, in a formal adversarial proceeding, specific appeals initiated by appellants challenging specific BIA action (or inaction) that they allege adversely affected them.*

Id. (internal punctuation omitted and emphasis added).

Here, the boundaries between adjudication and rulemaking were blurred beyond recognition—and Western got the worst of both worlds. Because the proceeding took the form of an adjudication, the ruling applied retroactively. But Western received none of the benefits of true adjudication: the new retroactive rule was announced without notice in a proceeding where no party even had standing to raise it.

III. The answer brief highlights other legal problems with the IBIA decision.

A. The IBIA borrowed the common law of property contrary to statutory purposes.

The answer brief, conceding that the statute and pre-2015 regulations did not address remaindermen consent, contends the IBIA could "fill the gap" with general property law. Doc. 45 at 27, 34 [20, 27]. Wrongly accusing Western of arguing that "the common law of property can never be applied by" agencies, the answer brief maintains that agencies can apply the common law "except when a statutory purpose to the contrary is evident." *Id.* at 29-31 [22-24] (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

The problem with the IBIA's reliance on property common law here is the congressional "purpose to the contrary" made "evident" by the 1948 General Right-of-Way Act. This case accordingly is governed by Tenth Circuit decisions "rejecting 'strict adherence to the common law'" under federal statutes "where doing so would be inconsistent with the statute's clear language and purpose." *United States v. Burkholder*, 816 F.3d 607, 619 (10th Cir. 2016) (citing and quoting *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 997 (10th Cir.1996)). That principle led the Tenth Circuit in *Burkholder* to hold that a federal statute rejected a common law tort standard of proximate cause. *See id.* ("Where, as here, Congress's intent to eschew a proximate-cause requirement is pellucid, our reasoned judgment indicates that Congress intended to abrogate the common-law understanding of causation.") (citing *Texas*, 507 U.S. at 534). As the Tenth Circuit wrote in another case, "Particularly where Congress has supplied its own statutory definition of a term, we cannot presume that Congress meant simply to codify the common-law meaning." *United States v. Hunt*, 456 F.3d 1255, 1264 (10th Cir. 2006).

This is a clear case for rejecting common law concepts because, as the answer brief concedes, "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." Doc. 45 at 31 [24] (citing 25 U.S.C. § 324). The IBIA unduly complicated the consent process—contrary to the 1948 General Right-of-Way Act's goals of "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).[1]

The IBIA also wrongly limited the retained interests of "gift deed" donors, disregarding the concept of a "life estate without regard to waste," as provided for in the American Indian Probate Reform Act (AIPRA), under which life estate holders are "entitled to the receipt of all income … from such land to the exclusion of the remaindermen." *See* 25 U.S.C. § 2201(10). The reservation language in both gift deeds closely tracked this AIPRA definition, as the current owners *retained for themselves* a life estate in "*all income including surface, subsurface leases, and any other sources*." *See* AR 1452, 1455 (emphasis added). The answer brief's hyper-technical response, that the "life estates at issue here were created entirely outside the AIPRA framework," Doc. 45 at 37 [30], misses the point. While AIPRA life estates without regard to waste are created by operation of Indian probate law, *see id.* at 36 [29], that law is instructive in determining the intent of those who create their own life estates voluntarily through gift deeds.

[1] 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). While the answer brief tries to distinguish *Perry*, *see* Doc. 45 at 33 n.10 [24 n.10], the key commonality was that "nothing on the face of either the statute or the regulation … require[d]" a new IBIA rule. 31 IBIA at 188-89.

B. The answer brief fails to recognize the administrative problems the IBIA created.

Finally, the answer brief fails to address the administrative problems created by the IBIA decision. Indeed, in some respects, the answer brief exacerbates those problems.

The answer brief writes that Western still has the option of "seeking a qualified right-of-way" from the BIA, Doc. 45 at 43 n.12 [36 n.12], thus suggesting—incorrectly—that the BIA now must decide anew whether to grant a qualified right-of-way. In fact, having ruled "the initial Grant of Easement was valid and enforceable for the duration of the life tenancies," the IBIA already ordered that it would "reinstate the Grant of Easement to the extent consistent with the authority of the life tenants to consent." 63 IBIA 47, 52. Western therefore currently holds a qualified right-of-way; the only remaining issue is whether Western is legally entitled to the unqualified right-of-way originally granted by the BIA before it was limited by the IBIA.

The answer brief also ignores the confusion generated by an adjudicatory ruling requiring remaindermen consent for a twenty-year renewal in which future interest holders may continually change. The current regulations at least attempt to fix the moving target by requiring consent of the life tenant and majority of the remainder interest holders known at the time of the application. 25 C.F.R. § 169.109. The IBIA decision, which required additional consents after full (above-market) compensation was paid and distributed to all current owners, is at odds with the current regulations. Also, the current regulations address how compensation is to be distributed among life tenants and their remaindermen, *see* 25 C.F.R. §§ 169.121, 169.122, but the IBIA and BIA offered no guidance on this critical topic—and any such guidance here would require double compensation given that Western already had paid and BIA already had distributed full payment for a twenty-year renewal.

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 2010 renewal of that right-of-way.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 1st day of June 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