

# Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study

---

*Report to Congress*

May 2007



U.S. Department of Energy



U.S. Department of the Interior



# REPORT TO CONGRESS

## ENERGY POLICY ACT OF 2005, SECTION 1813

### INDIAN LAND RIGHTS-OF-WAY STUDY

U.S. Department of Energy

U.S. Department of the Interior

May 2007



# Contents

Notation.....	v
Executive Summary .....	vii
1. Introduction .....	1
1.1. Statutory Language of Section 1813.....	1
1.2. Public and Tribal Consultation Meetings and Comments .....	2
1.3. Scope of the Section 1813 Report.....	3
2. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy Rights-of-Way on Tribal Land .....	7
2.1. Public and Tribal Comments .....	7
2.2. National Energy Transportation Policies Generally Relevant to Energy Matters on Tribal Land.....	9
2.2.1. The National Energy Policy.....	9
2.2.2. Principles of Eminent Domain.....	10
2.2.3. Emergency Authorities .....	11
2.2.4. Energy Policy Act of 2005.....	11
2.3. National Energy Transportation Policies Specifically for Energy Rights-of-Way on Tribal Land.....	12
2.3.1. Energy Policy Act of 2005, Section 503, Indian Energy .....	12
2.3.2. Indian Right-of-Way Act of 1948, Implementing Regulations, and Historical Statutes.....	13
2.4. Departmental Findings.....	13
3. Statutory and Regulatory Framework for Granting, Expanding, or Renewing Energy Rights-of-Way on Tribal Land and Associated Tribal Sovereignty and Self-determination Interests .....	15
3.1. Public and Tribal Comments .....	15
3.2. Laws, Regulations, and Federal Policies with Implications for Tribal Sovereignty.....	16
3.2.1. Statutory Background .....	16
3.2.2. Regulatory Background .....	18
3.2.3. Federal Policy of Tribal Self-Determination .....	18
3.2.4. Policies Promoting Consultation and Coordination with Tribal Governments ....	18
3.3. Departmental Analysis.....	19
3.4. Departmental Finding .....	21
4. Analyses of Historical Compensation Paid for Energy Rights-of-Way on Tribal Land.....	23
4.1. Background.....	23
4.2. Case Study and Survey Processes.....	23
4.3. Case Study Results.....	25
4.4. Survey Results .....	26
4.5. Departmental Analysis.....	26
4.6. Departmental Findings.....	27
5. Standards and Procedures for Determining Compensation for Energy Rights-of-Way on Tribal Land.....	29
5.1. Public and Tribal Comments .....	29
5.2. Departmental Analysis.....	32
5.3. Departmental Findings.....	36

5.3.1.	Develop Comprehensive Rights-of-Way Inventories for Tribal Lands.....	36
5.3.2.	Develop Model or Standard Business Practices for Energy Rights-of-Way Transactions .....	37
5.3.3.	Broaden the Scope of Energy Rights-of-Way Negotiations.....	38
6.	Issues Raised during the Study.....	39
6.1.	Increasing Costs of Energy Rights-of-Way and Costs to Consumers .....	39
6.1.1.	Public and Tribal Comments .....	39
6.1.2.	Departmental Analysis.....	41
6.1.3.	Departmental Findings.....	42
6.2.	Decreasing Energy Rights-of-Way Term of Years and Increasing Negotiation Periods.....	42
6.2.1.	Public and Tribal Comments .....	42
6.2.2.	Departmental Analysis.....	43
6.2.3.	Departmental Findings.....	43
6.3.	Uncertainty in Energy Rights-of-Way Negotiations.....	43
6.3.1.	Public and Tribal Comments .....	43
6.3.2.	Departmental Analysis.....	44
6.3.3.	Departmental Findings.....	46
6.4.	Risk to Investments in Infrastructure.....	46
6.4.1.	Public and Tribal Comments .....	46
6.4.2.	Departmental Analysis.....	47
6.4.3.	Departmental Findings.....	47
6.5.	Differences among Grants, Expansions, and Renewals of Rights-of-Way .....	47
6.5.1.	Public Comments .....	47
6.5.2.	Departmental Analysis.....	48
6.5.3.	Departmental Findings.....	48
7.	Congressional Approaches to Address the Issue.....	51
7.1.	No Action.....	51
7.2.	Congress Would Establish a Legislative Mandate for Tribal Consent.....	51
7.3.	Congress Could Choose a Valuation Methodology or Authorize the U.S. Government to Determine <i>Fair and Appropriate</i> Compensation.....	51
7.4.	Congress Could Require Binding Valuation.....	52
7.5.	Congress Could Authorize Condemnation of Tribal Lands for Public Necessity on a Case-by-Case Basis.....	52
8.	Recommendation of the Departments .....	53
8.1.	Departmental Observations.....	53
8.2.	Recommendation: Status Quo with Congressional Case-by-Case Intervention.....	54
9.	Summaries of Case Studies, Surveys, and Other Information Collected.....	55
9.1.	Ute Indian Tribe of the Uintah and Ouray Reservation.....	55
9.2.	Southern Ute Indian Tribe .....	57
9.3.	Morongo Indian Reservation .....	60
9.4.	Navajo Nation .....	61
9.5.	Survey Information .....	65
9.5.1.	Edison Electric Institute.....	65
9.5.2.	Interstate Natural Gas Association of America .....	69

9.6. Other Case Study Reports Submitted by the Participants.....	71
9.6.1. Bonneville Power Administration.....	71
9.6.2. Hopi Tribe.....	72
9.6.3. Pueblo of Santa Ana.....	72
9.6.4. San Xavier District of the Tohono O’Odham Nation .....	73
9.6.5. Shoshone-Bannock Tribes of the Fort Hall Reservation .....	73
9.6.6. Ute Indian Tribe of the Uintah and Ouray Reservation.....	73
9.6.7. Rosebud Sioux Tribe.....	74
Endnotes.....	75
Appendix A.....	83
Appendix B.....	85

THIS PAGE INTENTIONALLY LEFT BLANK

## Notation

The following is a list of the acronyms, abbreviations, and units of measure used in this document.

### Acronyms and Abbreviations

APS	Arizona Public Service
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOR	Bureau of Reclamation
BPA	Bonneville Power Association
CEPC	California Electric Power Company
CFR	<i>Code of Federal Regulations</i>
Cong.	Congress, Congressional
CPI	consumer price index
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
EI	Edison Electric Institute
EIA	Energy Information Administration
EPAct	Energy Policy Act of 2005
EPNG	El Paso Natural Gas Company
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FPC	Federal Power Commission
FR	<i>Federal Register</i>
GRIC	Gila River Indian Community
HRA	Historical Research Associates
INGAA	Interstate Natural Gas Association of America
IRA	Indian Reorganization Act of 1934
NEP	National Energy Policy
NEPA	National Environmental Policy Act
NPS	National Park Service
MOU	Memorandum of Understanding
NOG	Navajo Nation Oil and Gas Company

*Notation (Cont.)*

O&M	operations and maintenance
OIWA	Oklahoma Indian Welfare Act
P.L.	Public Law
ROW	right-of-way
SCE	Southern California Edison
SEC	Securities and Exchange Commission
S. Rep	Senate Report
Stat	<i>U.S. Statutes at Large</i>
TERA	Tribal Energy Resource Agreement
U.S.C.	<i>United States Code</i>
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
USPAP	Uniform Standards of Professional Appraisal Practices
ZR	zone rent

**Units of Measure**

kV	kilovolt(s)
mcf	thousand cubic feet
rod	16-1/2 feet

## Executive Summary

The U.S. Department of the Interior (DOI) and U.S. Department of Energy (DOE) (Departments) are providing this report to Congress pursuant to Section 1813 of Public Law (P.L.) 109-58, the Energy Policy Act of 2005 (EPAAct).

Section 1813(a)(1) of the EPAAct requires the Departments to jointly conduct a study of issues associated with grants, expansions, and renewals of energy rights-of-way (ROWs) on tribal lands. Section 1813 requires the Departments, for the purposes of this report, to use the definition of tribal lands included in Title V, Section 503, of the EPAAct. This definition, which is mandated by Congress, is as follows:

tribal land—means any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States (P.L. 1209-58, 119 Stat 765).

Any analyses within this report are limited to tribal lands as defined by Congress.

Section 1813(a)(2) requires the Departments to consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers in the course of the study, which the Departments did. The Departments held two nationwide public meetings in March and April 2006 to solicit comments from stakeholders on the scope of the study. In addition, the Departments communicated with tribes through letters sent directly to tribal leaders and through contact with the regional offices of the Bureau of Indian Affairs (BIA).

The Departments posted the transcripts of both meetings and all comments received on a Web site for public review. The Departments then released a draft report in August 2006. They requested written comments on it and also accepted verbal comments at one nationwide and several regional public meetings held between August 24 and 30, 2006. In addition, the Departments held a series of government-to-government consultation meetings at a tribe's request during this period. The Departments issued a revised draft report in December 2006 and requested comments by February 5, 2007.

Section 1813(b) requires the Departments to submit a report to Congress on the findings of the study that includes but is not limited to the following:

1. An analysis of historic rates of compensation paid for energy ROWs on tribal land;
2. Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land;
3. An assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROWs on tribal land; and

4. An analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy ROWs on tribal land.

Potentially, Section 1813 encompasses hundreds of tribes and many different types of energy ROWs on tribal lands over the entire course of the Federal relationship with Indian tribes. To focus on the core issues in the time available to conduct the study, the Departments clarified and narrowed the terms of the study. In doing this, the Departments relied heavily on the body of comments from Indian tribes, energy companies, associations, State and local governments, and interest groups.

The Departments' intent was to address the core issues raised by Congress, and accordingly they narrowed the scope to ROWs for electric transmission lines and to ROWs for natural gas and oil pipelines associated with interstate transit and local distribution. The Departments selected these energy ROWs to study because of the number of interested parties that discussed these types of ROWs, the availability of information on them, and the nature of their role in delivering energy resources to consumers.

The following common themes surfaced in the course of the public discussion about the study:

- Tribal sovereignty is manifested in the statutory and regulatory requirements of tribal consent in energy ROW matters.
- Tribal self-determination policies are important in advancing oversight of energy ROWs and expanding energy production.
- Congress exercises plenary authority over affairs regarding Indian issues consistent with treaty and trust responsibilities.
- Uncertainty and lack of transparency in the valuation process are of concern.
- Costs of energy ROW renewals are rising, in conjunction with other costs associated with energy production and delivery.
- With some exceptions, trends toward shorter term lengths (in years) for energy ROWs and longer negotiation periods are appearing.

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others. A tribe's authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty—the right to govern its people, resources, and lands.

The present right of tribes to govern their members and territories flows from a historical and preexisting independence and right to self-government that has survived, albeit in diminished form, through centuries of contact with other cultures and civilizations. Most treaties include

clauses intended to preserve this right of self-governance, at least with regard to tribes' internal affairs. The implication of any reduction in a tribe's authority to make that determination is a reduction in the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination. Such a reduction in a tribe's authority is within the broad plenary power of Congress over affairs regarding Indian issues. However, in recognition of tribal sovereignty and the United States' trust responsibility under existing treaties with Indian tribes, legislation granting such authority has been clear in expressing the intent of Congress to do so.

The Departments find that the negotiation processes for establishing or renewing ROWs on tribal land could benefit from mutually agreed-upon practices, procedures, and actions that would improve the understanding and collaboration among the parties. These include the following:

- Develop comprehensive ROW inventories for tribal lands.
- Develop model or standard business practices for energy ROW transactions.
- Broaden the scope of energy ROW negotiations.

In addition, the Departments identified a number of approaches for Congress to consider in developing appropriate standards and procedures for determining *fair and appropriate* compensation for energy ROWs on tribal lands. These are as follows:

- Elect to make no changes (i.e., allow ROW negotiations to continue under current laws, regulations, practices, and procedures).
- Enact a legislative clarification of tribal consent.
- Authorize the Federal Government to determine just compensation by using a variety of methods for calculating just compensation (appropriately adjusted to reflect unique tribal concerns).
- Require binding valuation for a particular impasse.
- Authorize *case-by-case* condemnation of tribal lands for public necessity.

After careful consideration of the information presented and the alternative approaches identified, the Departments offer the following recommendations for granting, expanding, or renewing ROWs on tribal lands:

- The valuation of energy ROWs on tribal lands should continue to be based on terms negotiated between the parties.
- If a failure in the negotiations over the grant, expansion, or renewal of an energy ROW has a significant regional or national effect on the supply, price, or reliability of energy resources, the Departments recommend that Congress

consider resolving such a situation through specific legislation rather than making broader changes that would affect tribal sovereignty or self-determination generally.

# 1. Introduction

The U.S. Department of the Interior (DOI) and U.S. Department of Energy (DOE) (Departments) are providing this report to Congress pursuant to Section 1813 of Public Law (P.L.) 109-58, the Energy Policy Act of 2005 (EPAAct). Section 1813 requires the study of issues related to the grant, expansion, and renewal of energy rights-of-way (ROWs) on tribal lands. In this Introduction, the Departments begin with the statutory text of Section 1813, a description of the public and tribal consultations, and a discussion of efforts to set study parameters that would best comply with the Congressional mandate in Section 1813.

## 1.1. Statutory Language of Section 1813

Section 1813(a)(1) of EPAAct requires the Departments to jointly conduct a study of issues associated with energy ROWs on tribal lands. Section 1813 requires the Departments, for the purposes of this report, to use the definition of tribal lands included in Title V (Indian Energy), Section 503 of the EPAAct, which amends Section 2601 of the Energy Policy Act of 1992. This definition mandated by Congress is as follows: “tribal land— means any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States.”

Section 1813(a)(2) requires the Departments to consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers in the course of the study.

Section 1813(b) requires the Departments to submit a report to Congress on the findings of the study, including but not limited to the following:

1. An analysis of historic rates of compensation paid for energy ROWs on tribal land;
2. Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land;
3. An assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROWs on tribal land; and
4. An analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy ROWs on tribal land.

These four elements of the study are addressed in this report in the following order.

- In Section 2 of the report, the Departments analyze relevant national energy transportation policies relating to energy ROWs on tribal lands.

- In Section 3, the Departments set out the statutory and regulatory framework for granting, expanding, or renewing energy ROWs on tribal land. The Departments also assess the tribal sovereignty and self-determination interests affected by granting, expanding, or renewing energy ROWs on tribal land.
- In Section 4, the Departments summarize the data and information collected regarding historic rates of compensation for energy ROWs on tribal land.
- In Section 5, the Departments discuss standards and procedures for determining fair and appropriate compensation for energy ROWs on tribal lands.
- In Section 6, the Departments discuss the common issues raised concerning the energy ROW negotiation process. The Departments analyze and submit findings on these issues. The Departments also provide a variety of approaches for resolving negotiation process concerns.
- In Section 7, the Departments present a range of approaches for Congress to consider regarding procedures for carrying out energy ROW negotiations and standards for determining *fair and appropriate* compensation for energy ROWs on tribal lands.
- Then, in Section 8, on the basis of all the information gathered during the conduct of this study and a review of the alternatives available, the Departments summarize their findings and recommend to Congress appropriate standards and procedures for determining fair and appropriate compensation for energy ROWs on tribal lands.
- Finally, in Section 9, the Departments provide a more detailed description of case studies, survey information, and data submitted by stakeholders regarding historic and current rates of compensation for energy ROWs on tribal land.

## **1.2. Public and Tribal Consultation Meetings and Comments**

The Departments began the study process by contacting interested tribes, energy companies, and associations in a series of telephone calls to determine the range of potential issues affected by the Section 1813 language and to gather information on how to structure the public consultation process. As time allowed, the Departments also met with a variety of tribes, energy companies, and associations that requested meetings.

After this prescoping effort, the Departments held two nationwide public meetings in March and April 2006 to solicit comments from interested participants on the scope of the study. The notices of these meetings were published in the *Federal Register* (FR). In addition, the Departments communicated with tribes by sending letters directly to tribal leaders and contacting

the regional offices of the Bureau of Indian Affairs (BIA). The Departments posted the transcripts of both meetings and all comments received on a Web site for public review.

After this scoping effort, the Departments published a notice in the FR seeking information and comments from interested participants regarding energy ROWs on tribal lands. Information and comments were due to the Departments by May 15, 2006. Upon receiving the information and comments, the Departments began reviewing them, and they requested followup information as needed.

On August 9, 2006, the Departments published a notice in the FR that announced the release of the draft report and requested written comments on it. The Departments also accepted verbal comments at one nationwide and several regional public meetings held between August 24 and 30, 2006. During this period, the Departments also held government-to-government consultation meetings with interested tribes as well. The dates and times of the meetings were published in the FR and announced in a letter sent to tribal leaders.

Comments were due on the draft report by September 1, 2006. This deadline was extended to September 4, 2006. The Departments continued to receive comments through the entire month of September. A revised draft report was issued on December 21, 2006; comments on it were received through February 5, 2007.

Over the entire study process, the Departments held several individual meetings, received extensive public testimony, and met in government-to-government consultation with more than 18 tribes. The Departments also received about 251 sets of written comments from 129 commenters, including 61 tribes, 11 tribal associations, 17 energy companies, 4 energy trade associations, 9 State or local governments, 3 interest groups, and 24 individuals or other commenters.

In the course of the public meetings and government-to-government consultations, and in the written comments submitted by interested groups and individuals, hundreds of study participants raised issues related to the Section 1813 study. The Departments appreciate the extensive efforts of these commenters to provide detailed ROW information and thoughtful comments both during the study process and for this final report. The Departments relied extensively on these comments to help define the scope of the report and analysis. A list of commenters is provided as an appendix to this report.

### **1.3. Scope of the Section 1813 Report**

The language of Section 1813 presents a very broad field of study. Potentially, Section 1813 encompasses hundreds of Indian tribes and many different types of energy ROWs on tribal lands over the entire history of the Federal relationship with Indian tribes. To focus on the core issues in the time available to conduct this study, the Departments clarified and focused the scope of the study. In doing this, the Departments relied heavily on comments from Indian tribes, energy companies, associations, State and local governments, interest groups, and interested individuals.

First, Section 1813 requires an analysis of historic rates of compensation paid for energy rights-of-way on tribal land. Given the limited time and resources available to conduct the study, as

well as the confidential nature of energy ROW agreements, the Departments determined that the most feasible approach for an analysis of historic rates was to rely on case studies of energy ROWs, supplemented by voluntary surveys of tribal and energy groups conducted by others. The Departments received many comments on this approach. Tribes, tribal energy companies, and tribal associations (“tribes”) commented that a case study approach would seriously limit the Departments’ ability to obtain a full understanding of energy ROWs on tribal lands, particularly historic practices followed to obtain energy ROWs. Tribes also noted that this approach would fail to account for numerous ROWs that lacked documentation or compensation agreements. Energy companies, trade associations, and interest groups (“industry”) were generally comfortable with a study plan that relied on case studies. Industry also favored including information from a voluntary survey of companies as a way to capture trends and emerging issues that they see in the ROW negotiation process.

After careful consideration, the Departments reaffirmed their decision to rely on voluntary case studies and survey information as the most feasible option for the timely gathering of information that would be useful in outlining and providing insight into the core issues identified in the scoping process, while also respecting the confidentiality concerns of both tribes and private industry. The Departments acknowledge that the data included in this report do not constitute a comprehensive historical review of rates paid for energy ROWs on tribal lands. The Departments also acknowledge that the case studies and voluntary survey information may tend to focus on the more complicated or contentious examples of energy ROW negotiations. Moreover, as many tribes reported in their comments, the case studies and voluntary survey information can represent only a few of the thousands of energy ROWs on tribal lands, many of which were successfully granted, renewed, or expanded. Finally, the Departments recognize that although case studies cannot be statistically generalized, they do, nevertheless, indicate the nature of historic compensation and the types of issues confronted by both tribes and industry.

Second, as stated before, the definition of tribal lands provided by Section 1813 is defined by reference to the EAct, Title V, Section 503, which amends Section 2601 of the Energy Policy Act of 1992. In conducting this study, the Departments found that it was important to clarify that this definition does not include energy ROWs on tribal fee lands, individual Indian trust allotments (even when the tribe owns an interest in the allotment), or individual Indian fee lands. Federal policy regarding Indian land holding has varied over the history of the Federal-tribal relationship. The majority of Indian land is now held as tribal trust land and is the focus of this study. The General Allotment Act of 1887 created tribal and individual allotted lands, many of which are still present. Many tribes have also purchased lands in fee, sometimes to recover lands lost through allotment. These lands may be held in fee, or they may be transferred to trust status through regulations in Title 25, Part 151 of the *Code of Federal Regulations* (25 C.F.R. Part 151).

The Departments recognize that even though the definition of tribal land is limited, the issues surrounding ROW negotiations could affect other landholders, including individual Indian allottees. However, the Departments’ analyses are limited to tribal lands as defined by Congress in Section 1813.

Third, clarification of the term energy rights-of-way was also needed. This term is not defined in Section 1813, is very broad, and could encompass many different types of ROWs. Some of the types of energy ROWs that could potentially fall within the scope of this term and require a grant of access (in the form of a grant of business lease, a facilities lease, a surface use and access agreement, or a surface damage agreement) in order to lawfully be on tribal land include the following:

- Local gas gathering pipelines from wells to transmission line tie-in points with the gas field,
- Intrastate gas transmission lines from gathering system tie-in points to processing plants,
- Intrastate and interstate gas transmission pipelines from gas processing plants to an industrial end-user or gas distribution system,
- Local gas distribution system pipelines (the consumer delivery system),
- Local oil gathering lines from wells to transmission line tie-in points to a refinery,
- Intrastate oil transmission lines from gathering system tie-in points to a refinery,
- Intrastate and interstate refined products pipelines from a refinery to distribution terminals,
- Intrastate and interstate high-voltage electric power lines from a generating station to transformer stations,
- Local low-voltage electric power lines to consumers,
- Coal slurry pipelines,
- A variety of railroad lines carrying energy products across tribal lands,
- Roads that serve as corridors to energy sites and to oil and gas drilling locations,
- Roads for hauling oil from wellhead storage tanks to a refinery, and
- Roads for hauling coal from a mine to a coal-burning facility.

While all these types of ROWs pertain to energy, they are not necessarily comparable. As explained in Section 3, different types of ROWs may derive from different statutory authority. In addition, the economics, environmental impacts, tribal or Federal oversight, and service

requirements for each type of energy ROW are different. Because the range of energy ROWs on tribal lands is so extensive, the Departments determined that a more limited examination was required to successfully complete this report.

The Departments therefore refined the scope of the Section 1813 study to electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution. The Departments selected these energy ROWs for study because of the number of interested participants that discussed these types of ROWs, the availability of information on them, and the nature of their role in delivering energy resources to consumers.

The Departments finally caution readers of this report that any conclusions or proposals herein should be understood in light of the scope of the focused study. Because the Departments' study focused on electric transmission, natural gas, and oil pipelines, the assessments and analyses in this report were based on the law and facts surrounding these specific energy ROWs. Applying this report beyond ROWs for electric transmission, natural gas, and oil pipelines should be done with caution.

## **2. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy Rights-of-Way on Tribal Land**

In Section 1813, Congress instructed the Departments to provide an analysis of relevant national energy transportation policies related to energy ROWs on tribal lands. National energy transportation policies related to energy ROWs on tribal land include these:

- The National Energy Policy (NEP),
- Emergency authorities to ensure the transport of energy,
- EAct provisions related to transmission,
- EAct Title V, Indian Energy (Title V), and
- Indian Right-of-Way Act of 1948 (1948 Act) and historical acts of Congress permitting ROWs across tribal lands.

These sources provide specific policies for energy transportation on tribal lands and provide general relevant national energy policies.

### **2.1. Public and Tribal Comments**

The Departments received a number of comments suggesting various policies and issues as relevant national energy transportation policies relating to the grant, expansion, or renewal of energy ROWs on tribal lands.

Industry generally commented that the Departments should focus on the Administration's NEP and policies recently enacted as the EAct. Industry commented that both NEP and EAct find that the Nation's current transmission and distribution infrastructure is aging and requires expansion to meet growing U.S. demand.<sup>1</sup> Industry commented that EAct specifically addresses these issues and includes provisions to encourage construction and expansion in the infrastructure. An interest group commented that Congress intended Section 1221 to relieve transmission congestion and constraints that adversely affect consumers, and that Section 368 was intended to reduce siting obstacles faced by the electric transmission line, natural gas pipeline, and other parts of the energy transportation infrastructure.<sup>2</sup> Specifically, in discussing the policies promoted by Section 368, the interest group asserted that "siting constraints will be significantly constrained by current tribal ROW policy."<sup>3</sup>

One trade association noted that its members are already responding to the need to build and expand transmission infrastructure. The association provided data that its "Western and Southwestern shareholder-owned utilities spent roughly \$6.8 billion (in 2005 dollars) on transmission between 2000 and 2005 and are planning to spend another \$5.4 billion on transmission between 2006 and 2008."<sup>4</sup> The trade association also commented that beyond

2014, “substantial additional transmission will likely be added as the nation’s transmission system is upgraded and expanded to provide capacity for the next several generations, including the ability to access clean coal and wind generation.”<sup>5</sup> However, the trade association asserted that the need to build such infrastructure “highlights the importance of achieving tribal ROW fees that are reasonable and based on FMV [fair market value], and fee-setting processes that are efficient, prompt, predictable, and fair.”<sup>6</sup>

Industry also commented that the underlying intent of policies to expand and improve energy transmission is to strengthen domestic energy sources.<sup>7</sup>

Tribes commented that Congress chose to address energy issues on tribal lands through EPOA Title V. Tribes commented that “Title V is an important expression of national energy policy and is the only piece of recent federal legislation that directly addresses both energy transportation needs and the specific issue of energy rights-of-way on tribal lands.”<sup>8</sup> Tribes asserted that “any effort to limit tribal power to consent when companies seek to install or renew rights-of-way across tribal land would be directly contrary to the carefully crafted policy determinations made by Congress when it passed Title V.”<sup>9</sup>

Tribes also commented that they already participate in energy policies, such as fostering domestic energy independence through the production and transmission of energy resources on tribal lands. One tribe commented that it “has been part of the energy-producing industry for over 50 years.”<sup>10</sup> This tribe commented that the 2,000 active natural gas wells on its reservation produce 22 billion cubic feet of natural gas every year for transport to consumers in the Western United States.<sup>11</sup> Another tribe stated more generally that “rather than being one part of an energy supply and infrastructure *challenge* facing the U.S., the story of historical tribal land energy resource development, and more significantly the prospects for continued development, is one of consistent and positive contribution to meeting the nation’s energy needs.”<sup>12</sup>

Tribes commented that discussions of relevant national energy transportation policies should also address the lack of utility services to reservation communities. Tribes stated that a basic purpose of national energy transportation policies is to provide for the delivery of energy resources needed by communities across the country and that, given the fact that utility services to Indian households lag far behind those to non-Indian households, these policies should be used to expand and improve utility service for reservation communities.<sup>13</sup> Specifically, Tribes presented data from DOE’s Energy Information Administration (EIA) showing that 14.2 percent of Indian households lacked electric service compared to 1.4 percent of all U.S. households.<sup>14</sup> They also cited a U.S. Census Bureau study reporting that 16 percent of Indian households use utility gas to heat their homes, compared to 51 percent of all U.S. households.<sup>15</sup> Tribes concluded that energy policies that maintain tribal sovereignty and promote self-determination, as reflected in current laws and processes for obtaining energy ROWs on tribal lands, are critical for improving energy service on reservations.<sup>16</sup>

## **2.2. National Energy Transportation Policies Generally Relevant to Energy Matters on Tribal Land**

### **2.2.1. The National Energy Policy**

In May 2001, the Administration issued its National Energy Policy (NEP), which discussed many of the issues ultimately addressed by Congress in EPAct. The Administration's NEP set forth a long-term strategy to promote reliable, affordable, and environmentally sound energy for America's future.<sup>17</sup> It proposed meeting this goal by increasing energy conservation, increasing domestic energy supplies, increasing use of renewable and alternative energy, ensuring a comprehensive energy delivery system, and enhancing national energy security.<sup>18</sup>

Chapter 7 of the NEP specifically discussed policies and goals related to energy transmission. The NEP stated, "One of the greatest energy challenges facing America is the need to use 21st-century technology to improve America's aging energy infrastructure."<sup>19</sup> In particular, the NEP concluded that natural gas pipelines and electric transmission lines are constrained because infrastructure has not kept up with demand.<sup>20</sup> The NEP further discussed a variety of constraints in each of these industries and their impacts on consumer costs and energy reliability.

The NEP described the Nation's electricity transmission system as the highway system for interstate commerce in electricity. Currently, however, the NEP found that this system is constrained because investment in transmission "lagged dramatically" over the past decade, the siting process occurs primarily at the State level, and there is limited access to Federal lands.<sup>21</sup> The NEP found that a constrained electric highway system cannot move energy where it is needed most and can lead to cost increases and reliability concerns.

For example, the NEP described how transmission can be used as a substitute for local generation by moving power from distant areas with surplus generation to areas of demand.<sup>22</sup> However, when transmission constraints limit power flows to areas of high demand, consumers in those areas have to rely on higher-cost local generation.<sup>23</sup> The NEP also observed that regional shortages of generating capacity and transmission constraints can combine to reduce the overall reliability of the country's electricity supply.<sup>24</sup> To address these various constraint problems, the NEP encouraged using incentives to promote sufficient investment in transmission infrastructure, making changes to the siting process to reflect the interstate nature of the transmission system, and improving access to Federal lands.<sup>25</sup>

With respect to natural gas and oil pipelines, the NEP noted that the primary transmission infrastructure constraints are related to shortfalls in pipeline capacity, community resistance to pipeline construction, and obtaining ROW approvals from Federal, State, and local governments. Summarizing regulatory burdens at different levels of government, the NEP stated that "currently it takes an average of four years to obtain approvals to construct a new natural gas pipeline."<sup>26</sup>

The NEP, however, did not propose eliminating regulatory protections for pipelines. Instead it proposed striking an appropriate balance between regulatory review and expediting approval. Citing three recent pipeline ruptures, the NEP stressed that policies to ensure the protection of

the people and the environment and the safety of the Nation's energy infrastructure are an important part of the permitting process.<sup>27</sup> Thus, the NEP proposed legislation "to improve the safety of natural gas pipelines, protect the environment, strengthen emergency preparedness and inspections and bolster enforcement."<sup>28</sup> In addition to these protections, the NEP encouraged regulatory agencies, which includes tribal agencies, "to continue interagency efforts to improve pipeline safety and expedite pipeline permitting in an environmentally sound manner."<sup>29</sup>

The NEP also noted the significant role of Federal lands with regard to energy corridors, particularly in the western United States. Federal lands discussed in the NEP include lands managed by the BIA (including tribal and individual Indian lands), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), National Park Service (NPS), U.S. Fish and Wildlife Service (USFWS), and U.S. Forest Service (USFS). The NEP concluded that each of these Federal entities deals with ROWs from a "unique perspective"<sup>30</sup> and noted that some of them may encourage ROW development, while others (e.g., NPS, USFWS, BOR) may discourage ROW corridors or require that ROWs be compatible with authorized purposes.<sup>31</sup>

The NEP mentioned tribal lands as lands managed by BIA. It stated that like other Federal land managers, "the BIA and tribal governments are authorized to grant rights-of-way across . . . tribal lands" for energy resources, electric transmission lines, and natural gas and oil pipelines.<sup>32</sup>

### **2.2.2. Principles of Eminent Domain**

Most electric transmission and energy pipelines have been built in the United States at the initiative of the private sector and are under rate regulation of the Federal Energy Regulatory Commission (FERC). Pursuant to the Section 7 of the Natural Gas Act, most large natural gas pipeline projects are subject to FERC jurisdiction for siting as well as for rate regulation. After a National Environmental Policy Act (NEPA) analysis, FERC may grant the pipeline developers a certificate which may include eminent domain authority. Should negotiations fail to secure ROWs on private or State lands, the natural gas pipeline project can use this eminent domain authority to condemn enough land for a ROW. Section 7 of the Natural Gas Act's eminent domain authority does not apply to Federal lands or tribal lands. By contrast, for electric transmission projects, it has historically been the States that have been the siting authorities, which has included the ability to grant eminent domain authority to oil pipeline and electricity project permit holders. However, with the passage of EPAct, Congress granted FERC very limited authority to grant transmission construction permits for projects that are located in any national interest electricity transmission corridors that may be designated by the Secretary of Energy pursuant to Section 1221(a). This limited Federal transmission facility permitting authority includes the authority to grant permittees the right to acquire ROWs through the right of eminent domain. However, the eminent domain authority given to FERC for these transmission projects cannot be used by a permit holder to acquire "property owned by the United States or a State" [1221(e)(1)]. This exclusion includes tribal lands, which are lands owned by the United States in trust for the beneficial use of the tribes. Accordingly, neither Section 7 of the Natural Gas Act nor Section 1221(a) of the EPAct give FERC the authority to grant the right of eminent domain to acquire energy ROWs on tribal lands.

### **2.2.3. Emergency Authorities**

While the Departments found no evidence that negotiation between parties for obtaining an energy ROW on tribal land contributed to an emergency situation, an analysis of emergency authorities addresses the system integrity and security issues raised by some industry parties in the Section 1813 study. The Departments examined emergency authorities of the Secretary of Energy pursuant to the Natural Gas Policy Act and the Federal Power Act (FPA). Although these authorities are used only in times of national emergencies, they can be used to mandate transfers of needed energy supplies. In an emergency situation, these generally applicable statutes could apply to tribes.

A number of tribal parties commented that while no tribe has exercised its consent authority in a manner that created an emergency situation, the issues raised by Section 1813 force tribes into the untenable position of having to prove a negative, i.e., that no tribe will ever use its consent authority in this manner or that no tribe will interfere with supplying energy resources in an emergency. Rather than forcing this exercise on the tribes, the Departments' analysis finds that emergency authorities could provide a means of rectifying such a situation if it did occur.

### **2.2.4. Energy Policy Act of 2005**

In addition to the provisions in EPAct Title V, discussed in Section 2.3.1, a number of other EPAct provisions address the Nation's energy infrastructure (particularly the electric transmission system) and may have some general application to tribal lands. EPAct promotes improving and expanding the Nation's energy infrastructure to meet the needs of a growing U.S. economy. Specifically, Sections 1221 and 368 of EPAct provide administrative tools for facilitating the siting and construction of needed energy transmission facilities.

EPAct Section 1221(a) amended FPA by adding a new Section 216(a). This section directs the Secretary of Energy to conduct a nationwide study on electric transmission congestion by August 8, 2006.<sup>33</sup> On the basis of this study, the comments on it, and considerations of issues that include economics, reliability, fuel diversity, national energy policy, and national security, the Secretary may designate "any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects customers as a national interest electric transmission corridor."<sup>34</sup> The national congestion study is to be updated every three years.

Section 368 of EPAct applies to transmission corridors for electricity, natural gas, and oil. It directs the Secretaries of Agriculture, Commerce, Defense, Energy, and the Interior—within two years of the passage of EPAct—to incorporate into land use plans energy ROW corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land in 11 Western States.<sup>35</sup> Within four years of EPAct passage, these Secretaries are to identify corridors within Federal lands in the remaining States.<sup>36</sup> These energy corridors will take into account reliability, congestion, and overall infrastructure capacity.<sup>37</sup>

In Sections 1221 and 368, Congress enacted authorities and processes intended to promote the siting of generation and transmission facilities to help resolve congestion and improve reliability, but it did not make these provisions applicable to tribal lands. Section 1221 gives FERC transmission siting authority under certain conditions, and this authority includes the power to

grant eminent domain. However, this authority specifically excludes property owned by a State or the United States, which includes tribal lands.<sup>38</sup> Similarly, Section 368 applies to Federal lands (e.g., BLM, USFS, U.S. Department of Defense lands) but not to tribal lands. Pursuant to Section 368, the Secretaries listed above are consulting with tribes interested in the Section 368 process. Some tribes have sought inclusion of portions of their land in the Section 368 process, while others have requested not to participate. Future tribal involvement may include participating in the NEPA review of a proposed energy corridor under Section 368.

Accordingly, Sections 1221 and 368 do not alter the framework for negotiating energy ROWs on tribal lands as established under current law, including EAct Title V. The Departments note that provisions of Title V promote tribal energy resource development and energy-related governing capacity, and encourage tribes' participation in resolving congestion issues.

## **2.3. National Energy Transportation Policies Specifically for Energy Rights-of-Way on Tribal Land**

### **2.3.1. Energy Policy Act of 2005, Section 503, Indian Energy**

The most recent statement of national energy transportation policy that specifically deals with energy ROWs on tribal lands strongly supports tribal decision making and management of energy resources and facilities, while it also correspondingly reduces Federal oversight. EAct Title V furthers the Federal policy of tribal self-determination by encouraging tribes to develop procedures and safeguards for tribal management of every aspect of energy production and delivery on tribal lands. As expressed generally in the provisions of Title V, the overarching goal is to “assist Indian tribes in the development of energy resources and further the goal of Indian self-determination.”<sup>39</sup>

The provisions of Title V that are specifically related to energy ROWs are entitled “Leases, Business Agreements, and Rights-of-Way Involving Energy Development or Transmission” and codified in *United States Code* (25 U.S.C. § 3504). These provisions set out a substantial program for governing energy facilities, including energy ROWs, through the development of Tribal Energy Resource Agreements (TERAs).<sup>40</sup> Upon approval of a tribe's TERA by the Secretary of the Interior, an Indian tribe “may grant a right-of-way over tribal land for a pipeline or an electric transmission or distribution line without review or approval by the Secretary of the Interior” and in accordance with certain terms set out in the statute.<sup>41</sup> These provisions require the energy ROW to (a) be issued in accordance with the tribe's TERA; (b) not last longer than 30 years; and (c) serve an electric generation, transmission, or distribution facility located on tribal land, or a facility on tribal land that processes or refines energy resources developed on tribal land.<sup>42</sup> Regulations to implement this statute were published by DOI in the FR on August 21, 2006.<sup>43</sup>

These provisions also specifically address the renewal of energy ROWs on tribal lands. The renewals of energy ROWs that have been approved according to the substantial process set out in 25 U.S.C. § 3504 will be “at the discretion of the Indian tribe.”<sup>44</sup>

Although Title V establishes new provisions to support and further tribal management of energy ROWs, Congress did not repeal existing authorities for energy ROWs on tribal lands. This was appropriate because it may not be in the interest of all tribes to invest the time and resources to develop a TERA pursuant to which energy ROWs can be approved without direct Secretarial oversight. Consequently, in addition to the policies set out by Title V, national energy transportation policies expressed by Congress in prior enactments are still relevant to energy ROWs on tribal lands.

### **2.3.2. Indian Right-of-Way Act of 1948, Implementing Regulations, and Historical Statutes**

In addition to EAct Title V, energy ROWs on tribal lands are governed by the 1948 Act<sup>45</sup> and DOI regulations in 25 C.F.R. Part 169. As explained in more detail in Section 3.2, the 1948 Act and its implementing regulations include obtaining the consent of the applicable Indian tribe as an integral element of the energy ROW application process.

In the years leading up to the 1948 Act, from the 1880s to 1940s, national energy transportation policy related to energy ROWs on tribal lands incorporated a variety of approaches. Of course, the Departments recognize that Federal Indian policy during this time was also shifting from the era of allotment—which was intended to remove tribal control of Indian lands—to the reorganization of tribal governments, and finally to the restoration of tribal land status.<sup>46</sup> Energy transportation policies on tribal lands ranged from individual acts of Congress for each ROW to broad statutes authorizing administrative processes for requesting a ROW. As explained in more detail in Section 3.2, the requirement for obtaining a tribe’s consent for an energy ROW was also expressed in a variety of ways.<sup>47</sup>

## **2.4. Departmental Findings**

Recent national energy transportation policy generally stresses the need to invest in aging transmission infrastructure and expand transmission to relieve congestion and improve reliability. Much of this policy was recently enacted into law in August 2005 as the EAct. These general energy transportation policies and enactments, however, recognize the unique laws that apply to tribal lands and do not alter existing laws and regulations for obtaining an energy ROW on tribal lands.

For the past 60 years, national energy transportation laws and policies specifically applicable to tribal lands have sought tribal consent for the grant, expansion, or renewal of energy ROWs on tribal lands. These laws and policies also promote tribal involvement in the determination of energy ROW routes, protection of cultural and natural resources, and emergency matters. The most recent of the Federal Government’s statutory and policy expressions—EAct Title V—encourages tribes to assume greater decisionmaking control over energy ROWs.

THIS PAGE INTENTIONALLY LEFT BLANK

### **3. Statutory and Regulatory Framework for Granting, Expanding, or Renewing Energy Rights-of-Way on Tribal Land and Associated Tribal Sovereignty and Self-determination Interests**

In Section 1813, Congress instructs the Departments to present information on the statutory and regulatory framework that guides the placement of energy ROWs on tribal lands and information on related tribal sovereignty and self-determination issues.

#### **3.1. Public and Tribal Comments**

As an overarching issue, in their comments, nearly all parties from all perspectives recognized the inherent sovereignty of Indian tribes and supported Federal policies of tribal self-determination. Tribes emphasized the Federal Government's acknowledgement of their inherent sovereignty through treaties, legislation, Supreme Court decisions, Executive Orders, and ongoing interactions between the Federal Government and tribes. Paraphrasing *Cohen's Handbook of Federal Indian Law*,<sup>48</sup> one tribe noted the "long-standing principle of federal Indian law that Indian tribes possess inherent sovereignty." Other tribes stated that inherent tribal sovereignty "exists in the tribe itself" and "does not derive from the federal government."<sup>49</sup> Referring to the tribal consent provisions in energy ROW statutes and regulations, many tribes commented that tribal consent to the use of tribal lands is a manifestation of tribes' sovereign authority to determine the terms of access to tribal lands.<sup>50</sup> Tribes commented on the interrelatedness of sovereignty, the Federal policy of tribal self-determination, and tribal governmental functions.<sup>51</sup> Industry also voiced its recognition of tribal sovereignty but noted that this is not an unbounded authority but is instead an authority that has been judicially limited in specific cases.<sup>52</sup>

Several tribes noted that tribal governments fulfill their responsibilities as sovereigns by providing services such as education, health care, environmental protection, sanitation, and law enforcement. Also mentioned were Federal programs, both those in which tribes have governmental responsibilities and those that tribes are actually responsible for implementing (e.g., Clean Water Act; Clean Air Act; National Historic Preservation Act; Comprehensive Environmental Response, Compensation and Liability Act; Emergency Planning and Community Right-to-Know Act; Oil Pollution Act; Native American Graves Protection and Repatriation Act).<sup>53</sup> Tribes noted that even with these governmental obligations, their inherent authority to tax activities on reservation lands in order to raise governmental revenues can be complicated by possible overlaps with the taxing authorities of neighboring jurisdictions.<sup>54</sup>

Tribes also described their responsibility for developing the governing capacity necessary for overseeing energy ROWs. Often these functions are supported by energy ROW fees. Several tribes stated that energy ROW activities require that the tribes have adequate management and business controls, data collection efforts, realty functions, and day-to-day oversight, which requires dedicated staff and considerable tribal fiscal resources.<sup>55</sup> For example, the need for tribal governmental capacity to deal with energy ROWs became evident when a natural gas pipeline exploded on the Confederated Tribes of the Umatilla Reservation in 1999. The tribal

police, fire, and emergency response personnel responded to the blast and assisted in containing the damage and investigating the cause of the explosion.<sup>56</sup> In another example, a tribe cited an oil pipeline that sprang a leak and spilled several thousand gallons of oil across its lands.<sup>57</sup>

Tribes also commented that tribal governmental involvement is necessary to prevent harm to reservation resources. In particular, tribes noted that sovereignty and governmental capacity were critical to protect tribal natural and cultural resources and sacred sites.<sup>58</sup> Tribes noted that relatively recent Federal statutes and their implementing regulations provide a legal framework that can be used by a tribe to prevent damage to sacred places and cultural resources if the tribal government has the financial and human resources to use this framework and to insist that Federal agencies comply with the law. While many tribes have cultural resource programs, and while some have Tribal Historic Preservation Officers, such tribal programs typically place many demands on a limited staff. The National Historic Preservation Act and Native American Graves Protection and Repatriation Act recognize tribal sovereign authority in the general subject matter of cultural resources management. However, the relatively recent passage of these acts means that many existing energy ROWs that will be up for renewal may not have been approved or would have been relocated if the current legal framework had been in place when the ROW was originally granted, because the governing tribe would have either denied consent or insisted on the ROW being relocated to avoid sacred places or other cultural resources.<sup>59</sup>

## **3.2. Laws, Regulations, and Federal Policies with Implications for Tribal Sovereignty**

### **3.2.1. Statutory Background**

The history of statutes governing energy and other types of ROWs over tribal land can be divided into three major periods. During the first phase, roughly from the 1880s to 1899, Congress authorized ROWs by enacting a specific statute for each particular ROW. In the second phase, beginning in 1899, Congress began to pass acts concerning categories of ROWs, such as those for the purpose of building railroad lines. The current phase began in 1948 with promulgation of the principal statute governing ROWs across tribal lands, commonly called the General Right-of-Way Act or the Indian Right-of-Way Act (1948 Act).<sup>60</sup>

During the first phase, Congress passed more than 100 separate laws granting specific ROWs on Indian reservations. These early statutes primarily involved easements for railroads and telegraph and telephone lines. Generally they required the company obtaining the ROW to pay damages or compensation as determined by the Secretary of the Interior. The acts also sometimes required that Indian consent be obtained for the ROW or the amount of ROW compensation.<sup>61</sup>

In 1899, in the second phase, Congress ended the practice of passing a separate statute for each ROW over Indian land and instead gave the Secretary of the Interior general authority to grant ROWs for railroads and telegraph and telephone lines.<sup>62</sup> Companies needing ROWs across Indian land no longer had to seek Congressional authorization but rather applied directly to the Secretary of the Interior, who could approve the ROW if the company complied with the terms

of the authorizing statute. Those terms did not include the consent of the tribe that owned the land.<sup>63</sup>

On March 11, 1904, Congress gave the Secretary of the Interior authority to grant ROWs for oil and gas pipelines traversing Indian reservations and allotments:

The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction . . . of pipe lines for the conveyance of oil and gas through any Indian reservation . . . or through any lands which have been allotted.<sup>64</sup>

This statute is silent with regard to obtaining tribal consent for the ROW. However, the statute gave the Secretary the discretion to establish “such terms and conditions as he may deem proper” on renewals of ROWs.<sup>65</sup> Thus, this statute authorized tribal consent as one such term or condition, at least with regard to renewals, should the Secretary, in his discretion, so desire.

On March 4, 1911, Congress gave the “head of the department having jurisdiction over the lands” authority to grant ROWs for electric transmission lines across Indian reservations.<sup>66</sup> This statute also is silent with regard to obtaining tribal consent for the ROW, requiring only the approval of the “chief officer of the department under whose supervision or control such reservation falls.”<sup>67</sup>

The current phase began with the 1948 Act, enacted on February 5, 1948, which expressly requires the consent of certain tribes. It provides, in pertinent part:

The Secretary of the Interior . . . is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes. . .<sup>68</sup>

No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act (IRA) and the Oklahoma Indian Welfare Act (OIWA)]<sup>69</sup> shall be made without the consent of the proper tribal officials. . .<sup>70</sup>

Sections 323 to 328 of this title shall not in any manner amend or repeal provisions of the Federal Water Power Act. . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.<sup>71</sup>

The consent provision in the 1948 Act is consistent with the tribal organization statutes, which confer on tribes organized under those statutes the power to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without their consent.<sup>72</sup> The inclusion of the consent requirement in the 1948 Act prevents implied supercession of the consent provisions of the tribal organization acts.<sup>73</sup> The 1948 Act also includes authority to impose conditions at the discretion of the Secretary.

Statutes on the same subject are to be construed together. The 1948 Act constitutes a comprehensive scheme for granting ROWs across Indian lands. It simplifies and unifies the earlier procedures and removes some of the confusion that resulted from the practice of enacting specific legislation for each separate type of ROW or easement.<sup>74</sup> The 1948 Act supplants the earlier ROW statutes but explicitly does not repeal them. When read together, the statutes empower the Secretary to require tribal consent for a tribe organized under the tribal organization statutes, and they vest the Secretary with the discretion to mandate tribal consent and other conditions for ROWs across lands of other tribes.

### **3.2.2. Regulatory Background**

Before the 1948 Act was passed, DOI regulations did not require the consent of tribes to enable the Secretary to make ROW grants over their reservations.<sup>75</sup>

On August 25, 1951, DOI promulgated regulations governing ROWs that established a unified procedure for applications, whether for pipelines or other purposes. The regulations were designed to implement and harmonize the 1948 Act with the myriad of other ROW statutes, including the 1904 Act, and to establish clear DOI policy that ROWs would not be authorized without tribal consent.<sup>76</sup>

The tribal consent provision in the regulations is unambiguous: “No right-of-way shall be granted over and across any restricted lands belonging to a tribe . . . without the prior written consent of the tribal council.”<sup>77</sup> No distinction exists in this regulation between tribes organized under the tribal organization statutes and other tribes. The regulation requires the consent of all tribes.<sup>78</sup>

### **3.2.3. Federal Policy of Tribal Self-Determination**

Self-determination is a Federal policy that guides the Federal Government in its actions, decisions, and programs regarding Indian tribes. Although self-determination was recognized in principle at the very beginning of the Federal Government’s relationship with tribes during the negotiation of treaties, it evolved into a specific policy during the latter part of the 20th century. Tribal autonomy formed a basic tenet of various pieces of legislation, especially the Indian Reorganization Act of 1934 (IRA)<sup>79</sup> and the Indian Self-Determination and Education Assistance Act of 1975.<sup>80</sup> In the latter statute, Congress recognized that the tribes “will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, or persons.”<sup>81</sup> Most recently, Title V of the Energy Policy Act of 2005 directed the Departments to create Indian energy programs in accordance with “federal policies promoting Indian self-determination.”<sup>82</sup>

### **3.2.4. Policies Promoting Consultation and Coordination with Tribal Governments**

Other policy expressions relevant to energy matters on tribal lands are contained in general tribal policies that provide direction to Federal Agencies on maintaining appropriate government-to-government relationships with tribal governments. These policies have been expressed in Executive Orders and Presidential Proclamations.

On November 12, 2001, President Bush issued a proclamation stating that “we will protect and honor tribal sovereignty and help stimulate economic development in reservation communities.”<sup>83</sup> More recently, the Administration focused on tribal energy issues. On November 7, 2005, President Bush recognized defining principles of tribal sovereignty and self-determination and noted EAct provisions for enhancing energy opportunities and strengthening tribal economies.<sup>84</sup>

Previous administrations articulated ongoing government-to-government consultation policies in Executive Orders. Most recently, Executive Order No. 13175, “Consultation and Coordination with Indian Tribal Governments,” instructs executive agencies to consult with Indian tribes. The Executive Order states that:

[When] undertaking to formulate and implement policies that have tribal implications, agencies shall:

1. Encourage Indian tribes to develop their own policies to achieve program objectives;
2. Where possible, defer to Indian tribes to establish standards; and
3. In determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.<sup>85</sup>

Most agencies, including FERC, DOE, and DOI, have comparable policy statements and orders calling for consultation with Indian tribes and Alaska Native tribal governments.

### **3.3. Departmental Analysis**

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of tribal consent to energy ROWs. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others.<sup>86</sup> A tribe’s authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty—the right to govern its people, resources, and lands. The present right of tribes to govern their members and territories flows from a historical and preexisting independence and right to self-government that has survived, albeit in diminished form, through centuries of contact with other cultures and civilizations. Most treaties include clauses intended to preserve this right of self-governance, at least with regard to tribes’ internal affairs. Treaties continue to be a major source of Federal law today.

This history of tribal sovereignty forms the basis for the exercise of tribal powers today.<sup>87</sup> Although the United States has long recognized the sovereignty of Indian tribes as “distinct, independent, political communities” exercising the authority of self-governance,<sup>88</sup> the relationships between Federal, State, and tribal governments are complicated.

Many different authorities define the contours of this relationship, including treaties, the Constitution, legislation, Supreme Court and other Federal court decisions, regulations, and Executive Orders. “The Constitution is the primary source of federal power to regulate Indian affairs. By enumerating powers exercised by the constituent branches of the national government, the Constitution both defines and limits national powers, and, as interpreted by the Supreme Court, provides ample support for regulation of Indian affairs.”<sup>89</sup> As the Supreme Court stated in *United States v. Lara* “... the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”<sup>90</sup> This broad Congressional power includes the authority “to impose federal policy directly on tribes without their consent.”<sup>91</sup> For example, the Supreme Court upheld Congress’ authority to enact legislation which altered a treaty and diminished a reservation.<sup>92</sup> Congress also can limit, modify, or eliminate the powers of tribal self-government.<sup>93</sup> However, in recognition of tribal sovereignty and the United States’ trust responsibility under existing treaties with Indian tribes, legislation granting such authority has been clear in expressing the intent of Congress to do so.<sup>94</sup>

Congress has legislated extensively in regard to Indian property, providing for the grant of leases and ROWs and even the disposal of Indian property without consent.<sup>95</sup> Federal court decisions are the source of many general principles of Indian law, and they also address and resolve particular fact situations. All of these authorities have an important role to play in the analysis of the Federal-tribal relationship in general and in the evaluation of individual consent issues in specific cases.

When he was writing in the late 1930s to 1941, Felix Cohen, then with DOI’s Solicitor’s Office, described the Federal Government’s policy for obtaining tribal consent for ROWs in the seminal *Handbook of Federal Indian Law*. Cohen wrote:

Congress . . . has conferred upon administrative authorities various statutory powers to alienate interests in tribal land less than fee, particularly easements and rights-of-way. Generally these statutes do not make tribal consent a condition to the validity of the alienation, but as a practical administrative matter tribal consent is frequently made a condition of the grant.<sup>96</sup>

One important aspect of this complex relationship is that under certain circumstances, the Federal Government becomes the trustee of Indian property.<sup>97</sup> There is no doubt that the trust relationship exists with regard to land held in trust for tribes. Trustees must act in the best interests of the beneficiary of the trust by protecting and preserving the corpus. DOI, as the trustee-delegate, is strongly committed to high standards for managing Indian trust land. In the context of ROWs over tribal lands, the regulations set forth a fairly detailed process, including some specific responsibilities of DOI. In performing those specific responsibilities, DOI fulfills its trust duties. While opinions about the appropriate consideration for a particular ROW may differ, the regulation is clear that the consideration shall be “not less than but not limited to fair market value of the rights granted, plus severance damages, if any” unless otherwise approved by the Secretary.<sup>98</sup> Disagreement about what constitutes *fair market value* is inevitable, but such disagreement does not indicate that DOI has not performed its trust duty in this regard.

While the Federal Government as a whole is the trustee of Indian property, and the Department of the Interior is the primary executive branch agency tasked with carrying out the trust responsibility to Indian tribes and to individual Indians, it is Congress that must define the nature and extent of that responsibility.

### **3.4. Departmental Finding**

The Departments encourage tribal economic development and have a duty to assure that the management of trust assets is in accordance with the best interest of tribes and tribal members. In addition, the proper discharge of the Federal responsibility to manage Indian trust assets also includes deference to and promotion of tribal control and self-determination.

Tribes have become increasingly involved in the process for approving the grant, expansion, or renewal of energy ROWs on tribal lands. As tribes have described to the Departments in their comments, they currently negotiate ROW issues (e.g., routes; compensation; terms; environmental, cultural, and emergency protections) pursuant to the 1948 Act and its implementing regulations.

A tribe's determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self-determination. Any reduction in the tribe's authority to make that determination is a reduction in the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination. Granting a ROW on tribal land only with the consent of a tribe is in accordance with the Federal policy promoting tribal self-determination and self-governance. The tribal consent requirement has been virtually unchanged since 1951. It reflects a longstanding interpretation of the pertinent statutes by the agency charged with their administration.

THIS PAGE INTENTIONALLY LEFT BLANK

## **4. Analyses of Historical Compensation Paid for Energy Rights-of-Way on Tribal Land**

In Section 1813, Congress requested an analysis that could instruct Congress on the historical rates of compensation for ROWs on tribal lands. The Departments performed an extensive review of potential energy ROWs and evaluated the best approach to provide the requested information.

### **4.1. Background**

For the reasons described in the Introduction, the Departments relied on a case study approach to shed light on the past and present process of determining compensation for energy ROWs on tribal lands.

The Departments recognize that a case study approach may not fully represent the context within which an energy ROW was granted, renewed, or expanded. In addition, the Departments recognize that these case studies represent a very small subset of the entire data set of energy ROWs crossing tribal lands. The exact number of energy ROWs on tribal land has not been calculated, but the following examples illustrate in brief the extensive data set that would be necessary to make a comprehensive historical analysis.

The Confederated Salish and Kootenai Tribes Reservation hosts 325 miles of ROWs for 11 regional electric transmission lines, 150 miles for local electric transmission lines, more than 2,000 miles for local electric distribution lines, and 56 miles for a regional refined fuels pipeline.<sup>99</sup> The Shoshone-Bannock Tribes of the Fort Hall Reservation have 22 energy ROWs: 19 for electric transmission lines and 3 for natural gas lines.<sup>100</sup> Similar statistics are available for other tribes.

The Departments appreciate the efforts of tribe and industry members who volunteered to provide case studies for review, conducted energy ROW surveys, and submitted information on specific ROWs.

### **4.2. Case Study and Survey Processes**

After the Departments' request for case study volunteers at the March 2006 public scoping meeting, the Ute Indian Tribe of the Uintah and Ouray Reservation (Ute Indian Tribe), the Morongo Band of Mission Indians (Morongo Band), the Southern Ute Indian Tribe (Southern Ute Tribe), and the Navajo Nation agreed to participate in the Section 1813 study and allow energy ROW agreements on their lands to serve as case studies. The Departments contracted Historical Research Associates, Inc. (HRA) to visit each volunteer and develop case study reports. After the announcement that these tribes would serve as case study examples, El Paso Natural Gas (EPNG) offered to open its records related to the Southern Ute and Navajo Nation cases that involved energy ROW negotiations with El Paso Western Pipelines.

At followup meetings with industry trade associations, the Departments further requested industry participation in the case studies. Southern California Edison officials expressed an

interest in participating, but after followup calls were made by the Departments and HRA, they declined to participate.

At the beginning of the research process, DOI provided HRA with the names of tribes that had offered to participate in the case studies of historic rates of compensation. DOI also provided contact information for key tribal and BIA representatives, and, through Office of Historical Trust Accounting personnel, arranged for site visits in concert with HRA historians. During some of these advance conversations, HRA discussed with tribal representatives their concerns about confidentiality or proprietary business information. In some cases, tribal representatives made requests related to confidentiality during or after HRA's visit.

HRA prepared a memorandum requesting access to records needed for the study, listing the types of potentially relevant records pertaining to ROWs for oil and gas pipelines and electric transmission lines. The types of records to which they sought access included:

- Leases or contracts for the energy ROW;
- Records of negotiations and determinations of compensation, including transcripts of negotiations or meetings involving BIA, tribal, and energy company representatives;
- Correspondence associated with negotiations (between all parties);
- Appraisals of the BIA and/or DOI Office of Special Trustee, company, and tribal entities;
- Applications for energy ROWs;
- Tribal authorizations of energy ROWs, such as tribal council resolutions and meeting minutes; and
- Any modifications to agreements.

DOI circulated this memorandum to tribal officials and BIA superintendents for the four tribal volunteers.<sup>101</sup> During the site visits, HRA reviewed records made available by tribal representatives and reviewed ROW files maintained by the BIA. HRA identified potentially relevant records by carefully reviewing these files and obtained copies of them. During site visits, HRA also met with tribal and BIA representatives to ask questions about how easements for energy ROW have been administered on the reservations.

These case study reports are summarized in Sections 9.1 through 9.4. The complete HRA report is included as an appendix to this report.

### 4.3. Case Study Results

The history of energy ROWs on the Uintah and Ouray, Southern Ute, Morongo, and Navajo Indian Reservations reveals general trends in the negotiation and management of easements over Indian lands. In particular, negotiations on these Reservations shed light on changes in the amounts and types of compensation and on the role of tribal consent in the negotiation process.

Compensation in the 1950s and 1960s was generally for damages calculated on a per rod or per acre basis. In 1968, the revised Federal regulations specified that consideration “shall be not less than the appraised fair market value of the rights granted, plus severance damages, if any, to the remaining estate.”<sup>102</sup> Appraisals had been used in the ROW approval process before 1968, but the language of the new regulation may have changed the methods used to appraise ROW. Appraisers (hired by energy companies) developed various methods for determining *fair market value of the rights granted*, but generally they calculated the fee value of the land by using sales of comparable lands, and then they discounted that amount by some percentage because the lands involved were being used, not sold. The BIA usually either reviewed the company’s appraisals or conducted its own appraisal. In these reviews, BIA appraisers determined fair market value by using comparable easements as a standard and by determining the land’s sale value on the basis of its highest and best use. Some tribes, such as the Southern Ute Tribe, do not require appraisals for tribal lands, mainly because the tribe itself has determined what the compensation rates should be. Currently, tribes such as the Morongo Band favor appraisal methods that take the revenue-generating potential of the land into account, rather than considering only the sale value of the land.

Starting in the 1970s and 1980s, types of consideration for energy ROWs began to vary. Per rod or per acre rates were replaced with annual lump payments, or compensation based on throughput, and/or tribal ownership interests (particularly for pipelines). Compensation packages have also included donations to tribal scholarship funds and options to purchase service from the energy companies. One ROW on the Navajo Reservation involved a land exchange as compensation, while the Southern Ute Tribe sometimes negotiated for joint ventures or for outright ownership in pipelines. Types of consideration have depended on the particular tribe and companies involved in the negotiations.

The 1948 Act required tribes to be involved in the approval process by granting their consent to easements if the tribes were organized under a Federal statute. Interior regulations that followed the 1948 Act required the consent of all tribes, not just those organized by statute. The examples above involve two tribes organized under the IRA of 1934 (Ute Indian Tribe and Southern Ute Tribe) and two that are not organized (Morongo Band and Navajo Nation). The case studies indicate that the BIA has had one administrative approach to all tribes, regardless of whether or not they are organized under the IRA.

In providing their consent to energy ROWs, the four tribes involved in these case studies have participated in negotiations to varying degrees. The Navajo Nation began asserting its interests in the 1950s or earlier, as did the Morongo Band (albeit with limited success), while the Southern Ute Tribe and Ute Indian Tribe made that move in the 1970s and 1990s, respectively. All four of the tribes now negotiate ROWs directly with the energy company involved, while also

continuing to ratify agreements through the passage of tribal resolutions. The BIA retains an oversight role and the ultimate authority to approve or reject the ROW.

#### **4.4. Survey Results**

In addition to case studies, the Departments received information from the Interstate Natural Gas Association of America (INGAA) and the Edison Electric Institute (EEI) based on member surveys they voluntarily conducted. The surveys were conducted in the spring of 2006 and are described later in this report.

Although several of its members were not able to participate in the survey for reasons explained in section 9.5.2, INGAA compiled results on 20 energy ROWs on tribal land involving 15 different tribes in 11 States. INGAA reported that survey respondents reported paying compensation in excess of market value and that compensation included payments in addition to per rod costs. Several respondents reported that ROW negotiations took significantly longer than 2 years. In the instance of the INGAA survey report, the Departments note that of the seven survey respondents “few . . . were satisfied with the negotiations.”<sup>103</sup>

EEI gathered survey information on 20 energy ROWs. EEI reported that ROWs, on average, were renewed for shorter terms of years than the ROWs that preceded them, that compensation exceeded EEI’s projected values, and that the average ROW negotiation was about 2 years. Moreover, EEI reported that its survey respondents have a high level of dissatisfaction with the recent processes and outcomes of most of their right-of-way renewals.<sup>104</sup>

#### **4.5. Departmental Analysis**

A complete historical analysis of energy ROW compensation on tribal lands was not possible because of the number of energy ROWs on tribal lands and the diffuse locations of ROW records. Even if compiling a complete and detailed historical inventory of energy ROWs on tribal land was possible, an analysis of compensation rates might only have marginal benefit because of the significant differences among energy ROWs. Even when limited to electric transmission lines and natural gas and oil pipelines, these energy ROWs have been established pursuant to a variety of legal authorities. In addition, energy ROWs vary in their duration, size, renewal rights, and valuation methods.

Other factors that complicate an across-the-board analysis are the financial and environmental risks associated with specific energy ROWs, additional facilities built on or related to the energy ROWs, and land use. The impacts of the energy ROW on cultural resources and areas of significance can also affect energy ROW costs. Energy ROW compensation also differs on the basis of agreements about who is responsible for security and emergency responses and about whether the energy ROW involves tribal energy development or provision of energy services.

Undertaking a historical analysis of energy ROWs is also complicated by the fact that ROW data may be confidential business information, subject to confidentiality agreements in some cases. Energy companies also expressed concern that their participation in the study could negatively affect ongoing or future tribal relationships.

Similarly, the surveys represent information collected that is based upon proprietary information that was not made available in total to the Departments. However, the surveys reviewed by the Departments reflect the comments provided by industry groups that ROW negotiations are increasingly complex, take longer, and result in shorter ROW duration, which is a concern of industry.

As stated before, the Departments recognize that the case studies may not fully represent the context within which the energy ROWs discussed in this section were granted or renewed. In addition, the Departments recognize that because these case studies represent a very small subset of the entire data set of energy ROWs crossing tribal lands, the results cannot be statistically extrapolated to the entire suite of energy ROWs on tribal lands, and the discussion of the negotiation process cannot be generalized to that data set.

Nevertheless, the Departments do believe that the cases and surveys presented here illustrate the situation that all parties who were involved in this study testify is true: The nature of the process has evolved significantly over time into one in which tribes are more fully involved in bilateral negotiations with energy companies and in setting the terms and conditions under which energy ROWs are authorized.

#### **4.6. Departmental Findings**

In these case studies, in addition to using standard market valuation analysis as a base for compensation, some tribes have successfully negotiated for alternative forms of compensation, such as throughput charges or partial ownership of the lines. These examples demonstrate that mutually satisfactory outcomes are possible, although they do not necessarily reveal a standard recipe for success. However, the Departments also found that there are situations where energy ROW negotiations, although successfully concluded, were not mutually viewed as satisfactory.

THIS PAGE INTENTIONALLY LEFT BLANK

## **5. Standards and Procedures for Determining Compensation for Energy Rights-of-Way on Tribal Land**

In Section 1813, Congress asked the Departments to address the standards and procedures that may be used to determine ROW compensation. During the scoping, consultation, and comment processes, the Departments received a number of comments that recommended and discussed different valuation methods used in negotiations for energy ROWs on tribal lands and elsewhere.

### **5.1. Public and Tribal Comments**

Overall, most industry representatives contended that the valuation of tribal lands for energy ROWs should be based on market value principles.<sup>105</sup> Tribal representatives rejected industry's description of market value principles as inappropriate for tribal lands and set forth a different understanding of market value.<sup>106</sup> In addition, some energy companies commented that limiting energy ROW negotiations to market value would restrict creative arrangements that promote development of energy resources on tribal lands.

Industry stated that concerns about the impacts of energy ROWs on infrastructure reliability and consumer energy costs could be alleviated through use of an "objective, consistent, transparent, and uniform standard for valuing" energy ROWs on tribal land.<sup>107</sup> One trade association suggested that compensation on tribal lands should be based on objective assessments of the value of comparable nearby land, the nature of the land's existing use, and the location of the energy ROW.<sup>108</sup> An interest group suggested that market value would be an appropriate standard for valuing energy ROWs on tribal land, citing it as the nationally recognized standard for determining just compensation for interests in land required for the public good.<sup>109</sup>

The suggested standards are similar to those used in eminent domain proceedings when the Federal Government and other governments acquire land for public purposes. One utility company stated that when there is no eminent domain alternative, there are few, if any, limits to the amount of compensation that could be discussed in negotiations between tribes and utilities.<sup>110</sup> One interest group described market value principles in depth, noting that market value does not typically reflect the proposed use of the ROW or the value of the ROW to the acquiring government.<sup>111</sup> Industry frequently commented, however, that the current valuation of many energy ROWs on tribal lands far exceeds the market value of those lands and appears to include the added value of the energy development.<sup>112</sup>

Industry pointed out that market value is the standard within the Federal Government for valuing property generally. An interest group cited the prevalence of market value principles in regulations used by DOI and the USFS for determining land values for a variety of purposes, including energy ROWs.<sup>113</sup> This same group also referenced recent DOI Secretarial Orders and a departmental memorandum requiring the use of market value principles, with some exceptions, for all DOI appraisals.<sup>114</sup> Industry comments contained information that some recent right-of-way renewals resulted in fees that were 20 to 30 times historical payments.

Most industry representatives suggested that the use of market value principles for energy ROWs on tribal lands would increase certainty for existing and new energy infrastructures by providing

an objective standard for determining value.<sup>115</sup> The desire for an objective standard was particularly emphasized by industry in the case of energy ROW renewals.

Industry commented that, in renewal situations, energy companies have existing physical assets and investments on tribal lands, and some members of industry expressed concern that if there was no enforceable standard, an energy ROW negotiation would automatically escalate to a company's cost to build around the tribal lands containing the company's assets.<sup>116</sup> In such cases, they commented that build-around costs could include lost revenue streams, new construction, and new ROW fees. Industry also commented that it could be faced with selling its existing facilities on tribal land at a reduced value if energy ROWs were not renewed.<sup>117</sup> Industry stated that the threat of incurring build-around costs causes uncertainty about existing projects and discourages future investment in tribal lands.

Industry raised concerns that they can no longer rely on the assumption that they can continue to use existing rights-of-way across tribal land—or that they could obtain new rights-of-way across tribal land—at what they consider to be a reasonable fee.

Industry has also stated that that they may be required to pay one or more forms of taxation on tribal land, including a Possessory Interest Tax on facilities or the ROW; a Business Activity Tax; a License and Use Tax; or a Gross Receipts Tax in addition to ROW fees.

In one instance, a company provided information that the control over renewals exercised by a tribe amounted to a “unilateral demand.”<sup>118</sup> It was conveyed that the company was unable to successfully negotiate a ROW renewal with the tribe. As a result, the tribe informed the company it would not continue with negotiations but would seek to purchase the company's assets to the exclusion of any other alternative. Faced with this prospect, the company has entered into negotiations to sell the assets. However, the company has indicated that it would resist seizure by the tribe or a “fire sale” of its assets at prices below the company's expected value.<sup>119</sup>

Tribes observed that imposing any standard valuation method and mandating its acceptance would constitute an exercise of eminent domain that is not applicable to lands owned by the United States and reserved for tribal use. Tribes asserted that condemning tribal lands for private energy purposes violates the exclusive use provision of many treaties, the Federal Government's trust responsibility to the tribes, and the promise that tribal lands and tribal reservations will remain under the control and beneficial ownership of Indian tribes.<sup>120</sup>

Tribes rejected market value principles as being inappropriate and inapplicable to tribal lands. They noted that tribal lands are not bought and sold on open markets, so traditional land appraisal techniques are not applicable.<sup>121</sup> Furthermore, they pointed out that tribal lands are held in trust by the Federal Government and are protected against alienation through treaties and other agreements that recognize tribal sovereignty over tribal lands and Federal obligations to tribal property.<sup>122</sup>

Tribes commented that one of the most vital components of their tribal sovereignty is their authority to determine access to and use of tribal lands and resources.<sup>123</sup> They cited the history

of the Federal-tribal relationship, as set out in long-standing treaties, statutes, Supreme Court opinions, and Executive Orders, for confirmation of this authority.<sup>124</sup>

Citing the uniqueness of tribal lands and the governmental responsibilities of tribes, tribes supported maintaining the present negotiating process. Tribes stated that negotiation between a tribe and an energy company is the most appropriate basis for determining energy ROW valuation because a tribe, like other governments, has sovereign responsibilities and must appropriately manage its resources for the benefit of its people.<sup>125</sup> Tribes commented that a uniform valuation system could not account for all the differences among tribes, tribal governments, and tribal lands. For example, at least one tribe noted that its leasing authority was separately recognized by Congress and unique from the statutory and regulatory process used by most tribes to approve energy ROWs.<sup>126</sup> In contrast to the unique circumstances recognized in modern tribal policies, tribes stated that proposals for uniform valuation techniques were regressive and similar to discredited Federal Indian policies.<sup>127</sup>

Tribes also stated that tribal lands have value tied to tribal histories and oral traditions and the resources that may be used in tribal cultural practices. Tribal lands may contain the graves of ancestors or sites that are used in religious ceremonies. Tribal members may regard a particular place as significant simply because it is part of all they have left of their aboriginal territory, or because their ancestors fought and died to keep it.<sup>128</sup> The standard valuation methods used for nontribal lands cannot account for this factor, which is unique in that tribal lands are the only lands possessed by descendants of aboriginal people.

Several tribes indicated that valuation methods for tribal lands could be comparable to valuation methods used by municipalities because both entities have jurisdiction and responsibilities for providing services to members or citizens. As reported in a study prepared for one tribal party, cities such as Houston and Laredo in Texas and Atlanta in Georgia value their ROWs by linear foot.<sup>129</sup> The study also noted that franchise fees received from the use of public ROWs may represent a significant percentage of a city's general budget.<sup>130</sup> The valuation methods used by municipalities were reported to depend on the purpose of the ROW and whether the ROW could accommodate other uses.<sup>131</sup> Tribes further noted that energy ROW fees provide tribes with governmental revenue and that the inherent authority of tribes to tax activities on reservation lands can be complicated by the taxing authorities of neighboring jurisdictions.<sup>132</sup>

Tribes also rejected the application of any single standard for determining energy ROW compensation. They contended that a single standard could not be appropriately used to determine compensation, given the variety of energy ROWs and the variety of mineral, natural, cultural, and sensitive environmental resources under their jurisdiction.<sup>133</sup> Without the flexibility to address these different factors, tribes and some energy companies commented that a single valuation method based on a standard market valuation methodology would reduce the participation of tribes in energy partnerships and decrease the amount of energy production and transportation on tribal lands.

Finally, tribes commented that calls for energy ROW valuations done according to a standard market valuation methodology were disingenuous for several reasons. First, the tribes pointed out that when energy companies entered into existing ROW agreements, they knew that they

were limited-term agreements and that their renewal would require renegotiation.<sup>134</sup> Second, the tribes asserted that some energy ROWs were originally obtained for little or no compensation and that past compensation rates are relevant to the current study.<sup>135</sup> The tribes maintained that some members of industry are essentially complaining about a change in the business environment—a change that is not to their benefit.<sup>136</sup>

## 5.2. Departmental Analysis

Recent writings about the negotiation process say that ultimately, a successful negotiation result is not about outwitting or taking advantage of others. It is about arriving at a shared solution to a problem—a solution that benefits all parties involved. It is also about more than just getting the best possible price on the deal. The most effective negotiation will result in a mutually beneficial, enduring relationship in which the parties trust one another and share expectations about how their deals will work in practice as well as on paper.<sup>137</sup>

These statements are especially true with regard to agreements between a private company and a tribal government. Unlike an individual property owner, who may sell his or her land or whose descendants may not necessarily maintain an interest in the property at the end of the agreement's term, a tribal government, whose interests are the well being of its people in perpetuity, will maintain its interest well past the terms of the agreement. The tribe will then bring to the bargaining table its past history of negotiations with private industry.

Furthermore, the efforts of the parties in the negotiation to achieve a win-win solution are enhanced when there is more transparency in the process and less chance that the factors to be considered during the negotiation will change unexpectedly.

To arrive at what is agreed upon to be *fair and appropriate* compensation for an energy ROW, the interested parties, through negotiation, seek to resolve disputes, agree on courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes that serve their mutual interests. The outcome of the negotiating conference may be a compromise satisfactory to all sides, a standoff (failure to reach a satisfactory compromise), or a standoff with an agreement to try again at a later time. As can occur in any negotiation, considerable uncertainty can enter the process when the negotiation time is lengthened because of factors unrelated to the economic context of the situation.

In more general situations not involving tribal lands, market value principles derive from the constitutional concept of *just compensation* (i.e., what the Federal Government pays when acquiring private or State-owned property for public purposes by voluntary purchase, exchange, or eminent domain). The Federal Government also uses market value principles to determine compensation for the use of Federal lands. The market value that satisfies just compensation is defined by a number of court cases and summarized in the Federal Land Acquisition Standards as:

the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing

and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.<sup>138</sup>

These market value principles are supported by the Uniform Standards of Professional Appraisal Practices (USPAP) for general use in real estate transactions.<sup>139</sup>

Energy ROWs across tribal lands are acquired through an *arms-length* negotiation process with a tribe. Valuation methods used in these negotiations often use the Uniform Appraisal Standards for Federal Land Acquisition and USPAP. Typically, these methods involve case-by-case estimates of land value and are well known and well understood. Other methods involve, but are not limited to, the following:

- Methods used by municipalities,
- Methods used for public lands,
- Comparisons to sales of similar lands,
- Valuations of the land *over the fence* from the proposed ROW,
- Sharing of net benefits or other partnership arrangements,
- Costs of alternative routes,
- Opportunity cost,
- Percentage of energy throughput,
- Value of the land before and after the ROW, and
- Cost of government services.

For example, in the Federal land appraisal process, DOI establishes a market value for the land under consideration. The market value is the amount in cash (or terms reasonably equivalent to cash) for which, in reasonable probability, the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell. This market value gives due consideration to all available economic uses of the property at the time of appraisal. However, the highest and best use considered in the estimate must be an economic use. A noneconomic highest and best use (e.g., conservation, natural lands, preservation, or any use that requires the property to be withheld from economic production in perpetuity) is not a valid use upon which to estimate market value under these standards.

A key consideration in establishing market value is the highest and most profitable use for which the property is adaptable and needed (or likely to be needed) in the reasonably near future. Federal agencies must show that the land is both physically adaptable for such use and that there is a need or demand for such use in the near future. The proposed use for the ROW is not a consideration.

Note that the trust nature of the tribal lands under discussion here limits the number of comparable sales that would be appropriate for use in valuation in which standard techniques are applied.

However, there are various additional methods available for calculating *fair and appropriate* compensation. These include, but are not limited to, the following:

- a. The BLM compensation schedule sets a market rent for all ROWs, eliminating the need for real estate appraisals for each ROW as well as avoiding the costs, delays, and unpredictability of the appraisal process.

The BLM rental schedule defines fee zones by county in every State except Alaska. A county is assigned a *zone value* on the basis of land values in the county. Lower-value counties are assigned lower-numbered zone values. A county's zone value is translated into a per-acre *zone rent* (ZR) by use of the adjustment formula described below. To calculate the annual ROW rental payment, the ZR is multiplied by the total acreage within the ROW.

For example, BLM has determined that Duchesne and Uintah Counties in Utah fall into Zone 2 of the ROW rent schedule with a zone value of \$100 per acre. Wasatch County, also in Utah, falls into Zone 4, with a zone value of \$300 per acre. For 2006, the ZR for energy pipeline ROWs given these values is \$8.01 per acre in Duchesne and Uintah Counties and \$24.06 per acre in Wasatch County.

If this method were used for tribal lands, different values would have to be determined and applied.

- b. In the licensing of hydroelectric projects that occupy tribal lands, a sharing of the net benefits approach has commonly been used to determine the market value of the lands used. Part 1 of the FPA, Section 10(e), requires FERC to set a "reasonable" annual charge for the use of tribal lands by FERC licensed hydroelectric projects.<sup>140</sup> This charge is subject to the approval of the tribe whose land is used.<sup>141</sup> Section 10(e) does not require that FERC use any particular method to set the annual charge, and FERC's regulations allow it to make this determination on a case-by-case basis.<sup>142</sup> Although FERC has not established a preferred methodology, one of the methodologies that has been used in the past by FERC to determine annual charges is the *net benefits* approach.

The sharing of the net benefits approach compares the cost of generating power at a particular hydroelectric project with the cost of generating the same amount of power from the next-best alternative source, which is typically more expensive. The

difference equals the net benefit of generating the power from the hydroelectric project. These net benefits include the benefits obtained from using tribal lands to generate hydroelectricity by a particular project. While the net benefit may be shared in various ways, a common method is to multiply the net benefit by the percentage of Indian land used by the project to determine the portion of the net benefit that accrues to Indian lands.

FERC has used a variation of this approach, sharing the net benefit on a 50-50 basis between the project owner and the various landowners.

Whatever method is used to determine market value for land, it should represent the baseline value. A process for adjusting the value up or down could be specified. Reasons for adjustment could include these:

- a. An adjustment could be made for the tribal government to oversee safety, cultural, and environmental matters associated with the energy ROW. Calculations would be based on the costs to the tribal government for providing these services on tribal lands.
- b. Adjustment could be made for the tribal benefits that could be derived from an energy ROW, such as access to energy resources for tribal members or tribal businesses, improvements to roads or other infrastructure, and job and training opportunities.
- c. Adjustment could be made for the value associated with establishing an energy ROW across a large section of land in a single agreement, compared to a more piecemeal approach on nontribal land.

Indian tribes and energy companies may use any combination of these valuation methods, and others, in their negotiations for appropriate compensation for energy ROWs on tribal lands. This open negotiation process enables tribes to determine the terms for access to tribal lands and resources. In some cases, this negotiation process could lead to an agreed-upon amount for compensation that is more than the amount that would be calculated as market value when the valuation standards usually practiced on nontribal lands were used.

The Departments note that the negotiation and valuation process can also vary for the same type of energy transmission system, depending on if the transaction is for a new ROW, or if it is for a ROW related to a permit for renewal of existing facilities, or if the ROW is for new facilities on tribal land where there is no available route for a bypass, or if the ROW is for the renewal of facilities or for new facilities directly related to the production of energy resources on tribal land.

### **5.3. Departmental Findings**

The Departments find that negotiation between the interested parties is an appropriate method for determining compensation. During the primary terms of many of these energy ROWs, the self-governance of tribes has evolved. On the basis of existing treaties, laws, regulations, and Executive Orders, tribes have become more involved in the day-to-day decisionmaking and management of activities on tribal lands. This involvement includes decisions on renewing energy ROWs that may have been put into place three, four, or even five decades ago.

Over this time, the responsibilities of tribal governments have also evolved. Many tribes have developed government structures to manage the increased responsibilities assumed by the tribes, such as cultural resource management and the provision of health, safety, and environmental protections. Unlike private property owners along a particular ROW, sovereign tribes do not rely on local or State governments to oversee the health, safety, and environmental reviews, permits, and requirements associated with placing and monitoring energy facilities. The individual tribes must bear the responsibility and costs associated with carrying out such governmental functions.

In the past, the compensation for ROWs could reflect the valuation for *highest and best use*, because much of the management of Indian lands was being performed by the Federal Government. Today, however, many tribes must use their own governmental bodies to perform these tasks for the general well being of their members. But tribes, unlike Federal, local, and State governments, cannot always rely primarily on taxation to provide the fiscal support for these governmental bodies and must capture the associated costs of running tribal government from contracts and compacts with the Federal Government, ROW fees, and other economic development activities, such as resource development and gaming. ROW fees therefore are comparable to property tax rates on assessed real estate established by local governments to fund budgets to provide local services.

The Departments find that the parties themselves could enhance the negotiation processes and benefit from mutually agreed-upon practices, procedures, and actions that would improve the understanding of and collaboration among the parties. These include alternatives set out in the following subsection and which the parties could consider.

#### **5.3.1. Develop Comprehensive Rights-of-Way Inventories for Tribal Lands**

Individual tribes, energy companies, or other entities could develop inventories of energy ROWs on tribal lands. Tribal parties and industry parties alike commented that energy ROW negotiations frequently begin with a high degree of uncertainty about the existing situation. Moreover, it appears that even if parties have accurate information about the specific energy ROW under negotiation, the negotiations can be influenced by uncertainty regarding other energy ROWs on the tribe's lands.

Some tribes and companies have already taken steps to collect this information, but it appears from the amount of uncertainty present in negotiations that both parties need to prioritize the gathering of such basic information. Access to information of this type would facilitate better oversight, increase understanding of issues considered in ROW negotiations, and potentially

streamline future negotiations. Such information could also bring undocumented energy ROWs to light, help to avoid trespass situations, and reduce overall uncertainty in future energy ROW negotiations.

### **5.3.2. Develop Model or Standard Business Practices for Energy Rights-of-Way Transactions**

Indian tribes, energy companies, or other entities could develop model or standard business practices for general energy ROW negotiations and for recurrent energy ROW situations. Similar to the need for basic energy ROW information described above, there is a need for organized information about business practices for energy ROWs on tribal lands, the lack of which leads to uncertainty in negotiations. Developing model or standard business practices would help to normalize and guide negotiations. Even if parties decided to depart from standards or models for some reason, the foundation provided by such guides would help them negotiate their individual terms.

Again, some tribal and industry parties have taken steps to develop information along these lines. However, given the level of uncertainty still present in energy ROW negotiations, it appears that the development of model or standard business practices deserves greater priority. Model and standard business practices could be developed around specific energy ROW situations. For example, there are practical differences between negotiations for a new energy ROW and those for renewal or expansion of an existing energy ROW. Negotiations for new energy ROWs are made in the planning process of a project, when capital expenditures have not been made, whereas negotiations for renewed or expanded energy ROWs can be constrained by existing infrastructure investments, the service needs of existing energy markets, or the history of the energy ROW in question. While the statutory and regulatory context for negotiating a new, renewed, or expanded energy ROW is the same, models and standard business practices could reflect these practical differences.

Model and standard business practices could be developed to address the limited duration of most energy ROWs on tribal lands. They could include information on when negotiations will start, what the basis of the negotiations will be, and how disputes will be resolved. In addition, DOI could consider conditioning the approval of any new or renewed energy ROW, where approval is required, on the inclusion of this type of information in the agreement.

Model and standard business practices could be developed to address energy ROW durations that the parties consider to be of significant length. For longer duration energy ROW agreements, tribes and energy companies could include in their agreements methods for adjusting compensation over time, processes for resolving disputes, waivers for limiting tribal sovereign immunity, or the ability to renegotiate issues during the term of the ROW.

Model and standard business practices could be developed to recognize the potential for expanding an energy ROW. Recognizing the potential for energy ROW expansion at the beginning of negotiating an agreement could help parties select suitable transportation routes and provide certainty that any future issues would be addressed. Up front planning for the possibility of expansion could provide tribes and energy companies with a step-by-step guide for increasing partnerships around energy ROW development.

Finally, model or standard business practices for all types of energy ROW transactions could include developing dispute resolution, mediation, or arbitration tools suited for energy ROW issues.

### **5.3.3. Broaden the Scope of Energy Rights-of-Way Negotiations**

Another way to address the uncertainty and lack of shared objectives that tribes and energy companies may face in energy ROW negotiations is to recognize more explicitly the variety of concerns that may motivate each party. Depending on the tribe and company involved, negotiation techniques can be developed to address business and tribal concerns. For example, companies may be concerned not only with shareholder return but also with maintaining their standing in existing markets, increasing their market share, exploring for new resources, or diversifying resources. Similarly, tribes may have concerns beyond economic development. Tribes may be interested in comprehensive reservation development, increasing governmental oversight of energy ROW impacts, or protecting reservation resources.

The significance of implementing such negotiating practices can be seen by examining the tribes and companies that have developed successful relationships. The Departments found that energy ROW negotiations involved in these relationships did not get stalled over valuation issues. This appears to be true whether the relationship is a full energy development partnership or merely one between a ROW grantor and ROW user. Through partnerships, acceptance of alternative valuation methods, creative approaches to energy exploration, and recognition of the parties' various responsibilities, some tribes and energy companies have shown that it is possible to leverage their respective resources and objectives for their mutual benefit.

## **6. Issues Raised during the Study**

### **6.1. Increasing Costs of Energy Rights-of-Way and Costs to Consumers**

#### **6.1.1. Public and Tribal Comments**

Industry expressed concern that escalating energy ROW fees and negotiation costs will raise customers' energy costs. An energy company, noting that 70 percent of its natural gas comes from two major supply companies with infrastructure on tribal lands, indicated that its natural gas ratepayers could be negatively impacted by unreasonable energy ROW fees paid by interstate pipeline companies.<sup>143</sup> A trade association also contended that energy ROW renewals resulted in tens of millions of dollars in additional costs to its member utilities and their customers.

Industry also commented that consumer energy prices could increase because of increased negotiation costs with tribes, particularly if potential trespass damages were levied against utilities. A trade association commented that such trespass penalties could add hundreds of thousands of dollars, or even millions of dollars, in additional costs to the utility and its customers, but it provided no specific data or actual instances of such penalties.<sup>144</sup>

Several energy industry representatives indicated that the costs for energy ROWs on tribal lands, including administrative costs associated with longer negotiation periods, have tended to increase.<sup>145</sup> Industry expressed concern about the increasing cost of energy ROWs and the implications of those rising costs for energy companies and consumers, both today and in the future. In the public meetings, industry commented that electric utilities are facing upward cost pressure on multiple fronts. They noted that the cost of fuels, such as coal and natural gas, has risen substantially in recent years for utilities. They also noted that the cost of siting, operating, and maintaining generation, transmission, and distribution facilities has gone up, particularly in areas of the country where the need for new facilities is straining available resources. Finally, they commented that environmental costs are also increasing, as Federal and State governments demand additional reductions in emissions. In such a setting, industry asserts that each and every cost needs to be kept at a reasonable level.<sup>146</sup>

For example, as noted earlier, EEI and INGAA conducted member surveys and provided case studies that included data showing increased fees for energy ROW renewals.<sup>147</sup> Industry was particularly concerned about the increasing costs of energy ROW renewals, as opposed to grants or expansions, because of existing investments in facilities on tribal lands and potential obstacles to abandoning or moving an energy ROW.<sup>148</sup> Furthermore, in public meetings, industry asserted that hundreds of ROW renewals will need to be negotiated over the next 10 to 15 years.

Based on the information collected by INGAA, survey respondents indicated they were paying ROW compensation in excess of what they considered fair market value. In addition, the respondents indicated that terms for ROWs had decreased to an average of 20 years.

Acknowledging cost increases over historic levels, tribal parties commented that increases in energy ROW fees reflected historically low energy ROW valuations, increased tribal

involvement in ensuring an economic return for the use of tribal lands, benefits from obtaining a ROW across large tracts of land from a tribal single owner, and increased tribal government costs while Federal economic support has been decreasing.<sup>149</sup> With regard to the governing capacity required, one tribe commented that ROW activities “demand a high level of personnel, time, attention and use of the Tribe’s governmental funds” such that they employ “94 personnel positions” dedicated to various aspects of ROW management.<sup>150</sup>

Tribes also commented that costs on private lands cannot be accurately compared to costs on tribal lands because there is no market for tribal lands to appropriately define cost parameters. One tribe said, “Unlike private lands, Tribal trust land can’t be sold. [Also, unlike] private landowners, Tribes provide essential governmental services to people.”<sup>151</sup>

Tribes also asserted that rising energy costs are not the result of increases in energy ROW fees across tribal lands. Studies were commissioned by three tribes to measure the consumer cost of energy ROW fees across tribal lands.

An energy analyst who used the Altos North American Regional Gas model found that energy ROW costs on tribal lands would have no impact on downstream markets. The analyst stated that energy ROW charges on pipelines traversing tribal lands in the Southwestern United States would induce a volumetric tariff difference of \$0.02/mcf (thousand cubic feet) for all pipelines emanating from or traversing the greater San Juan/Four Corners area and have zero discernible effect on market prices.<sup>152</sup> The analyst concluded that the tribal energy ROW costs are such a small part of the overall energy market that they could not have an impact on downstream markets at all.<sup>153</sup>

A second tribally commissioned study that used published reports on the Navajo Nation’s proposed ROW fee for the EPNG network determined that the potential impacts on downstream consumers in Arizona, California, and Nevada would cost the average residential user between \$0.40 and \$0.60 per year if the ROW fee was spread over EPNG’s total pipeline system. The cost per user would be between \$0.58 and \$0.85 per year if the Navajo Nation’s ROW cost was passed directly to the consumers in these downstream States.<sup>154</sup>

A third tribally commissioned study sought to determine what percentage of a consumer’s bill is attributable to energy ROW costs for electric transmission lines and natural gas pipelines on tribal lands. The study first determined the percentage of energy costs that are attributable to ROW fees generally, and then estimated the portion of these costs attributable to ROWs on tribal lands. The study concluded that for the average homeowner, tribal ROW costs amounted to between \$0.01 and \$0.06 per month for electricity on monthly bills that averaged between \$50 and \$200, and between \$0.001 and \$0.016 per month for natural gas on monthly bills averaging \$47.<sup>155</sup> In addition, this tribe further quantified the impacts of the throughput fee it charges for the use of a ROW on its land; it found that at \$0.05/mcf, the throughput fee was a small fraction of the delivered gas in California (\$13.27/mcf) and Utah (\$11.75/mcf) during August 2006, with the fee equivalent to 0.4 percent of the delivered natural gas price to Utah consumers.<sup>156</sup>

However, an economic analysis of energy ROW compensation presented by an interest group indicated that if the residential customers of one gas and electric utility in New Mexico would

fully bear the cost increases associated with about 95 energy ROW renewals over the next 15 years, those customers' electric rates could increase as much as 5 percent (\$5 for every \$100 portion of a bill).<sup>157</sup> As explained in the analysis, this estimate depends on the utility that is seeking and being approved for *rate recovery* and is based on the assumption that all 95 energy ROWs will be renewed at a value reported in the Navajo Nation and EPNG's ongoing energy ROW negotiations. This estimate does not account for valuation differences in negotiations concerning energy distribution ROWs and energy ROWs that do not provide local service.

One tribe sought to gauge energy companies' perceptions of the business risks related to interactions with tribes by reviewing Security and Exchange Commission (SEC) filings and the notations of risk in those filings.<sup>158</sup> The tribe found that in most years, all of the 18 Western energy companies studied from 2001 to 2005 described challenges associated with energy infrastructure construction and/or operation. However, it also found that over the 5-year period, only three companies characterized the negotiation or renegotiation of tribal ROWs as a material concern in annual reports to the SEC.

### **6.1.2. Departmental Analysis**

The Chairman of FERC recently testified before Congress that transportation costs for natural gas and crude oil petroleum products are relatively small: The transportation component for natural gas is about 6 percent of its delivered cost and about 1 percent of the delivered cost for petroleum products.<sup>159</sup> The cost of electric transmission is also a small portion of a consumers' electric bill. In 2006, the EIA found that transmission costs for electricity are in a range of about 10 percent of total delivered electricity costs.<sup>160</sup>

These Federal Government statistics are in keeping with data from the energy industry. Testifying at the same hearing as the FERC Chairman, Williams Pipeline Company testified that pipeline transportation and storage "is the smallest part of the cost of natural gas delivered to residential and commercial customers—typically about 10 percent of the total retail cost of natural gas."<sup>161</sup> In addition, consistent with these consumer statistics, a report prepared for EEI entitled *Why Are Electricity Prices Increasing?* found that transmission and distribution costs accounted for about 4 percent of an electric utility's operational costs and 8 percent of its maintenance costs, and that these costs remained relatively flat from 2002 to 2005.<sup>162</sup>

Although some commenters indicated that some tribes require compensation for energy ROWs on their lands in excess of the lands' *market value* for other purposes, the effects do not appear to be large enough to have a significant impact on overall energy transportation costs and the total cost of delivered energy paid by consumers.

These first two results are supported by a review of filings with FERC requesting increases in the oil, natural gas, or electric rates that a FERC-regulated utility can charge consumers. Typically, if a regulated utility incurs a prudent cost, then that cost is generally passed on to customers. However, a survey of hundreds of rate increase cases that were protested or set for trial over the last 5 years, and discussions with FERC trial staff, revealed only three instances for which tribal ROW costs were cited in the case as a reason for requesting a rate increase. One of these cases is still pending.<sup>163</sup> The remaining two cases resulted in some rate increases, but the (a) tribal ROW fees were not always or not entirely passed on to consumers, (b) increases involved nontribal

factors, and (c) overall rate increase was not deemed to be significant by the parties or FERC. In one of these cases, the tribal energy ROW fees are considered a regulatory asset that will be depreciated,<sup>164</sup> and in the other case, the tribal ROW fees were not fully passed on to consumers or directly raised by the company filing for the rate increase.<sup>165</sup> Although these are complicated matters, these cases provide examples that fees for ROWs on tribal lands do not always result in increases in overall costs to consumers. Moreover, the lack of rate case filings that cite to fees for ROWs on tribal lands supports the Departments' analysis that energy ROWs on tribal lands represent a very small portion of energy costs and infrastructure.

There is no evidence to date that any of the difficulties associated with ROW negotiations have led to adverse impacts on the reliability or security of energy supplies to consumers. Information has been provided that indicates there are increased costs to companies and consumers and other consequences associated with some of the recent protracted negotiations for energy ROWs across tribal land. However, the conditions cited above concerning the relatively small economic impacts of existing or potential disputes over energy ROWs on tribal lands also imply that, except in unusual geographic circumstances, the effects of any future potential ROW disputes on the reliability or security of energy supplies to consumers are also likely to be small.

### **6.1.3. Departmental Findings**

As a result of our analysis, the Departments have found that (a) total energy transportation costs are a small component of overall consumer energy costs; (b) in general, a relatively small percentage of the energy transportation infrastructure is on tribal lands; and (c) as of now, no difficulties associated with ROW negotiations have led to security or reliability impacts that affect consumer cost.

## **6.2. Decreasing Energy Rights-of-Way Term of Years and Increasing Negotiation Periods**

### **6.2.1. Public and Tribal Comments**

Industry generally noted that the term of years for energy ROWs is decreasing and that the negotiation times are increasing. Industry parties pointed out that shorter energy ROW terms and longer negotiation periods increase the ROW-related administrative costs to both industry and tribes. Some from industry voiced concern that in cases where there is a transition in a tribe's leadership, the lack of a consistently applied valuation methodology and negotiation process can also result in prolonged or delayed ROW negotiations. Industry also commented that these factors, either individually or taken together, "add to the uncertainty which utilities must consider in their investment and planning processes."<sup>166</sup> This uncertainty is cited as a growing concern by industry, especially when the expected increase in the number of ROW negotiations in the next decade is taken into account.

Tribes also commented on the length of negotiations. One tribe observed that negotiations took from 6 months to 8 years, but that most of the time, the parties worked in good faith to resolve their differences. Tribes noted that each energy ROW over tribal lands has unique characteristics that can affect negotiation times. Some factors that may increase or decrease negotiation times, include these:

- Length of the ROW and diversity or continuity of the affected land area or land owners,
- Impacts on lands of cultural or religious significance,
- Impacts on agricultural lands,
- Provision of utility services to reservation residents and access to tribal natural resources,
- Number of individual landowners affected, and
- Requirements associated with an environmental assessment.<sup>167</sup>

It was also conveyed to the Departments that some companies (particularly those that entered into business partnerships with Indian tribes) found that energy ROW agreements on tribal lands are completed more efficiently than agreements with other nontribal land owners.

### **6.2.2. Departmental Analysis**

As presented by both industry and tribal parties, there is an indication that negotiations are taking longer and that the term of the agreement is shorter. This situation may be due to a number of factors, including the complexity of modern negotiations, the fact that many tribes are assuming additional self-determination and self-governance responsibilities and have become more engaged in managing tribal business opportunities, and the Federal Government’s approval processes.

### **6.2.3. Departmental Findings**

Where it occurs, longer times taken for successful negotiations and the shorter terms for ROWs affect the costs to both industry and the tribes, with the potential for increasing overall costs. The Departments find that when comprehensive information about energy ROWs on tribal lands is developed, parties can enter into negotiations on a stronger footing, and negotiation periods can be shortened.

## **6.3. Uncertainty in Energy Rights-of-Way Negotiations**

### **6.3.1. Public and Tribal Comments**

Some in industry commented that the exercise of tribal sovereignty through tribal consent to energy ROWs—combined with a lack of uniform and measurable standard for valuing ROWs—create a high degree of uncertainty with regard to the Nation’s energy infrastructure and the consumers’ energy costs.<sup>168</sup> One energy company commented that “the long-term security of these [transmission] lines must be more definitively guaranteed to protect the reliability and availability of the national power grid.”<sup>169</sup> A trade association noted that as a result of uncertainty, “necessary infrastructure may not be built.”<sup>170</sup>

Although in some cases tribes have opted to use a market valuation method, tribal parties and some energy companies commented that changes to tribal sovereignty and tribes' ability to consent to energy ROWs through imposition of a standard valuation method for all cases would result in uncertainty about a tribe's ability to exercise self-determination and manage its own energy resources.

Some from industry expressed concern about the possibility that energy ROW agreements could expire, leaving energy facilities in trespass. A trade association raised the concern that members found in trespass could have access to their facilities curtailed or blocked, thereby limiting their ability to use and maintain lines and other facilities.<sup>171</sup> This trade association also stated, however, that the Administrative Procedure Act and three Federal court rulings protect a timely ROW renewal applicant from actual trespass.<sup>172</sup>

Tribes stated that industry parties pointed to no specific instances in which the statutory and regulatory requirements for tribal consent or delays in energy ROW renewals resulted in disruptions to energy delivery or threatened the reliability of the system.<sup>173</sup> Tribes noted that they have never evicted an energy company with an expired ROW or required a company to remove its energy infrastructure from tribal lands. They commented that the tribes should instead be fully compensated for trespass situations. Many tribes also commented that they viewed trespass situations as a time to create opportunities for improved long-term business relationships.<sup>174</sup>

### **6.3.2. Departmental Analysis**

The fundamental issue is related to the negotiating climate, which is often marked by uncertainty and lack of shared objectives—not to the valuation of a particular energy ROW. Indeed, in response to the draft report, at least one industry representative commented that uncertainty (not cost increases) was the primary concern.<sup>175</sup> The Departments find that uncertainties abound in the energy ROW negotiation process when:

- Energy ROWs with limited terms require renewal, but past valuation methods are unclear, are undocumented, or were developed with little tribal involvement;
- Information about the energy ROW in question is limited;
- New valuation methods lack transparency;
- The parties have widely differing cultural values;
- The parties do not have comparable resources to commit to the negotiations;
- Either party considers the existing relationship to have been unproductive; or
- The parties lack shared goals for the future of an energy ROW.

The significance of these factors (when compared with using some predetermined valuation method) is made clear by the comments of some energy companies. They stated that they had no problems in using the current process for obtaining an energy ROW on tribal lands when the ROWs did not cross State lines. Energy companies that built productive relationships and partnerships with tribes commented that they found the tribes to be fair negotiators for energy ROW valuation on tribal lands.<sup>176</sup>

The Departments also note that uncertainty occurs at all levels within the energy industry and is not primarily caused by negotiations with Indian tribes. Two reports published in June 2006 (*Why Are Electricity Prices Increasing?*<sup>177</sup> and *Siting Critical Energy Infrastructure*)<sup>178</sup> stress that uncertainty over energy ROWs stems from increased costs throughout the energy industry, needed infrastructure investments, and siting challenges at all levels of government and public involvement. These recent reports do not mention energy ROW negotiations with Indian tribes as a source of uncertainty. Moreover, despite the forward-looking nature of these reports, the cost of energy ROWs on tribal lands is also not mentioned as an upcoming or later future issue.

*Why are Electricity Prices Increasing?* finds that “[f]uel and purchased power expense growth essentially explains all of the 22% increase in utilities expenses from 2002 to 2005.”<sup>179</sup> Over this period, the report notes that fuel and purchased power increased from 66 percent to 71 percent of all operation and maintenance (O&M) costs, while transmission and distribution costs were essentially flat and represented a small percentage of O&M costs.<sup>180</sup>

*Why Are Electricity Prices Increasing?* also discusses challenges associated with upgrading an aging transmission system. The report states that the “power delivery system is characterized by an aging infrastructure and largely reflects technology developed in the 1950’s or earlier.”<sup>181</sup> It notes that the strain on the system is beginning to show and that utilities have plans to reverse a 25-year-old trend of declining investments in transmission infrastructure.<sup>182</sup> The report also notes that costs can be imposed by local governments. In discussing the electric industry’s plans to upgrade distribution networks, the report indicates that local government requirements related to aesthetics and local land use could increase costs. In particular, the report notes that requirements to put existing distribution lines underground would impose a cost of about \$1 million per mile, which is a fivefold to tenfold increase over the cost of a new overhead power line.<sup>183</sup>

Siting challenges are discussed at length in *Siting Critical Energy Infrastructure*. The report states that large transmission projects must demonstrate (typically to State public utility commissions) that a new transmission line is the best option for addressing electricity reliability and is also the most economic solution.<sup>184</sup> Transmission lines must also comply with environmental reviews and address competing land uses.<sup>185</sup> The report finally notes that concerns about private property and property values must also be addressed.<sup>186</sup> To effectively overcome these uncertainties, the report suggests that “high-capacity interstate transmission projects should be designed to provide local benefits that can help justify their value to local constituencies.”<sup>187</sup>

### **6.3.3. Departmental Findings**

When uncertainty becomes a factor, negotiations can take longer, the parties may feel constrained by prior practices that limit creative business solutions, or the parties may lack the common ground needed to explore potential solutions. Nevertheless, the Departments note that despite these uncertainties, the vast majority of energy ROW negotiations are completed and contain mutually agreed-upon terms and conditions. This is true even if the negotiations are protracted and the method for determining the value of the energy ROW results in compensation that greatly exceeds what is perceived to be the market value of the tribal lands involved.

## **6.4. Risk to Investments in Infrastructure**

### **6.4.1. Public and Tribal Comments**

Industry commented that financial institutions and rating agencies could view a pattern of shorter energy ROW terms, longer negotiation periods, and escalating energy ROW rates as a source of risk to the industry. The perception of such a risk by financial institutions could “adversely affect the cost of the capital needed to build new generation and transmission infrastructure.”<sup>188</sup> Moreover, industry noted that excessive energy ROW fees and other access costs associated with tribal lands generally discourage the expansion of, and investment in, the facilities on those lands, thereby reducing tribal opportunities for job creation and development.<sup>189</sup>

Some in industry stated that the difficulties that companies have in renewing ROWs on tribal lands are leading them to make proactive decisions to bypass tribal land, and that the failure to adopt a reasonable process for ROW renewals will only increase the energy isolation of Indian country, discourage job creation and investment, and postpone the long-overdue economic development and national economic participation of Indian tribes.<sup>190</sup>

One industry representative noted, however, that risks in the energy industry were widespread and could come from financial markets and national and international policies in addition to fluctuating prices, supply, and demand, all of which contribute to the volatile nature of the industry.<sup>191</sup> Another energy company also noted that the Section 1813 study itself, and concern about changes in the law, create uncertainty with regard to developing energy resources on tribal lands.<sup>192</sup>

Tribes generally commented that energy production and the number of energy ROWs granted on tribal lands are increasing over or consistent with earlier levels and do not reflect a reduction in investment. One tribe presented data on the number of natural gas pipeline and electric transmission ROWs granted on its lands since 1980 to illustrate that the granting of energy ROWs continued at earlier rates or grew with some fluctuation, depending on economic cycles.<sup>193</sup> Another tribe commented that over the last 20 years, it has successfully concluded negotiations for grants or renewals of interstate pipelines with a number of major pipeline companies.<sup>194</sup>

Tribes also noted that innovative energy ROW agreements have led to expansion of energy investment and resources on their reservations. In one case, such agreements added about 1.7 trillion cubic feet to the Nation’s supply of natural gas.<sup>195</sup>

## **6.4.2. Departmental Analysis**

Because energy transport companies must make ROW siting decisions that are in their (and their shareholders') best interest, they may decide to *build around* a reservation. The result is probably more economic cost to the company, lost opportunity costs to the tribe, and possibly less access to energy resources.

## **6.4.3. Departmental Findings**

Most tribes need additional revenue sources and have reasons to seek economic development opportunities, including productive relationships with energy companies. Energy companies want to develop cost-effective options for transporting energy resources across the country. To date, these mutual interests have allowed energy ROWs to be developed across Indian lands without disrupting energy resources or imposing undue costs on the consumer. However, a reasonable certainty in the current and future negotiation process is needed to assure that these mutual benefits can be obtained and to minimize the risk associated with infrastructure investment.

## **6.5. Differences among Grants, Expansions, and Renewals of Rights-of-Way**

### **6.5.1. Public Comments**

Some in industry raised concerns that the negotiation process differs depending on whether the energy ROW under consideration is for a new facility or for an expansion or renewal of existing facilities on tribal land.

Industry contends that “where new, non-geographically constrained facilities would be sited on tribal lands, either party can walk away from the transaction if the terms are not mutually acceptable. However, where the only practical or possible route for a new facility is across tribal land or where the term of an existing facility is being renewed, there is little constraint on what a tribe can demand for that renewal.”<sup>196</sup> Furthermore, industry states that a build-around option is an unlikely and expensive scenario for companies that have already “invested hundreds of millions, if not billions, of dollars on existing infrastructure located on tribal lands.”<sup>197</sup> Industry also states that if Congress provided a backstop mechanism (in the form of eminent domain authority to be exercised by a Federal authority), “there would be an increased incentive for tribes to negotiate energy rights-of-way renewals for terms and conditions that more accurately reflect the current market situations.”<sup>198</sup>

Further, industry stated that the issue is one that will most likely become increasingly contentious in the future because, according to their information, about 90 percent of the outstanding renewals for companies have not yet occurred.

In comments made at public meetings, tribes contend that company investments in already installed infrastructure (in the case of a renewal) have largely depreciated and that companies are seeking to obtain value in negotiations for something for which they have already realized a benefit. In addition, one tribe noted that renewals of energy ROWs on tribal lands are “no different than other types of contract renewals that [the members of the energy industry]

routinely face in other settings when they come to the end of a contract and which require forward analysis of investment options and cost alternatives that ignore sunk cost and consider the renewals in the context of current market conditions.”<sup>199</sup>

Industry asserts that most interstate natural gas pipelines still have a large amount of undepreciated investment, and they point to the annual reports filed by each pipeline with FERC. These commenters state that in general, most pipelines (including older pipeline systems) have not been fully depreciated because (a) they are continually investing in new infrastructure and (b) FERC typically requires a pipeline to depreciate its facilities in accordance with the expected life of the natural gas reserves attached to its pipeline system, which often is a period of 30 to 40 years or more for major onshore pipelines.<sup>200</sup>

Tribes further state that industry entered into these contracts knowing that they had finite terms and would have to be renegotiated at a later date. Industry should not have expected that the same terms and conditions that were settled on decades before would continue without significant modification to account for present day conditions and tribal funding needs.

### **6.5.2. Departmental Analysis**

The Departments verified with FERC that most companies continually reinvest in their pipeline systems in many ways, such as by upgrading systems to enhance production capacity or increase safety or simply by conducting routine maintenance on aging equipment. In many cases, a pipeline system that was permitted 20 years ago may still have hundreds of millions of dollars in undepreciated investment. It would thus be a daunting proposition for a company to decide whether to sell or abandon a pipeline that was not fully depreciated.

However, these contracts were entered into with the full knowledge that they were for a fixed term and that the company would have to enter into a renewal negotiation at some time in the future. Companies that made additional infrastructure investments should have been fully aware that they would be faced with this situation. At the same time, they could have included clauses in these older contracts to deal with this situation or they could have asked to renew the ROW contract before making any additional investment.

The Departments do recognize that the negotiation posture of tribes vis-à-vis the Government has changed over time, so that the governmental role has increasingly evolved from direct involvement in the negotiation to the review and approval or disapproval of terms arrived at by direct interaction between tribes and the energy industry. However, tribal sovereignty is a known and familiar part of the business landscape in parts of the United States and should be recognized in any prudent business practice, especially over the last 25 years. Companies cannot expect that terms of contracts would remain static over time or would remain the same for contract renewals.

### **6.5.3. Departmental Findings**

Companies continue to make significant investments in energy transmission systems over time. In many cases, they still have significant undepreciated investments in infrastructure when the renewal of an energy ROW is due. However, this situation is a result of a full and open prior

contract negotiation that the company should have anticipated when it entered into the initial contract and for which it should have made subsequent, additional investments.

THIS PAGE INTENTIONALLY LEFT BLANK

## **7. Congressional Approaches to Address the Issue**

Under existing laws and regulations, difficulties in negotiations for energy ROWs across tribal lands can arise that are sometimes very significant to the parties and may relate to the trust relationship between the Federal Government and Indian tribes. As noted in Section 3.3 it is Congress, as Trust Settlor, who ultimately defines the nature and extent of the responsibilities of the Executive Branch as the Trustee Delegate. With that perspective in mind, the Departments determined a range of approaches (listed here) that Congress could consider if it concludes that a particular impasse merits a legislative solution. This report offers approaches that range from no Federal intervention to major changes to the long-standing relationship between the tribes and the Federal Government concerning tribal sovereignty and the Federal policy of tribal self-determination.

Because of the fiscal and time constraints on this study, the Departments did not conduct an individual benefit-cost analysis for each approach. Should Congress choose to consider any of these approaches, the Departments recommend that before any option is enacted, the first step be a benefit-cost analysis of the selected option(s) by an independent entity to determine that the overall benefits exceed the projected costs.

### **7.1. No Action**

Under the no action approach, Congress would elect no change, allowing ROW negotiations to continue under current laws, regulations, practices, and procedures. To date, many comments from tribal parties and energy companies indicate that current policies for granting and renewing energy ROWs are generally working. This approach would continue the present practice, which allows tribes and energy companies to use their own methods for valuing a ROW and to conduct negotiations on their own terms.

### **7.2. Congress Would Establish a Legislative Mandate for Tribal Consent**

As described in Section 3.2.1, there is an existing statute that requires the consent of only those tribes organized under the Indian Reorganization Act and the Oklahoma Indian Welfare Act before an energy ROW can be authorized on tribal lands. Since 1951, there has also been a DOI regulation in effect that is applicable to all tribes and requires the consent of a tribe before an energy ROW can be authorized. Congress could emphasize the importance of the concept of tribal consent for energy ROWs by enacting a new statute applicable to all tribes that would require that the tribe's consent be obtained as a condition to the authorization of an energy ROW.

### **7.3. Congress Could Choose a Valuation Methodology or Authorize the U.S. Government to Determine *Fair and Appropriate* Compensation**

Under this approach, Congress could either choose from one of the valuation methodologies suggested in Section 5.2 or direct the Executive Branch to establish a Federal entity to determine *fair and appropriate* compensation for *all* energy ROWs across tribal land. This entity, rather than Congress, would be responsible for developing a valuation methodology (and the attendant regulations) to calculate just compensation for the use of the land. However, each party (tribes or industry) would reserve the right to accept or reject the calculated value.

#### **7.4. Congress Could Require Binding Valuation**

Congress could modify the current process for energy ROW agreements by establishing binding procedures to resolve any impasse that might result in negotiations. Such binding procedures could require the parties to:

1. Enter into binding arbitration conducted by a mutually approved third party. The third party's decision would not be subject to appeal. Either party could petition to invoke this procedure.
2. Enter into binding arbitration conducted by a third party selected by Congress. The arbiter's decision would not be subject to administrative appeal. Either party could petition to invoke this procedure.
3. Accept just compensation as determined by a Federal entity by using one of the strategies outlined in Section 5.2.

#### **7.5. Congress Could Authorize Condemnation of Tribal Lands for Public Necessity on a Case-by-Case Basis**

A condemnation proceeding involves the exercise of eminent domain by the government. It is a taking of land against the will of its owner, and it requires a judicial proceeding in which a public purpose or necessity is established and just compensation is awarded to the land owner.

The U.S. Supreme Court has consistently affirmed that the U.S. Constitution vests Congress with plenary power over Indian affairs.<sup>201</sup> As recognized *supra* in Section 3.2.1, Congress has exercised this power in a variety of circumstances in the past to achieve various goals, including energy ROWs for transportation projects.<sup>202</sup> Consistent with this practice, Congress would be able, if it so chose, to remedy a threatened or actual energy supply interruption arising out of an energy ROW negotiation through a grant of condemnation or eminent domain authority. However, in recognition of tribal sovereignty and the United States' trust responsibility under existing treaties with Indian tribes, legislation granting such authority has been clear in expressing the intent of Congress to do so.<sup>203</sup>

## 8. Recommendation of the Departments

### 8.1. Departmental Observations

The principal observations from the Departments' analysis are as follows:

1. The current policy is to rely on negotiations between Indian tribes and energy companies to arrive at terms for the grant, expansion, or renewal of energy rights-of-way on tribal land. This is in keeping with long-standing Federal policies against the alienation of tribal lands without tribal consent and support for tribal self-determination.
2. Current methods of valuing energy rights-of-way—through negotiations between tribes and energy companies—are guided by and in keeping with existing Federal tribal and energy policies. In addition, recent energy legislation (EPAAct 2005) supports greater independence and control by tribes over their tribal land and resources.
3. The issues concerning energy rights-of-way on tribal lands are most acute with regard to negotiations for renewals. Recently, some renewal negotiations have become more protracted, and the fees paid to the tribes for the use of their lands have risen (except for some exceptions). However, fees paid to Indian tribes for the grant, expansion, or renewal of energy rights-of-way on tribal lands are a small component of overall consumer costs for electricity or natural gas.
4. Negotiations between Indian tribes and energy companies for the grant, expansion, or renewal of energy rights-of-way across tribal lands have had no demonstrable effect on energy costs for consumers, energy reliability, or energy supplies to date. Therefore, broad changes to the current Federal policy of self-determination and self-governance for tribes—or the existing right of consent—are not warranted at this time.
5. It is possible that future unresolved conflicts over energy rights-of-way across tribal land may have a significant regional or national effect on the availability, reliability, or consumer costs of energy resources. Failure to secure tribal consent for the siting of an energy right-of-way on tribal lands, especially in geographically constrained areas, could result in a heightened regional or national energy concern. In such circumstances, the U.S. Constitution empowers Congress to strike a balance between tribal sovereignty and the greater national interest. In some cases, this may mean that the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty.
6. Increasing rights-of-way costs to energy transmission companies may also have a detrimental effect on some tribes. Decreasing term durations, increasing costs, and future uncertainty may make rights-of-way across tribal land less desirable for many companies. This is particularly likely if companies also face the uncertainty of a right-of-way renewal in 20 or 25 years, with tribes holding virtual veto power over the

renewal. If companies choose to build around tribal land where they can, tribes run the risk of losing economic opportunities and possible interconnects to energy transmission facilities.

7. In most cases, initial rights-of-way agreements are term contracts, and no guarantee or indication of renewal was given by the tribes or the Federal Government. Therefore, any renewals represent, in essence, new contracts.

## **8.2. Recommendation: Status Quo with Congressional Case-by-Case Intervention**

The comments received by the Departments demonstrated that the grant, expansion, or renewal of energy rights-of-way on tribal lands involve fundamental issues related to tribal sovereignty, tribal self-determination, energy policy, and the ongoing business activities of many energy companies.

The Departments critically reviewed the information gathered and assessed the implications with regard to tribal sovereignty; Federal policies concerning tribal lands; tribal self-determination; national energy transportation policies as they relate to tribal lands; methods of valuing energy rights-of-way on tribal lands; and the impacts of establishing the value of such rights-of-way through negotiations between an affected tribe and an energy company seeking to grant, expand, or renew the terms for a right-of-way.

Accordingly, the Departments recommend the following:

1. Valuation of energy rights-of-way on tribal lands should continue to be based on terms negotiated between the parties.
2. If the failure of negotiations involving the grant, expansion, or renewal of an energy right-of-way has a significant effect on the regional or national supply, price, or reliability of energy resources, the Departments recommend that Congress consider resolving such situations on a case-by-case basis through legislation targeted at the specific impasse, rather than making broader changes that would affect tribal sovereignty or self-determination generally.

## **9. Summaries of Case Studies, Surveys, and Other Information Collected**

As noted in Section 4, four tribes responded to the Departments' request for case study volunteers, and a contractor, HRA, was brought in to develop the case study reports. HRA historians, accompanied by DOI personnel, visited each reservation included in the study and examined tribal and BIA records pertaining to energy ROWs. Information on the ROWs located on Southern Ute and Navajo Nation Tribal land was supplemented with documents from the files of El Paso Western Pipelines in Colorado Springs, Colorado. HRA complied with all requests for confidentiality of information. The following are summaries of HRA's case studies. Several commenters on the August 2006 and December 2006 draft versions of the Section 1813 report provided details that expanded the information in the HRA case studies. Those details are included in the summaries below and are so noted.

EEI and INGAA volunteered to survey their members for information on energy ROWs on tribal land. To the extent permitted by the availability of documents, the Departments compared the submitted surveys to the source documents that the energy companies had used to complete their surveys. Through this process, the Departments were able to verify that the data submitted by energy companies were accurately reported in the survey reports issued by EEI and INGAA. Section 9.5 contains summaries of those survey reports and explains which information from them was verified or not verified in this manner.

In addition to the HRA case studies, several tribes and utilities provided information on their experiences with energy ROWs. Several of those submissions are summarized in Section 9.6. Because of time limitations, the only case study presented in Section 9.6 that was verified against source documents is the Bonneville Power Administration submission. Other individual submissions were not subject to any verification process by the Departments or HRA, and the information is so noted.

### **9.1. Ute Indian Tribe of the Uintah and Ouray Reservation**

The Ute Indian Tribe of the Uintah and Ouray Reservation (Northern Ute) is located in the Uintah Basin of northeast Utah. The Northern Ute Reservation now covers more than 4 million acres. The Reservation includes high mountain desert and vegetated mountain ranges. It spans several oil and gas fields.

The Northern Ute received its first oil royalties in 1949. The Northern Ute functioned in the 1960s as an approver of ROW fees that were negotiated by the BIA. It assumed a more active role in negotiating ROW compensation in the following decades. By 2005, the Northern Ute established its own energy company, Ute Energy, to develop tribal oil and gas resources. As illustrated in the following examples, ROW compensation increased as the Northern Ute became more actively involved in negotiations. Other examples of the Northern Ute's increasing participation in negotiations and its business model are presented in Section 9.6.6. These examples of the Northern Ute's involvement in energy ROW renewals were not included in the HRA analysis.

**a. Right-of-Way No. H62-1989-070**

In 1960, the Tribal Business Committee approved a 2.4-mile-long, 100-foot-wide ROW for a 138 kV line. ROW compensation was a damage fee of \$764. The term of years for the ROW is unknown, and records do not indicate whether a real estate appraisal was made.

**b. Right-of-Way No. H62-1978-005**

In 1978, a utility company offered the Northern Ute \$100 per acre to construct a 69 kV line over 3.78 acres of tribal land. An appraisal conducted by the BIA determined that \$378 was just compensation for the ROW, since the highest and best use of the land was dry grazing, and since a year earlier other land used for that purpose had sold for \$50 to \$200 per acre. The appraiser determined that compensation should be less than the full fee simple value of the land, since the land surface was minimally disturbed and the land owners retained the bulk of their rights. The BIA collected the \$378 in May 1978, and the power line was completed in June 1978. The grant of easement was executed in January 1980, with a 50-year term beginning in April 1978.

**c. Right-of-Way No. H62-1983-18**

In November 1982, the Northern Ute was offered \$500 per acre for 8.55 acres of tribal land for a 12-inch natural gas transmission line. The Tribal Business Committee authorized the 20-year ROW on the condition that the \$500 per acre offer actually met or exceeded market value. The committee also directed that the grant of easement include 5-year reviews to determine if damage payments should increase, and it indicated that increases would depend on compliance with ROW stipulations or current economic conditions.

The land appraisal, completed a year after the ROW was authorized and the pipeline was constructed, found that the \$500 per acre offer was appropriate given real estate values in the area and that the bulk of the rights would be retained by the land owners. In 2003, the company applied for ROW renewal, offering to pay damages and compensation as determined by DOI. No further information on the ROW renewal or compensation is available, but the pipeline is included on a 2006 tribal map showing FERC-regulated pipelines.

**d. Right-of-Way No. H62-1992-80**

In 1991, a company wished to cross 4 miles of tribal lands with two 10-inch interstate natural gas pipelines and construct a compressor station and four natural gas gathering lines for a total of 28.5 acres. The company suggested a 30-year ROW but did not offer a compensation rate. It later offered \$2,000 per acre for a 25-acre easement and \$4,500 for a 5-year business lease for the compressor site, in addition to the \$250 it had earlier given the tribal scholarship fund.

The Tribal Business Committee proposed basing the ROW fee on throughput. The company declined because it had never provided compensation on such a basis before, only 2 percent of the pipeline crossed tribal lands, and it would be impossible to finalize contracts in the 2 weeks remaining before construction would start. The company countered with an offer of \$2,500 per acre, an additional contribution to the scholarship fund, and a joint venture with the Northern Ute

on the gathering lines. The Northern Ute refused and again suggested a throughput fee or a joint venture as an alternative.

The company again rejected the throughput proposal, stating that it had already established fixed transportation and gathering rates for its consumers and would not be able to adjust them to recover the additional throughput costs. The company indicated its interest in a joint venture in the future but not at the present time because of time constraints. It offered \$3,000 per acre for the pipeline and compressor station with a 20-year term, \$1,325 per acre for the gathering lines, and a \$25,000 contribution to the scholarship fund. The company also stated it would ask its contractors to employ 35 to 40 Northern Ute on construction projects. Complete terms of the ROW agreement are not available, but the Northern Ute received \$238,537 as payment for the pipeline, compressor station, and gathering lines for a 20-year ROW.

## **9.2. Southern Ute Indian Tribe**

The size of the tribal estate is presently estimated at 308,000 acres. Since the 1950s, oil and gas have been the key economic resources for the Southern Ute. Located within the San Juan Basin, the Southern Ute's lands contain oil and gas reserves and coal beds.

In the 1950s and 1960s, the Southern Ute generally accepted the BIA's recommendations on the adequacy of compensation for energy ROWs. Compensation in those decades usually consisted of appraisals of surface damage fees on a per acre or per rod basis. In the 1970s, the Southern Ute became more involved in oil and gas leasing, and in 1980, the Tribal Council formed an Energy Resource Office to help gather information on the Southern Ute's energy potential and monitor compliance with existing leases. The forms of ROW compensation became more varied, including contributions to scholarship funds, annual rental fees, land trades, throughput fees, and investment opportunities.

In the 1990s, the Southern Ute formed the Red Willow Production Company<sup>204</sup> to operate oil and gas wells and leases and the Red Cedar Gathering Company to pursue coal-bed methane gas production. By this point in time, compensation was negotiated between the Southern Ute and energy companies, and the Tribal Council would accept or reject ROW proposals. The BIA would then approve the ROWs to which the council had consented. Appraisals were seldom done, since the Southern Ute established general compensation rates for particular types of ROWs.

Red Willow Production Company and Red Cedar Gathering Company are managed by the Southern Ute Growth Fund, which estimated its investment value at more than \$2 billion in 2006. The following four case studies demonstrate the movement made by the Southern Ute from the 1950s to the present day to manage its energy resources.

### **a. Western Slope Gas Company**

In 1961, the Western Slope Gas Company offered damages of either \$1 per rod or \$320 per lineal mile for a 50-year, 50-foot-wide ROW for a natural gas transmission pipeline and gathering system. Subsequent applications that year for additions to the gathering system were

also for a 50-year term at the \$1 per rod rate. The Tribal Council consented to the applications at the rate of \$1 per rod.

### **b. Mid-American Pipeline Company**

By the late 1970s, the Southern Ute became directly involved in ROW compensation negotiations. The Mid-America Pipeline Company offered \$15.60 per rod for a 10-inch liquefied petroleum gas pipeline crossing almost 7 miles of tribal land. Total compensation under the offer was \$33,571. After the Southern Ute rejected the offer, Mid-America proposed \$15 per rod and donations to the scholarship fund, for a total compensation package of \$56,203. The Tribal Council eventually approved a 10-year easement for payment of \$32,280 and other considerations, which totaled \$50,000 in contributions to the scholarship fund.

By the mid-1980s, Mid-America and the Southern Ute were involved in renewal negotiations. The Southern Ute rejected the Mid-America proposals for either a permanent easement at \$28 per rod or \$140,000 for a 20-year term with an option to pay \$20,000 annually thereafter for as long as the company chose to renew the ROW. Mid-America noted that it had paid from \$5 to \$20 per rod for permanent ROWs on non-Indian land in the vicinity.

The Southern Ute countered with offers based on a rate-based tariff fee. Under this valuation method, compensation could be up to \$236,200 for a 10-year term and \$497,000 for a 25-year term. Mid-America instead proposed a perpetual easement for a lump sum and annual contributions to the scholarship fund; the amounts offered are not contained in available records. The Southern Ute suggested compensation of \$374,810 for a 25-year term, which was based on Mid-America's expected profits but was to be paid as an annual rental that would be based on the pipeline's projected throughput.

Negotiations for a renewal began in 1985, 5 years before the expiration of the grant of easement. No agreement had been reached by the time the ROW expired in October 1990, and the Southern Ute declared it would not hold Mid-America in trespass as long as negotiations were conducted in a good-faith manner. In late 1991, the two parties agreed to \$425,000 for a 10-year ROW, plus the guarantee of a tax credit in case the Southern Ute should later impose an applicable possessory interest tax or business opportunity tax.

In 1996, the parties entered negotiations on the ROW renewal and an additional 16-inch pipeline. Tribal and Mid-America representatives agreed to a formula that multiplied the previous renewal amount by the consumer price index (CPI)(all urban consumers), resulting in compensation of \$518,000 each for the renewal and the new easement (\$320 per rod).

### **c. El Paso Natural Gas Company**

In 1956, EPNG compensated the Southern Ute \$4,250 for damages for a 20-year, 6.647-mile ROW for a 24-inch natural gas pipeline (the El Paso mainline). EPNG's payment was double the estimated damages.

In its 1974 renewal application, EPNG indicated that the ROW would expire at the end of 1976. In 1976, the company submitted a second renewal application since no action had been taken on the first. In subsequent negotiations, EPNG offered \$3 per rod for 20 years for all its projects (i.e., projects in addition to the mainline) that were expiring in 1978 and 1979. The Southern Ute refused the offer on the grounds that it was receiving \$5 per rod for other primary ROWs and that it was due damages for EPNG's trespass. Agreement was reached in 1979 granting EPNG a 10-year easement for all its ROWs on the Reservation that had or would expire before January 1, 1982, for a payment of \$607,515. Three years later, EPNG requested a waiver of the annual 20 percent increase in per rod costs because of decreased sales and inflation that was lower than expected. The Southern Ute rejected the request.

In January 1989, EPNG applied for renewal of the ROWs renewed in 1979 and submitted payment of \$349,326, which it based on a Tribal Council resolution requiring \$600 per acre for ROW renewals. The Southern Ute refused the offer and requested compensation based on alternative valuations such as throughput. The Southern Ute requested \$2,638,000 for a 10-year renewal. EPNG countered with an offer of \$966,933. The final agreed-upon figure was \$1.3 million for a 10-year renewal of the ROWs.

EPNG applied in May 1998 for a 20-year renewal of the mainline ROW, due to expire in February 2000, and included payment of \$77,289 for 96.611 acres based on an appraisal of \$800 per acre. The company subsequently proposed 10 annual payments of \$25,122 per year, or a lump sum of \$303,507. Negotiations were not concluded until March 2000. The agreement called for EPNG to assign its Colorado Dry Gas Gathering System to the Southern Ute and for the Southern Ute to pay EPNG \$2 million and provide renewed 20-year ROWs for the El Paso Field Services Blanco Gathering System and the mainline facilities.

#### **d. Red Cedar Gathering Company**

In an effort to expand the pipeline infrastructure required to expedite development of its coal-bed methane resource, the Southern Ute issued a blanket 11-year grant to WestGas for all ROWs necessary for constructing and operating gathering systems and pipelines in the western part of the Reservation. ROW compensation consisted of a throughput fee of \$0.015 per million Btu on all gas compressed and processed in a defined area.

When the Public Service Company of Colorado decided to sell WestGas in 1994, the Southern Ute entered into a partnership with Stephens Group, Inc. (an investment group) to bid on it. The bid was initially rejected but then reconsidered when it was made clear that the Southern Ute would have to consent to the transfer of easements from WestGas to the winning bidder. The partnership bought WestGas for \$87 million, and Stephens and the Southern Ute created the Red Cedar Gathering Company (a joint venture). Stephens contributed all of WestGas's assets to Red Cedar, and the Southern Ute contributed \$5 million and an extension of WestGas's existing ROWs to the end of 2036. The throughput fee was also increased to \$0.0175, with subsequent upward adjustments to be made in 2009 and every 5 years thereafter, as long as the adjustments were in Red Cedar's best interests. The blanket grant was also extended from the previously defined area to all tribal lands.

### **9.3. Morongo Indian Reservation**

The Morongo Band of Indians is one of several linguistically related tribal groups in south-central California collectively referred to as the *Cahuilla*. The Morongo Reservation was created in 1877 by Executive Order. The size of the Morongo Reservation got larger and smaller with subsequent Executive Orders and allotment activity. In 2003, the Reservation encompassed 32,402 acres, of which 31,115 acres were tribal lands. The Morongo Band did not organize under the IRA.

The Morongo Reservation possesses no oil, gas, or mineral resources. Nevertheless, the Morongo Band has numerous energy ROWs. The Reservation's location in southern California is an ideal east-west corridor for the transmission of natural gas, oil, and electricity. Beginning in 1995, the 50-year term of some electric and transmission line ROWs began to expire, and renewal negotiations are currently under way.

The degree of tribal involvement in negotiations for the initial energy ROWs is unclear from BIA and Morongo Band records. Appraisals were used to determine compensation for some ROWs, but there are also instances of the Morongo Band exploring alternative forms of compensation.

#### **a. Right-of-Way No. 372-Morongo-15**

In 1946, the Southern California Gas Company and the Southern Counties Gas Company of California were granted a ROW for a 30-inch gas pipeline at a rate of \$99.75 per acre for the 8.02-mile easement.<sup>205</sup> In 1966, the Band requested that Southern California Gas Company provide gas service to the Reservation. The company did so in 1968, in exchange for obtaining renewals of the 30-inch pipeline in addition to another ROW and for receiving a new ROW for a 36-inch natural gas pipeline. The estimated cost of the gas system installed by Southern California Gas Company was \$82,078.

#### **b. Right-of-Way No. 378-Morongo-143**

In April 1945, representatives from the BIA and Southern California Edison (SCE) attended a general meeting of the Morongo Band to discuss SCE's plans to build a transmission line connecting Boulder Dam to Los Angeles. Two months after the meeting, DOI granted SCE authority to construct the line. The Morongo Band, BIA, and SCE were negotiating compensation for the ROW as the transmission line was being built. The Morongo Band contested BIA's appraisal of \$25 per acre.

In November 1945, SCE requested permission for two transmission lines and a road across the Morongo Reservation. Damages were estimated at \$6,421.50, and the BIA required an annual payment of \$5 per mile. SCE agreed to pay the damages fee but balked at the annual fee. The Morongo Band pushed for payment of the annual fee and continued to protest the \$25 per acre appraisal, at one point suggesting to DOI that \$100 per acre was the appropriate land value.

The final compensation schedule for the transmission lines totaled \$6,421.50 (39 towers at \$25 per tower; \$25 per acre for dry land; \$637.50 for 2.49 acres of irrigated land) and a \$5 per mile

annual rental for an unspecified number of years. In May 1950, SCE submitted a license application to FERC's predecessor, the Federal Power Commission (FPC), for the transmission line. The 50-year license was issued in April 1954 but had a starting date of July 1, 1945.

SCE initiated the renewal process in 1992, 3 years before the ROW expiration date. The Morongo Band asserted that the FPC license, which also had a 1995 expiration date, could not be renewed by FERC, the successor agency to FPC, because the line was no longer a primary line and therefore no longer under FERC's jurisdiction. The Morongo Band reported that it had to threaten SCE with litigation to remove the line before SCE would agree to enter negotiations. Both parties have since entered into an agreement that calls for negotiations to begin in 2008 and conclude by 2010.

### **c. Right-of-Way No. 378-Morongo-47**

In 1959, when the California Electric Power Company (CEPC) applied for a 150-foot ROW for two 115 kV transmission lines on 4.73 miles of the Reservation, the Morongo Band suggested that the company provide electric service to Reservation homes in addition to a damage fee.<sup>206</sup> CEPC was amenable to this and offered payment of \$21,000 and the provision of a distribution system to allotted lands, on the condition of receiving ROWs for the distribution lines. CEPC's \$21,000 payment was based on an appraisal of \$400 per acre, which the appraiser reduced by 40 percent on the basis that the land did not have potential for subdivision or commercial development. BIA's appraisal valued the land at \$13,250, which was 50 percent of appraised market value of the fee title. The Morongo Band accepted the company's offer.

In 1963, SCE acquired CEPC's power lines and increased the voltage of one line to 230 kV, apparently with the approval of BIA. At some point, SCE installed fiber optic lines on the ROW for its own use. In the late 1990s, SCE requested a ROW amendment to allow it to sell its excess fiber optic capacity. The amendment was agreed to for a lump sum payment of \$535,000.

### **d. Right-of-Way No. 378-Morongo-277**

SCE's 33 kV Banning-Palm Springs electric distribution line had been licensed by FPC since 1929. After the FPC determined that the line was no longer a primary line, SCE applied for a 25-foot, 4.02-mile ROW for the line in 1969. In keeping with its BIA-approved practice of valuing easements at 50 percent of market value for lines with voltages of less than 220 kV, SCE offered \$7,155 for about 12.19 acres. It also estimated severance damages at \$1,500. The BIA stated that the appraisal was adequate compensation but noted that nothing was constraining the Morongo Band's free-bargaining position.

In a special election, the Morongo Band approved granting SCE 50-year ROWs for a 220 kV transmission line and 12 kV and 33 kV distribution lines. The lump sum payment was \$153,660.

## **9.4. Navajo Nation**

The Navajo Nation covers more than 16 million acres on the Colorado Plateau of northeast Arizona, southeast Utah, and northwest New Mexico. The Tribal Council, the legislative branch of the Navajo Nation, is composed of 88 popularly elected members.

The bulk of the Navajo Nation tribal income in the 20th century derived from energy-related mineral leases for its natural gas, oil, coal, and uranium resources. Income from oil and gas averaged \$70,000 per year from 1921 to 1937 and rose to \$1 million per year from 1938 to 1956. In the 1960s, annual averages for oil and gas income were \$18 million. In the 1970s, the Navajo started moving away from fixed royalties as the price of fossil fuels increased worldwide.

The Navajo Nation Oil and Gas Company (NOG) was chartered through DOI as a Federal corporation under Section 17 of the IRA and ratified by the Navajo Nation Council in 1998.<sup>207</sup> Five years later, NOG began developing energy resources on tribal lands by granting new oil and gas leases.<sup>208</sup>

As energy ROWs came up for renewal in the 1970s and 1980s, the Navajo Nation and energy companies negotiated consolidated easements that incorporated a number of ROWs into one package. Since the 1980s, it has been the Navajo Nation's practice to negotiate directly with ROW applicants.

#### **a. Four Corners Pipeline**

Four Corners Pipe Line Company (Four Corners) applied to BIA and the Navajo for an easement for a 16-inch oil pipeline in April 1957 and received it in May 1959. The Navajo participated in the application approval process and, at one point, withdrew its consent to the application until stipulations that had been agreed upon earlier were included in the agreement. One of the stipulations called for damages of \$1 per lineal rod. The payment of damages for the 20-year easement for 230 miles of pipeline and other facilities totaled \$199,796.

Twenty-six miles of the pipeline fell across lands subject to a land dispute between the Hopi Indians and the Navajo. Four Corners paid each tribe \$10,000 for the 26-mile segment. In April 1976, Four Corners applied to renew the ROW, set to expire in May 1977. The BIA, indicating that current market value was \$3 per rod, rejected the company's initial offer of \$2 per rod. Although Four Corners responded with an offer at the higher rate, the ROW was not renewed.

In February 1980, Four Corners requested an easement consolidating all of its ROWs on Navajo Nation lands. The subsequent 1981 agreement between the Navajo and Four Corners renewed all of the company's prior ROWs, both expired and unexpired.

Payment for the consolidated renewals was primarily based on throughput of hydrocarbons in the main line at \$0.03 per barrel, adjusted annually on the basis of the CPI. The first year's payment was not to be less than \$250,000 for 1981. Four Corners also paid \$900,000 for the period in which the mainline was in use but the ROW had expired. In return, the Navajo released the company from liability during that trespass. Four Corners further agreed to pay for actual damages caused by pipeline construction or operation.

In 1998, Questar Southern Trails Pipeline Company (Questar) purchased the Four Corners pipeline with the intent to convert it from oil to natural gas. Since this change required

additional construction, the 2001 agreement between Questar and the Navajo Nation to re-renew the 1981 ROW also included Navajo consent to additional ROWs for the necessary construction. The 2001 20-year ROW agreement called for undisclosed compensation in the form of 20 annual installments, with all payments after the first adjusted annually according to the CPI, annual contributions to the Navajo Nation Scholarship Program, and installation of up to six taps for delivery of gas on the Reservation.

#### **b. Arizona Public Service 500 kV Line**

The Arizona Public Service (APS) transmission line described in this case study runs from the Four Corners steam generating plant in New Mexico to a substation near Boulder City, Nevada. The line runs across Navajo land and passes through the Hopi Reservation before running again on Navajo land.

Final approvals for the Navajo sections of the line were granted in March 1967 for a 25-year term with an option to renew for a “like term.”<sup>209</sup> The Navajo were involved in the approval process.

In December 1991, consistent with the ROW terms, APS submitted a payment of \$108,176.47 (\$6.98 per rod) to BIA for the Navajo Nation to renew the ROW associated with the 500 kV line, but it also indicated its willingness to discuss other considerations for renewal. The Navajo Nation rejected that payment and asked the BIA to return the check to APS. The payment was resubmitted to BIA in March 1992; the check was cashed without being returned to APS.<sup>210</sup>

The Navajo rejected compensation at the same rate as the initial grant and appointed a negotiation team to seek different terms. The BIA suggested that the APS appraisal of \$4.73 to \$4.76 per rod was significantly short of the “going rate,” which was a minimum of \$45 per rod.<sup>211</sup>

By late December 1993, the Hopi Nation and Navajo Nation were part of a confidentiality agreement with SCE to negotiate the ROW renewal. SCE was involved because it had the right to use the entire capacity of the transmission line. A task force was established in 1994 to negotiate the ROW renewal with APS, SCE, the City of Los Angeles Department of Water and Power, and the Public Service Company of New Mexico.

The Navajo Nation requested BIA to return to APS any payments it had made for the ROW renewal because they were not acceptable. The ROW has not yet been renewed.<sup>212</sup>

#### **c. Transwestern Pipeline Company, San Juan Line**

Transwestern Pipeline Company (Transwestern) began operation of a 30-inch natural gas pipeline on the Navajo Reservation in 1960, added compression facilities in 1967, and began building loop lines in 1969. By 1980, the capacity of the Transwestern system on Navajo land was 750,000 mcf per day. Information on the initial ROW grant is not available, but it was set to expire in October 1979.

Transwestern's ROW renewal application was submitted to BIA without Navajo Nation consent. The BIA rejected the application determining that the Navajo Nation's consent was required by the Navajo Treaty of 1868 and applicable Federal regulations. Transwestern sued in Federal court to have the rejection of its application overturned, but the Navajo Nation's right to consent was upheld, and Transwestern returned to negotiations with the Navajo Nation.<sup>213</sup>

In 1984, Transwestern and the Navajo Nation developed a memorandum of understanding (MOU) that allowed Transwestern to renew its expired ROWs and extend its unexpired ROWs to a new expiration date of December 2003. The parties also reached agreement on an undisclosed settlement amount.

Transwestern and the Navajo Nation agreed to a subsequent MOU in 1991 that gave the company an option to acquire 79.5 miles of additional ROWs. Under the MOU, 25 percent of the consideration would be paid as a nonrefundable payment with the remainder (of the fee), paid when Transwestern exercised its option to acquire ROWs, adjusted according to the CPI and the actual size of the ROWs. The MOU committed Transwestern to sell and deliver up to 3,000 mcf of natural gas to the Navajo Nation upon completion of a service agreement.

In 1998, Transwestern began the process of renewing its easements scheduled to expire at the end of 2003. The company sought one grant to cover all its easements on Navajo Nation trust land. An independent appraiser estimated that the market value of the affected land ranged from \$10.69 to \$14.40 per rod. The BIA recommended instead that the market value of the land was \$25 per lineal rod.

Transwestern and the Navajo Nation agreed to an extension of the ROWs to November 2009. Transwestern's other rights would expire at that time, and the parties wanted all ROWs to have the same renewal and expiration dates.<sup>214</sup> Payment for the extension was to be made in an initial installment followed by six annual payments based on the CPI and adjusted upward but not decreased. The 2001 agreement was amended in 2004 to allow Transwestern to construct a new 36-inch, 21,415-rod pipeline, the easement for which will also expire in 2009.

#### **d. El Paso Natural Gas Company, San Juan Line**

The EPNG pipeline system on the Navajo Nation land may be the largest network of energy ROWs on tribal land. The company's pipelines also cross lands of the Southern Ute, Laguna Pueblo, Acoma Pueblo, Gila River, Tohono O'odham, and San Carlos Apache.

EPNG's first ROW on Navajo land was for a 218-mile, 24-inch natural gas pipeline. The application filed in July 1950 offered \$1 per rod (\$320 per mile) in damages, in addition to any actual damages caused by construction on agricultural or forested lands. No additional information is available on that transaction.

EPNG expanded its operations in the 1950s and 1960s to include sections of loop line that were 24, 30, and 34 inches in diameter. In 1971, EPNG applied for renewal of the main line and the loop lines in addition to other ROWs. The company sought to combine the ROWs even though expiration dates ranged from 1972 to 1986.

An appraiser for EPNG established the fee simple market value at \$25 to \$670 per acre, depending on the land type. The appraiser then discounted those values by 50 percent on the basis that the ROWs accounted for only about 50 percent of the land's value. The appraiser also stated that 8 percent of the value of the land taken would be a just rental rate for the land. These calculations put the value of the ROWs at \$50,769. The BIA recommended a value of \$125,272 after reviewing that appraisal.

The ROWs in question were eventually renewed as two consolidated ROWs. Total compensation for the renewals was \$260,000 for tribal and allotted land. One of the new ROWs had a 14-year term, expiring in 1986, with an option to renew for an additional 20 years. Consideration for the 20-year renewal would be \$276,000, adjusted every 5 years on the basis of the CPI. The other new ROW did not include similar renewal provisions.

Negotiations to renew these ROWs began in January 1982, 4 years before their expiration date. The Navajo sought an agreement based on throughput, which EPNG opposed. At some point, the parties seemed to agree to a payment of \$600,000, but they disagreed as to what the payment covered. The Navajo claimed that the \$600,000 covered only one ROW, but EPNG asserted that it covered both. The Navajo further believed that EPNG had agreed to renegotiate consideration for all its ROWs.

The final agreement to resolve these issues required an initial \$2 million payment to the Navajo Nation and 20 annual payments of \$1.35 million, adjusted every 3 years on the basis of the CPI. Under the agreement, EPNG was allowed to acquire 15 miles of gathering lines. Rather than consolidating all of EPNG's ROWs into one easement, the agreement divided the renewals into several different easements. However, all the easements shared the same expiration date. The agreement states that this was done to ease the administrative burdens on both parties.<sup>215</sup>

When EPNG submitted the official renewal applications in 1985, it included appraisal information estimating the value of the land at \$15 per rod. The BIA noted that the rate for other pipelines ranged from \$20 to \$40 per rod but that the per rod rate under the recent renewal agreement came to almost \$78.

In the ensuing years, EPNG and the Navajo have negotiated amendments to the 1985 agreement, which expired in October 2005. The easements were extended to December 31, 2006.

## **9.5. Survey Information**

EEI and INGAA conducted surveys on their members' experiences in negotiating energy ROWs on tribal lands.

### **9.5.1. Edison Electric Institute**

EEI is a trade association for shareholder-owned electric utility companies. EEI reported that its members provide electric service to 71 percent of all electric utility customers in the country and generate almost 60 percent of the electricity produced by the Nation's generators.

In its survey, EEI sought (a) information about the costs, terms, and conditions of energy ROW renewals; (b) data on the appraised value of lands included in the ROW; (c) comparative data on the terms and conditions of the ROW contract that immediately preceded the renewed ROW contract; and (d) information on the methodology used to determine the renewal cost. Member companies were asked to concentrate on energy ROW renewal transactions occurring within the past 5 years. EEI aggregated the survey results to protect the confidentiality of all parties involved.

At the request of EEI, findings from the surveys were independently verified against source documents provided by energy companies. This verification consisted of comparing source documents, supplied by the companies, to the companies' survey responses and the aggregated survey data that EEI used as the basis for its comments dated May 15, 2006. It was not feasible to verify the accuracy or completeness of the source documents provided by the energy companies.

Following this verification, EEI corrected the few differences that were found and then reaggregated the data and submitted a survey addendum dated June 21, 2006. Since several of the energy ROW renewals included in the survey had occurred more than 5 years ago, EEI revised its report to present findings of the full data set (which included all energy ROW renewals) and the 2001–2005 data set (which included only renewals that occurred during that time span).

The following data were extracted from the revised comments dated June 21, 2006, unless otherwise noted. Information presented in the following tables and in the text that expands on the information in those tables has been verified as accurately reported by EEI, unless specifically noted below.

A preliminary EEI screening survey of its 75-member base revealed that 28 companies had jurisdictional territories that overlapped tribal reservation lands, and 20 of those 28 companies had ROWs on tribal land. Eight of the 20 companies had completed renewal transactions within the past 5 years, and only one of the eight declined participation in the survey. Information was gathered on 20 energy ROWs, seven of which were renewed before 2001.

The EEI survey data showed that, on average, energy ROWs are being renewed for a shorter term of years than the ROWs that preceded them. As shown in Table 1, this was true for ROWs renewed since 2001 and for the ROWs in the entire data set.

Data Set	No. of ROWs	No. of Years in Duration		
		Avg.	Median	Range
2001–2005				
Term of expiring ROW	12	48	50	20–50
Term of renewed ROW	12	31	25	20–50
Full				
Term of expiring ROW	20	43	50	20–50
Term of renewed ROW	20	28	25	10–50

In Table 2, EEI compares the fair market value of land associated with existing ROWs to the cost paid for that ROW. EEI defines *fair market value* as the “economic (i.e., competitive) value of the land.”<sup>216</sup> To arrive at this fair market value, EEI calculated the market value of the land. In that calculation, EEI took into account the variation in terms of years of the renewals and whether the market value of the energy ROW was presented in a survey response as fee simple or easement.

Energy ROW prices were adjusted by EEI to reflect a usable life of 50 years. For example, a 25-year renewal compensated at \$2 million was normalized to \$4 million for 50 years. When land value was presented in a survey as fee simple, it was discounted by 50 percent in one calculation and 70 percent in another to obtain the easement value.

On the basis of a 50 percent discount, EEI calculated that the average multiple of market value was 31 for energy ROWs renewed within the last 5 years; the average multiple was 21 on the basis of a 70 percent discount. The average multiples for the full data set were 115 on the basis of the 50 percent discount and 83 on the basis of the 70 percent discount. When an outlier (1,624 times the market value) was dropped from the full data set, the average multiples were 31 and 23, respectively. These averages, medians, and ranges of multiples of market value for energy ROW renewals are presented in Table 2.

Data Set	No. of ROWs	Multiple of Market Value of 50%/70%		
		Avg.	Median	Range
2001–2005	12	31/22	8/6	1–150/1–107
Full	19	115/83	12/8	1–1,625/ 1–1,161
Full minus outlier	18	31/23	10/7	1–150/1–107

EEI reported that of the 12 energy ROW renewals completed within the past 5 years, when easements were assessed at 50 percent of the fee simple value, the market value was (a) paid in two cases, (b) between 2 and 4 times the market value in four cases, and (c) between 11 and 25

times in three cases; also, in three cases, compensation was between 65 and 150 times market value. When the easement value was assessed at 50 percent of the fee simple value for the full data set, the market value was (a) paid in two cases, (b) between 2 and 4 times in five cases, and (c) between 11 and 25 times in five cases; also, in five cases, compensation was between 65 and 1,625 times market value.

The EEI survey requested information on the methodologies used to establish the value of the ROW renewal. In the full data set, EEI reported that (a) tribal negotiators sought renewal fees that were based on build-around costs in five cases; (b) throughput was used in one instance; and (c) in three cases, the valuation sought was based on other recent ROW renewals. For the ROWs renewed in the 2001–2005 period, build-around costs were sought in two cases, throughput was requested once, and recent ROW renewals were used as the basis in two cases.

Another measure of energy ROW renewals used by EEI was per mile cost. EEI reported that the traditional all-inclusive costs (i.e., ROW and construction) of high-voltage, overhead transmission facilities are about \$500,000 per mile for rural land and about \$1 million per mile for suburban land. Lower-voltage transmission and distribution lines generally are hundreds of thousands of dollars per mile.<sup>217</sup> EEI clarified that the all-inclusive cost estimates are based on easements in perpetuity and not temporary permits on tribal land.<sup>218</sup>

EEI reported that the average per mile cost of ROW renewals was \$893,700 for respondents in the 2001–2006 data set and \$727,400 for respondents in the full data set. When per mile costs are normalized over a 50-year term, the average is \$1,494,900 for renewals in the past 5 years and \$1,366,000 for renewals in the full data set. Additional data on per mile costs of renewals are provided in Table 3.

Data Set	No. of ROWs	Per Mile Cost (\$)		
		Avg.	Median	Range
2001–2005				
Unadjusted	11	893,700	140,500	12,800–7,300,000
Normalized	11	1,494,900	280,900	12,800–10,400,000
Full				
Unadjusted	18	727,400	146,200	12,800–7,300,000
Normalized	18	1,366,000	318,900	12,800–10,400,000

When information was available on the compensation paid for the energy ROW preceding the renewal described in the survey response, EEI calculated the multiple of the renewal price to the preceding price. Table 4 conveys the results of that analysis; however, note that (as EEI pointed out in its report) the Table 4 findings are based on relatively few data points.

<b>TABLE 4 ROW Renewal Cost as Multiple of Previous ROW Cost</b>				
Data Set	No. of ROWs	Multiple		
		Avg.	Median	Range
2001–2005	5	779	227	18–2,767
Full	11	863	227	10–3,812

EEI also surveyed its members on the length of time that negotiations took to reach agreements on ROW renewals. Table 5 presents those findings.

<b>TABLE 5 ROW Renewal Negotiation Periods</b>				
Data Set	No. of ROWs	No. of Months		
		Avg.	Median	Range
2001–2005	12	23	13	6–102
Full	20	25	14	6–102

The following qualitative information was included in EEI’s May 15, 2006, comments, but it was not verified by comparing it to source documents.

EEI members noted two main reasons for the length of renewal negotiations: frequent turnover in tribal governance and long lead times for BIA actions on land appraisals. EEI observed that lengthy negotiations increase administrative costs to companies and tribes and can place companies in the position of operating beyond a ROW expiration date. Shorter terms (in years) for ROW renewals can also contribute to increased ROW administrative costs for tribes and companies.

In its report, EEI noted that if energy ROW costs increase by a factor of 227 (the median escalation over previous ROWs), total electricity costs will rise by 4 percent because of those increases.

### **9.5.2. Interstate Natural Gas Association of America**

INGAA is a national, nonprofit trade association that represents the interstate natural gas pipeline industry. According to INGAA, its members account for virtually all of the natural gas transported and sold in interstate commerce.

INGAA reports that several members chose not to become involved in the survey, either out of concern that their participation could have an impact on present or future negotiations with tribes or because there was not sufficient time to gather the requested information. INGAA also states that members were reluctant to participate in the survey because the information sought either was highly sensitive business information, was subject to a confidentiality agreement, or could be used by tribes as a starting point for negotiations.

Six INGAA companies and one non-INGAA member (a products pipeline company) submitted survey information on a total of 20 energy ROWs on tribal land involving 15 different tribes in 11 States.

At INGAA's request, the Departments verified its use of survey data. As in the case of the EEI survey, this verification consisted of comparing INGAA's survey responses with information in the source documents submitted by participating companies. It was also not feasible to verify the accuracy or completeness of the source documents. In addition, because of concerns regarding the confidentiality of data, not all the companies that submitted survey information supplied source documents for the independent assessment.

The verification of the relevant documents confirmed the following findings that INGAA included in its report:

- All respondents that provided data indicated that they were paying compensation in excess of market value.
- In addition to the per rod ROW payment, many companies contributed to tribes in various forms (scholarships, recreational funds, etc.).
- The average term of years for initial and renewed ROWs was 20 years.
- Two respondents reported that ROW negotiations took at least 2 years; others reported significantly longer periods; and one reported that they took more than 10 years.

Three of the five case studies volunteered by EPNG for the INGAA report are summarized below. The information in these case studies has been verified through source documents provided by El Paso. The two remaining El Paso case studies described in the INGAA comments were summarized previously in Sections 9.2 and 9.4.

In 1993, the easement for the Plains to Gallup Crossover Line—two 30-inch, 56-mile natural gas pipelines that cross the Laguna Indian Reservation and move gas from the Permian Basin to the San Juan Basin—was appraised at a value of \$300 per acre. The negotiated settlement for a 20-year ROW renewal was approximately \$7,000 per acre.

Similarly, EPNG's negotiated settlement for a 20-year ROW renewal for 23 miles of the Crossover Line that crosses the Acoma Indian Reservation reached almost \$7,000 per acre. EPNG reported the land was appraised at \$300 per acre.

Since it began its business relationship with the Gila River Indian Community (GRIC) of Arizona in the 1930s with a 10-inch pipeline that covered 20 miles of GRIC land, EPNG acquired additional easements and now has more than 100 miles of pipeline on the land. In 1987, EPNG and GRIC negotiated an easement that would renew the ROWs for all EPNG facilities on the tribal land with a common expiration date of December 31, 1994. An approved

GRIC appraiser initially appraised the easement at \$130,000 but modified it to \$260,000. The final negotiated agreement was \$3.2 million.

When the ROW was renewed in 1994, EPNG paid \$3.588 million for a 10-year renewal. In 2004, the company paid \$5.2 million for an additional 10-year renewal in addition to payments for administrative costs, a scholarship fund, and an education fund.

INGAA included the following comment, which was not verified through source documents, in its May 15, 2006, submission: tribes generally began negotiations by requesting terms of less than 20 years, and few respondents were satisfied with the negotiations.

INGAA also included the results of a 1998 survey in its submission for the Section 1813 study. That survey is not described here because it did not differentiate between tribal and allotted lands and it included data from Canada and from ROWs other than those for oil and natural gas pipelines and electric transmission lines—the subjects of this report. Similarly, the case studies included in the INGAA report that were volunteered by a non-INGAA member are not summarized here because the company is a products pipeline company.

## **9.6. Other Case Study Reports Submitted by the Participants**

The following examples illustrating historic rates of compensation for energy ROWs on tribal land were selected from several submissions by tribes and the Federal power marketing administrations. These case studies were chosen because either they were fairly complete or they addressed issues raised in the Section 1813 study, including valuation methods and conflict adjudication processes.

Because of limited time and resources available, only the Bonneville Power Administration (BPA) case was verified. For the other cases included in this section, only summaries are provided; these cases were not verified by the Departments.

### **9.6.1. Bonneville Power Administration**

In 1978, DOE's BPA entered into an agreement with the Confederated Tribes of the Warm Springs Reservation of Oregon that provides BPA with perpetual easements for an additional-width energy ROW as well as opportunities for two future ROWs totaling a width of not more than 747.5 feet. Documentation indicates that BPA paid at least 5 times market value for the additional-width ROW.

One of the future ROWs would accommodate moving BPA's existing transmission line approximately 12 miles if the Confederated Tribes exercised that option. Compensation for the future corridors would be negotiated to be consistent with prevailing economic conditions and market values.

Pursuant to the terms of the 1978 agreement, if BPA and the Confederated Tribes were unable to agree on the proper compensation for the ROW, it would be determined by arbitration. Each party would select an arbitrator, and then these two arbitrators would select a third one. If the two arbitrators were unable to agree on a third, either party could request the Chief Judge of the

U.S. District Court for the District of Oregon to appoint the third impartial arbitrator. Thereafter, the three arbitrators would meet in formal session to hear and receive evidence from the parties concerning the compensation for the ROW. The decision of the arbitrators as to the amount of compensation would be binding on both parties.

### **9.6.2. Hopi Tribe**

The Hopi Reservation has the second-lowest percentage of households with access to electricity in the United States: 29 percent of Reservation residents live without electricity, as opposed to the national average of approximately 1 percent.<sup>219</sup>

The major provider of electric services in Arizona has a 500 kV transmission line ROW across the Hopi Reservation. Under the original 25-year term of the agreement, the Hopi Tribe was paid a total of \$755 for an approximately 50-mile ROW. In their submittal, the Hopi state, “Though there is some debate between the Tribe and the electrical provider whether the original agreement was automatically renewable at the same compensation at the end of the first 25 years, the electricity has continued to flow uninterrupted.”<sup>220</sup>

The transmission line does not provide any electricity to Hopi Reservation residents. However, the Hopi Tribe, to encourage electrification, foregoes compensation from the electric provider for ROWs providing electrical service to the Reservation. Often the Hopi Tribe pays to have these distribution lines extended pursuant to the energy provider’s policy that extensions can be charged to users on a per foot basis.

Thus, the Hopi Tribe reported that it has been paid a total of \$1,510 for a 50-year, 50-mile transmission ROW that supplies electric power to millions while supplying none to the Hopi, foregoes fees on other ROWs to supply power to its residents’ homes, and sometimes pays for the necessary extension for those distribution lines.<sup>221</sup>

APS, the holder of the ROW for the 500 kV line, stated that ROW is 97.53 miles in length and that it paid the Hopi Tribe \$755 per mile for a total payment of \$36,818.33. The resolutions approving the ROW and payment state that the second payment for the second 25-year term will be an amount equal to the first payment. APS subsequently sent payments totaling \$38,137.17.<sup>222</sup>

APS also stated that the 500 kV line does not provide electricity to any Arizona residents because 100 percent of the capacity of the line is owned by SCE.

### **9.6.3. Pueblo of Santa Ana**

In the 1980s, the Pueblo of Santa Ana negotiated 20-year ROWs for a 12-inch natural gas pipeline and a 30-inch gas pipeline at an acre per year compensation of about \$356.42 and \$143.65, respectively. Both ROWs included terms for an automatic renewal for an additional 20-year term, with compensation based on the rate of inflation. When the renewals occurred, the ROW compensations came to approximately \$697.56 and \$271.66, respectively.<sup>223</sup>

#### **9.6.4. San Xavier District of the Tohono O’Odham Nation**

In 1992, the Bureau of Reclamation acquired an easement in the City of Tucson for a high-voltage power line to connect to the Central Arizona Project pumping station. The easement crosses the San Xavier District for a distance of about 1 mile. Land to the east of the San Xavier District and land to its west were acquired from the City of Tucson and Pima County for \$7.50 per square foot.

The San Xavier District and its allottees were offered \$1.76 per square foot for the land between those easements, and the width of the easement was reduced from 60 to 30 feet. The power line has been constructed, but negotiations for appropriate compensation continue.<sup>224</sup>

#### **9.6.5. Shoshone-Bannock Tribes of the Fort Hall Reservation**

The Fort Hall Reservation has 19 electric transmission lines and 3 natural gas pipelines on its 545,000 acres. One of the earliest energy ROWs was the 50-year, 1941 grant to the Utah Power Company for a 26-mile transmission line. BIA and the company conducted negotiations for the ROW, which led to a damage assessment of \$6 per pole and a proposed \$5 per mile annual rental fee. The Shoshone-Bannock Tribes received \$177 in damages; records do not confirm that the per mile annual rental fee was ever paid.

The transmission line ROW expired in 1991. The company did not request its renewal until 2001 when, in response to an Idaho Public Utilities Commission hearing on Utah Power’s proposed merger with another company, the Shoshone-Bannock Tribes testified that the company was in trespass. Within a week of the hearing, after a brief period of negotiations, the company filed a renewal that was approved for a 20-year term for an undisclosed fee.<sup>225</sup>

Two electric transmission line ROWs on the Reservation are held in perpetuity. The fees for these ROWs were \$15,050 for a 138 kV line and \$33,950 for a 345 kV line. The former ROW is 15.28 acres, and the latter is 183.56 acres.<sup>226</sup>

#### **9.6.6. Ute Indian Tribe of the Uintah and Ouray Reservation**

In addition to the case studies prepared by HRA and summarized in Section 9.1, the Northern Ute submitted additional examples of its more recent practices in consenting to energy ROWs.<sup>227</sup> Each of the case studies involved situations in which energy companies had existing energy facilities on a ROW but conducted new negotiations for access. Negotiations were needed to resolve disputed instances of trespass or remedy disputes over past performance under existing agreements. All negotiations resulted in agreements on renewals or replacement agreements. In addition, the agreements expanded the scale and the scope of the Northern Ute’s and companies’ energy-related activities on the Reservation.

In one case, the Northern Ute and an energy company developed several incentives to accomplish their mutual business objectives: (1) throughput fees of \$0.05 per mcf for a ROW renewal, (2) capacity priority position for the Northern Ute’s royalty in-kind gas, (3) an overriding royalty to provide a ROW for each well location; (4) a commercial right for the Northern Ute to participate in any pipeline expansion and a right for it to participate in any new drilling in the area, and (5) preferential transportation cost for any third-party commercial gas.

In another case, the Northern Ute offered an energy company a concession agreement that would allow the company to manage all its ROWs on the Reservation under one master agreement. The fee for the concession agreement had a floor and ceiling to be reset on the basis of a specified index. The parties agreed that binding arbitration would be used for certain disputes if they could not resolve them amicably. The Northern Ute granted a limited waiver of sovereign immunity and agreed to submit to jurisdiction of outside legal courts for enforcement of arbitration awards.

Through negotiations in a third case, the Northern Ute was able to resolve several long-standing disputes, maintain throughput as the basis for a ROW renewal, and increase its energy development opportunities. Though characterized as tough negotiations, the outcomes created partnerships and aligned the parties' economic interests.

### **9.6.7. Rosebud Sioux Tribe**

In 1974 and 1976, BIA signed easements for a 15-mile, 115 kV transmission line through the Rosebud Sioux Reservation. Despite statutory provisions<sup>228</sup> that ROWs over reservation lands are not to exceed a period of 50 years, the ROWs were granted in perpetuity.

The Tribal Council consented to the ROWs on the basis of the understanding that the transmission line would supply an additional source of electric energy throughout the area that would benefit the Reservation. The fees for the 1974 and 1976 ROWs were \$14,484 and \$10,520, respectively, to be paid to the Rosebud Sioux and the individual land owners whose property the ROWs crossed. The Rosebud Sioux does not have any documentation on the appraisals made for the ROWs or the distribution of payments for them.<sup>229</sup>

## Endnotes

- <sup>1</sup> See, e.g., Comments of the Edison Electric Institute 5–6 (Sept. 4, 2006); Comments of the Fair Access to Energy Coalition (FAIR) 19 (Sept. 4, 2006).
- <sup>2</sup> Comments of FAIR 19 (Sept. 4, 2006).
- <sup>3</sup> Id.
- <sup>4</sup> Comments of the Edison Electric Institute 6 (Sept. 4, 2006).
- <sup>5</sup> Id.
- <sup>6</sup> Id.
- <sup>7</sup> Comments of FAIR 21 (Sept. 4, 2006).
- <sup>8</sup> Comments of the Isleta, Zia, and Sandia Pueblos 6 (Sept. 1, 2006).
- <sup>9</sup> Id. (emphasis in the original).
- <sup>10</sup> Public Testimony of the Jicarilla Apache Nation 1 (Mar. 7–8, 2006).
- <sup>11</sup> Id.; Comments of the Jicarilla Apache Nation 9 (May 12, 2006).
- <sup>12</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 19 (May 11, 2006) (emphasis was in the original).
- <sup>13</sup> Comments of the Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 13 (Jan. 20, 2006).
- <sup>14</sup> Id. (citing U.S. Dep’t of Energy, Energy Consumption and Renewable Energy Development Potential on Indian Lands ix (April 2000) (*available at* <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/ilands.pdf>) (using information from the 1990 Decennial Census).
- <sup>15</sup> Id. at 14 (citing U.S. Dep’t of Commerce, Bureau of the Census, Statistical Brief, Housing of American Indians on Reservations — Equipment and Fuels 3, table (April 1995) (*available at* [http://www.census.gov/apsd/www/statbrief/sb95\\_11.pdf](http://www.census.gov/apsd/www/statbrief/sb95_11.pdf)).
- <sup>16</sup> Id. at 12.
- <sup>17</sup> National Energy Policy Development Group, National Energy Policy viii (May 2001).
- <sup>18</sup> Id. at vii.
- <sup>19</sup> Id. at 7-1.
- <sup>20</sup> Id.
- <sup>21</sup> Id. at 7-7 and 7-8.
- <sup>22</sup> Id. at 7-5.
- <sup>23</sup> Id.
- <sup>24</sup> Id. at 7-6.
- <sup>25</sup> Id. at 7-7 and 7-8.
- <sup>26</sup> Id. at 7-12.
- <sup>27</sup> Id.
- <sup>28</sup> Id.
- <sup>29</sup> Id.
- <sup>30</sup> Id. at 7-9.
- <sup>31</sup> Id. at 7-8 to 7-9.
- <sup>32</sup> Id. at 7-9.
- <sup>33</sup> 16 U.S.C. § 824p.
- <sup>34</sup> 16 U.S.C. § 824p (a) (2).
- <sup>35</sup> 42 U.S.C. § 15926 (a).
- <sup>36</sup> 42 U.S.C. § 15926 (b).
- <sup>37</sup> 42 U.S.C. § 15926 (d).
- <sup>38</sup> 16 U.S.C. § 824p (e).
- <sup>39</sup> 25 U.S.C. § 3502.
- <sup>40</sup> 25 U.S.C. § 3504 (e).
- <sup>41</sup> 25 U.S.C. § 3504 (b).
- <sup>42</sup> 25 U.S.C. § 3504 (a) and (b).
- <sup>43</sup> 71 Fed. Reg. 48626.
- <sup>44</sup> 25 U.S.C. § 3504 (c).
- <sup>45</sup> Indian Right-of-Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323–328.
- <sup>46</sup> The primary allotment act, which was the General Allotment Act of 1887 (also known as the Dawes Act), 24 Stat. 388, authorized the President to allot portions of tribal lands to individual Indians. Individual allotments

were to remain in trust for a period of years, allowing the individual time to assimilate, and were then to be conveyed in fee to the individual. Tribal lands not assigned to individuals were to be sold as surplus lands. The primary effect of the General Allotment Act was a reduction in Indian-held land, for a variety of reasons. It decreased from 138 million acres in 1887 to 48 million in 1934. Federal policy reversed this course with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, which ended allotment and restored the status of tribal lands. See William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 19–25 (2nd ed., 1988).

<sup>47</sup> See, e.g., 25 U.S.C. § 321; 43 U.S.C. § 961; the Act of August 5, 1882 (22 Stat. 299) (granting a ROW to Arizona Southern Railroad Co. through the Papago Indian Reservation in Arizona); Section 3 of the Act of March 2, 1889 (25 Stat. 852) (granting a ROW to Forest City and Watertown Railroad Co. through the Sioux Indian Reservation); Section 2 of the Act of June 6, 1894 (28 Stat. 87) (granting a ROW to Albany and Astoria Railroad Co. through the Grand Ronde Indian Reservation in Oregon).

<sup>48</sup> See generally COHEN's *HANDBOOK OF FEDERAL INDIAN LAW* 204–220 (2005 ed.).

<sup>49</sup> Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 6 (April 29, 2006).

<sup>50</sup> See, e.g., Comments of the Isleta, Zia, and Sandia Pueblo (May 15, 2006); Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation cover letter (May 11, 2006).

<sup>51</sup> See, e.g., Comments of the Council of Energy Resource Tribes and National Congress of American Indians 2 (Jan. 20, 2006).

<sup>52</sup> See, e.g., Statement of the New Mexico Oil & Gas Association 2 (April 18, 2006); Comments of the Edison Electric Institute 2 (May 15, 2006).

<sup>53</sup> See, e.g., Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 3–6 (April 29, 2006) (citations omitted).

<sup>54</sup> See, e.g., Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, Mandan, Hidatsa, and Arikara Nation 6 (April 29, 2006) (citing to *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989)); Comments Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 24 (Jan. 20, 2006).

<sup>55</sup> See, e.g., Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 67 (May 11, 2006).

<sup>56</sup> Comments of the Confederated Tribes of the Umatilla Indian Reservation 4 (Jan. 6, 2006).

<sup>57</sup> Comments of the Pueblo of Santa Ana 5 (May 15, 2006).

<sup>58</sup> See, e.g., Comments of the Leech Lake Band of the Ojibwe 1–2 (Jan. 9, 2006); Comments of the Pueblo of Jemez 4 (Jan. 20, 2006); Comments of the Pechanga Band of Luiseño Mission Indians 7 (May 15, 2006).

<sup>59</sup> Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 5 (Sept. 4, 2006).

<sup>60</sup> Indian Right-of-Way Act of 1948, Vol. 62, p. 17, 62 Stat. 17, codified at 25 U.S.C. §§ 323–328.

<sup>61</sup> Historical Research Associates, Inc., *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006*, 4 n. 3, 4, and 5 (July 7, 2006).

<sup>62</sup> Act of March 2, 1899 (30 Stat. 990).

<sup>63</sup> *Id.*

<sup>64</sup> 25 U.S.C. § 321.

<sup>65</sup> *Id.*

<sup>66</sup> Act of March 4, 1911, codified at 43 U.S.C. § 961.

<sup>67</sup> *Id.*

<sup>68</sup> 25 U.S.C. § 323.

<sup>69</sup> For purposes of this discussion, the Indian Reorganization Act (25 U.S.C. § 476) and the Oklahoma Indian Welfare Act (25 U.S.C. § 503) are referred to as the “tribal organization statutes.”

<sup>70</sup> 25 U.S.C. § 324.

<sup>71</sup> 25 U.S.C. § 326.

<sup>72</sup> Historical Research Associates, Inc., *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006*, 4 n. 3, 4, and 5 (July 7, 2006).

<sup>73</sup> S. Rep. No. 80-823, (Jan. 14, 1948), reprinted in 1948, U.S.C.C.A.N. 1033, pp. 1034–1036.

<sup>74</sup> *Id.* at 1036 (preserving existing statutory authority for specific types of ROWs “avoid[s] any possible confusion which may arise, particularly in the period of transition from the old system to the new”).

<sup>75</sup> 25 C.F.R. § 256.83 (1939) (although this regulation is entitled “Consent of Allottees or Tribe,” its terms only required that ROW applications be “presented” or “submitted” to tribal governments, and did not explicitly require the consent of the tribal government following such presentation or submission).

<sup>76</sup> 16 Fed. Reg. 8578 (1951).

<sup>77</sup> 25 C.F.R. § 169.3 (a) (originally this regulation was published at 25 C.F.R. Part 256. In 1957, DOI reorganized ROW regulations and placed them under Part 161 of Chapter 25).

<sup>78</sup> In 1967, DOI published a proposal to allow the Secretary to grant rights-of-way over lands of tribes that had not organized under the tribal organization statutes, without tribal consent. The House of Representatives Committee on Government Operations issued a report which concluded, “[T]he Secretary’s proposal for granting rights-of-way over tribal land without consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.” HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, DISPOSAL OF RIGHTS IN INDIAN TRIBAL LANDS WITHOUT TRIBAL CONSENT. H. Rep. No. 91-78, at 304 (1969). The proposal was subsequently withdrawn.

<sup>79</sup> 25 U.S.C. § 461.

<sup>80</sup> 25 U.S.C. § 450a.

<sup>81</sup> 25 U.S.C. § 450 (a) (2).

<sup>82</sup> 25 U.S.C. § 3502.

<sup>83</sup> Presidential Proclamation 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).

<sup>84</sup> Presidential Proclamation 7956, 70 Fed. Reg. 67635 (Nov. 7, 2005).

<sup>85</sup> Executive Order No. 13175, 65 Fed. Reg. 67429 (Nov. 9, 2000).

<sup>86</sup> BLACK’S LAW DICTIONARY 1402 (7th ed. 1999).

<sup>87</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 205 (Aug. 2005 ed.).

<sup>88</sup> *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

<sup>89</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 390 (Aug. 2005 ed.).

<sup>90</sup> *United States v. Lara*, 541 U.S. 193, 200 (2004), citing *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); and *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>91</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 398 (AUG. 2005 ed.).

<sup>92</sup> *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

<sup>93</sup> In *Santa Clara Pueblo et al. v. Martinez et al.*, 436 U.S. 49 (1978), the Court stated that Title I of the Indian Civil Rights Act represented an exercise of Congress’ “plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess.” *Id.* at 57-58.

<sup>94</sup> *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968); *Santa Clara Pueblo et al. v. Martinez et al.*, 436 U.S. 49, 58 (1978); *United States v. Dion*, 476 U.S. 734, 738–39 (1986); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

<sup>95</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 214 (Aug. 2005 ed.).

<sup>96</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 104 (1941) (footnotes omitted) (citing to 25 U.S.C. §§ 311–322 and historical regulations at 25 C.F.R. §§ 256.24, 256.53, and 256.83).

<sup>97</sup> A trust relationship may arise when the United States is required by statute to manage or operate Indian lands or resources. *See United States v. Mitchell*, 463 U.S. 206 (1983) (specific duties defined by statute and regulation). In order for a trust to exist, the three common-law elements of a trust must be present: a trustee (the United States), a beneficiary, and a corpus (timber, lands, funds, etc.).

<sup>98</sup> 25 C.F.R. § 169.12.

<sup>99</sup> Comments of the Confederated Salish and Kootenai Tribes of the Flathead Nation 2 (April 25, 2006).

<sup>100</sup> Comments of the Shoshone-Bannock Tribes 8 (May 12, 2006).

<sup>101</sup> For the case of the Ute Indian Tribe of the Uintah and Ouray Reservation, HRA prepared the request memorandum during the site visit. For the other reservations, the request was circulated prior to HRA’s visit.

<sup>102</sup> 33 Fed. Reg. 19807 (Section 161.12).

<sup>103</sup> Comments of the Interstate Natural Gas Association of America 7 (May 15, 2006).

<sup>104</sup> Comments of the Edison Electric Institute 9 (Feb. 5, 2007).

<sup>105</sup> *See, e.g.,* Comments of FAIR 2 (May 15, 2006); Comments of the Edison Electric Institute 14 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 12 (May 15, 2006).

<sup>106</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 2 (Feb. 5, 2007).

<sup>107</sup> *See, e.g.,* Comments of the Interstate Natural Gas Association of America 2 (May 15, 2006).

<sup>108</sup> Comments of the Edison Electric Institute 14 (May 15, 2006).

<sup>109</sup> Comments of FAIR 2 (May 15, 2006).

<sup>110</sup> Comments of Idaho Power Company 3 (Feb. 15, 2006).

<sup>111</sup> Comments of FAIR 5 (May 15, 2006).

<sup>112</sup> *See, e.g.,* Comments of the Edison Electric Institute 10–11 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 2 (May 15, 2006).

- <sup>113</sup> Comments of FAIR 2–3 (May 15, 2006).
- <sup>114</sup> *Id.* at 7-10.
- <sup>115</sup> *See, e.g.*, Comments of the Idaho Power Company 4 (Feb. 15, 2006); Comments of the Edison Electric Institute 14 (May 15, 2006).
- <sup>116</sup> *See, e.g.*, Comments of the Idaho Power Company 4 (Feb. 15, 2006); Comments of the Edison Electric Institute 10 (May 15, 2006).
- <sup>117</sup> Comments of the Interstate Natural Gas Association of America 9 (May 15, 2006).
- <sup>118</sup> *See* Comments of the Williams Company (Feb. 5, 2007).
- <sup>119</sup> *Id.*
- <sup>120</sup> *See, e.g.*, Comments of the Quechan Indian Tribe 1–2 (May 15, 2006); Comments of the Confederated Tribes of the Warm Springs Reservation of Oregon 7 (May 15, 2006).
- <sup>121</sup> *See generally* Comments of the Jicarilla Apache Nation 17–21 (May 12, 2006).
- <sup>122</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 3 (May 15, 2006); Comments of the Jicarilla Apache Nation 18–19 (May 12, 2006); Comments of Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 3–7 (Jan. 20, 2006).
- <sup>123</sup> *See, e.g.*, *Id.*; Comments of the Confederated Tribes of the Warm Springs Reservation of Oregon 3 (May 15, 2006).
- <sup>124</sup> *See, e.g.*, Comments of Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 3–7 (Jan. 20, 2006).
- <sup>125</sup> *See, e.g.*, Comments of the Pechanga Band of Luiseño Mission Indians 5 (May 15, 2006).
- <sup>126</sup> *See generally* Seneca Leasing Act of 1950, 64 Stat. 442 (Act of Aug. 14, 1950), and Seneca Nation Land Claims Settlement Act of 1990, 25 U.S.C. § 1774.
- <sup>127</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 16 (May 15, 2006).
- <sup>128</sup> Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 5 (Sept. 4, 2006).
- <sup>129</sup> Municipal Administrative Services, Inc., 5 and 7 (May 12, 2006) (submitted with comments of the Navajo Nation (May 13, 2006)).
- <sup>130</sup> *Id.*
- <sup>131</sup> *Id.* at 2.
- <sup>132</sup> *See, e.g.*, Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 6 (April 29, 2006) (citing *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989)); Comments of the Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 24 (Jan. 20, 2006).
- <sup>133</sup> *See, e.g.*, Comments of the Pechanga Band of Luiseño Mission Indians 7 (May 15, 2006); Comments of the Shoshone-Bannock Tribes 15 (May 12, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 3 (May 15, 2006); Comments of the Jicarilla Apache Nation 13–14 (May 12, 2006).
- <sup>134</sup> *See, e.g.*, Comments of the Southern Ute Indian Tribe 5–6 (May 15, 2006); Comments of the Affiliated Tribes of Northwest Indians Economic Development Corporation 8 (May 14, 2006).
- <sup>135</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 6–7 (May 15, 2006); Comments of the Jicarilla Apache Nation 18-19 (May 12, 2006); Comments of the Shoshone-Bannock Tribes 9 (May 12, 2006).
- <sup>136</sup> *See, e.g.*, Comments of the Southern Ute Indian Tribe 5–6 (May 15, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 9 (May 15, 2006).
- <sup>137</sup> WINNING NEGOTIATIONS THAT PRESERVE RELATIONSHIPS 3 (Harvard Business School Press, 2004).
- <sup>138</sup> Uniform Appraisal Standards for Federal Land Acquisitions 30 (5th ed., 2000).
- <sup>139</sup> *See generally* Uniform Standards of Professional Appraisal Practice, Standard 1: “Real Property Appraisal, Development” (July 1, 2006) (*available at* <http://commerce.appraisalfoundation.org/html/2006%20USPAP/toc.htm>).
- <sup>140</sup> 16 U.S.C. § 803 (e).
- <sup>141</sup> *Id.*
- <sup>142</sup> 18 C.F.R. § 11.4 (a).
- <sup>143</sup> Comments of Sempra Energy 2 (May 15, 2006).
- <sup>144</sup> Comments of the Edison Electric Institute 5 (May 15, 2006).
- <sup>145</sup> *See generally* Comments of the Interstate Natural Gas Association of America (May 15, 2006); Comments of the Edison Electric Institute (May 15, 2006).
- <sup>146</sup> Comments of the Edison Electric Institute 12 (May 15, 2006 and Sept. 4, 2006).

- <sup>147</sup> Comments of the Edison Electric Institute 8 (June 21, 2006); Comments of the Interstate Natural Gas Association of America 8–10 (May 15, 2006).
- <sup>148</sup> Comments of the Edison Electric Institute 8 (May 15, 2006).
- <sup>149</sup> Comments of the Shoshone-Bannock Tribes 9 and 15 (May 12, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 6–7 (May 15, 2006); Comments of the Ute Mountain Ute Tribe 2 (May 15, 2006); Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 87 (May 11, 2006).
- <sup>150</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 67 (May 11, 2006).
- <sup>151</sup> Comments of the Ute Mountain Ute Tribe 3 (May 15, 2006).
- <sup>152</sup> Dale M. Nesbitt, Altos Management Partners, Inc., Impacts on Natural Gas Markets of Charges Assessed for Tribal Rights-of-Way in the Southwestern United States 4 (May 15, 2006) (submitted with comments of the Southern Ute Indian Tribe (May 15, 2006)).
- <sup>153</sup> Id.
- <sup>154</sup> Charles J. Cicchetti, Pacific Economics Group, The Economic Implications of Navajo Right of Way Fees 8 (May 15, 2006) (submitted with comments of the Navajo Nation (May 13, 2006)).
- <sup>155</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 36–46 (May 11, 2006).
- <sup>156</sup> Id.
- <sup>157</sup> Comments of FAIR 9 (June 16, 2006).
- <sup>158</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 47–50 (May 11, 2006).
- <sup>159</sup> Testimony of Federal Energy Regulatory Comm’n Chairman Joseph Kelliher, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, Summary and 6 (Nov. 2, 2005).
- <sup>160</sup> Energy Information Administration, U.S. Dep’t of Energy, Annual Energy Outlook 147 (2006).
- <sup>161</sup> Testimony of Philip D. Wright, Williams Pipeline Company, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, 2 (Nov. 2, 2005).
- <sup>162</sup> The Brattle Group, Why Are Electricity Prices Increasing? 10 (June 2006) (percentages calculated from operation and maintenance costs shown in Figure 2-1) (*available at* <http://www.eei.org>).
- <sup>163</sup> See Federal Energy Regulatory Comm’n, Docket No. RP05-442.
- <sup>164</sup> See Federal Energy Regulatory Comm’n, Docket No. RP06-72; settlement approved see 117 F.E.R.C. ¶ 61,217 (Nov. 21, 2006).
- <sup>165</sup> See 95 F.E.R.C. ¶ 61,059.
- <sup>166</sup> Comments of the Edison Electric Institute 5 (May 15, 2006).
- <sup>167</sup> See, e.g., Comments of the Shoshone-Bannock Tribes 15 (May 12, 2006).
- <sup>168</sup> See, e.g., Comments of the Edison Electric Institute 2 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 3 (May 15, 2006); Comments of Idaho Power Company 2 (May 15, 2006).
- <sup>169</sup> Comments of Idaho Power Company 2 (May 15, 2006).
- <sup>170</sup> Comments of the Interstate Natural Gas Association of America 3 (May 15, 2006).
- <sup>171</sup> Comments of the Edison Electric Institute 5 (May 15, 2006).
- <sup>172</sup> Id. At 5 n. 2 (citing 5 U.S.C. §§ 551(8) and 558(c), as interpreted by *Swinomish Tribal Community v. Federal Energy Regulatory Comm’n*, 627 F.2d 499, 506 (D.C. Cir. 1980); *Miami MDS Co. v. Federal Communications Comm’n* 14 F.3d 658, 659–60 (D.C. Cir. 1994); and *Natural Resources Defense Council, Inc. v. United States Env’tl. Protection Agency*, 859 F.2d 156, 213 (D.C. Cir. 1988)).
- <sup>173</sup> See, e.g., Comments of the Isleta, Zia, and Sandia Pueblos 8 (May 15, 2006); Comments of the Jicarilla Apache Nation 13 (May 15, 2006).
- <sup>174</sup> See, e.g., Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 74 (May 11, 2006).
- <sup>175</sup> Comments of the Edison Electric Institute 3 (Sept. 4, 2006).
- <sup>176</sup> See, e.g., Comments of Questar Southern Trails Pipeline Company 2 (May 15, 2006); Comments of the Bill Barrett Corporation 1 (March 8, 2006).
- <sup>177</sup> The Brattle Group, Why Are Electricity Prices Increasing? (June 2006) (*available at* <http://www.eei.org>).
- <sup>178</sup> National Commission on Energy Policy, Siting Critical Energy Infrastructure (June 2006) (*available at* <http://www.energycommission.org>).
- <sup>179</sup> The Brattle Group, Why Are Electricity Prices Increasing? 9 (June 2006) (*available at* <http://www.eei.org>).
- <sup>180</sup> Id.
- <sup>181</sup> Id. at 52.
- <sup>182</sup> Id. at 52–55.
- <sup>183</sup> Id. at 64.
- <sup>184</sup> National Commission on Energy Policy, Siting Critical Energy Infrastructure 18 (June 2006) (*available at* <http://www.energycommission.org>).

- <sup>185</sup> Id.
- <sup>186</sup> Id.
- <sup>187</sup> Id.
- <sup>188</sup> Comments of the Edison Electric Institute 12 (May 15, 2006).
- <sup>189</sup> See, e.g., Comments of Western Business Roundtable 1 (Jan. 20, 2006); Comments of Idaho Power Company 2 (May 15, 2006); Comments of the Edison Electric Institute 13 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 3 (May 15, 2006).
- <sup>190</sup> Comments of the Edison Electric Institute 5 (Sept. 4, 2006).
- <sup>191</sup> Comments of the New Mexico Oil and Gas Association 1 (Jan. 20, 2006).
- <sup>192</sup> Comments of the Bill Barrett Corporation 2 (Mar. 8, 2006).
- <sup>193</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 61–62 (May 11, 2006).
- <sup>194</sup> Comments of the Southern Ute Indian Tribe 4 (May 15, 2006).
- <sup>195</sup> Id. at 8.
- <sup>196</sup> Comments of the Edison Electric Institute 4 (Sept. 4, 2006).
- <sup>197</sup> Comments of the Interstate Natural Gas Association 4 (Sept. 3, 2006).
- <sup>198</sup> Comments of the Edison Electric Institute 10 (Sept. 4, 2006).
- <sup>199</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 109 (May 11, 2006).
- <sup>200</sup> Comments of Greenberg Traurig 2 (Oct. 11, 2006).
- <sup>201</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–67 (1903); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57 (1978); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”)
- <sup>202</sup> See *United States v. Celestine*, 215 U.S. 278, 285 (1909); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57 (1978); *United States v. Dion*, 476 U.S. 734, 738–39 (1986); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
- <sup>203</sup> See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968); *United States v. Dion*, 476 U.S. 734, 738–39 (1986); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
- <sup>204</sup> Page 50 of the HRA Report states that the Southern Ute assigned operation of 21 acquired wells to Red Willow and retained royalty interests in 30 other wells. The Southern Ute states that it retained royalty interests in all wells on the Reservation operated by Red Willow. Comments of the Southern Ute Indian Tribe 6 (Sept. 2, 2006).
- <sup>205</sup> Comments of the Morongo Band of the Mission Indians 6 (Sept. 3, 2006) (the unit of measure stated in the HRA Report is acres, but it should be miles).
- <sup>206</sup> Comments of the Morongo Band of the Mission Indians 6 (Sept. 3, 2006) (the unit of measure stated in the HRA Report is acres, but it should be miles).
- <sup>207</sup> Comments of the Navajo Nation 8 (Sept. 1, 2006).
- <sup>208</sup> Id. at 9. Page 113 of the HRA Report states that the Navajo Nation had refused all offers to develop its energy reserves from 1978 to 2003. The Navajo Nation states that it granted rights to 254,000 acres to Chuska Energy Company for oil and gas exploration and development under an operating agreement signed in 1987 and that it had prior agreements with the company in 1983 and 1984.
- <sup>209</sup> HRA (Historical Research Associates, Inc.), *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006* 127 (July 7, 2006).
- <sup>210</sup> Comments of Arizona Public Service Company 2–3 (Sept. 3, 2006).
- <sup>211</sup> HRA (Historical Research Associates, Inc.), *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006* 129 (July 7, 2006).
- <sup>212</sup> Id. at 131. The HRA Report states that the easement has not been renewed. APS states that it considered the ROW renewed when the check it submitted was cashed. Comments of Arizona Public Service Company 2-3 (Feb. 5, 2007).
- <sup>213</sup> Comments of the Navajo Nation 7–8 (Sept. 1, 2006).
- <sup>214</sup> Id. at 8.
- <sup>215</sup> Id.
- <sup>216</sup> Comments of the Edison Electric Institute 6 (May 15, 2006).
- <sup>217</sup> Id. at 9 (May 15, 2006).
- <sup>218</sup> Comments of the Edison Electric Institute 17 (Sept. 4, 2006).
- <sup>219</sup> U.S. Department of Energy, *Energy Consumption and Renewable Energy Development Potential on Indian Lands* (2000) (*available at* <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html>).
- <sup>220</sup> Comments of the Hopi Tribe 3 (May 14, 2006).
- <sup>221</sup> Id.

<sup>222</sup> Comments of Arizona Public Service Company 3–4 (Sept. 3, 2006).

<sup>223</sup> Comments of the Pueblo of Santa Ana 3 (May 15, 2006).

<sup>224</sup> Comments of the San Xavier District of the Tohono O’odham Nation 1 (May 15, 2006).

<sup>225</sup> Comments of the Shoshone-Bannock Tribes of the Fort Hall Reservation 9 (May 12, 2006).

<sup>226</sup> Comments of the Shoshone-Bannock Tribes of the Fort Hall Reservation attachment (May 12, 2006).

<sup>227</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 77–85 (May 11, 2006).

<sup>228</sup> 43 U.S.C. § 961.6.

<sup>229</sup> Comments of the Rosebud Sioux Tribe 3–6 (May 15, 2006).

THIS PAGE INTENTIONALLY LEFT BLANK

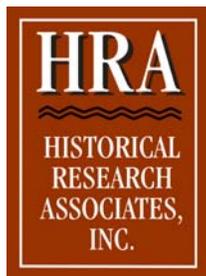
## **Appendix A**

The 2006 HRA document, *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006*, is an appendix to this report.

# Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006

A report prepared for the U.S. Department of the Interior  
as part of the Energy Policy Act Section 1813 Study

Matthew C. Godfrey, Ph.D, Co-Principal Investigator  
Emily Greenwald, Ph.D, Co-Principal Investigator  
David Strohmaier, M.A., M.S. Project Historian



Historical Research Associates, Inc.

July 7, 2006

# Contents

- Introduction..... 1**
- Abbreviations ..... 2**
- Rights-of-Way on Tribal Lands: Statutes and Regulations..... 3**
  - Early Right-of-Way Legislation, 1880s-1898..... 3
  - Consolidation of Rights-of-Way Statutes, 1899-1947 ..... 4
  - The Act of February 5, 1948..... 7
  - Federal Regulations Concerning Rights-of-Way Over Indian Lands ..... 8
  - Federal Regulations Since 1951..... 11
  - Process for Obtaining a Right-of-Way..... 15
  - Summary ..... 16
- Case Studies: Methodology ..... 18**
- Energy Rights-of-Way on the Uintah and Ouray Indian Reservation ..... 19**
  - Formation of the Reservation..... 19
  - Energy Resource Development..... 23
  - Energy Rights-of-Way ..... 25
  - Case Studies ..... 33
- Energy Rights-of-Way on the Southern Ute Indian Reservation..... 44**
  - Formation of the Reservation..... 44
  - Energy Resource Development..... 49
  - Energy Rights-of-Way ..... 50
  - Case Studies ..... 57
- Energy Rights-of-Way on the Morongo Indian Reservation..... 77**
  - Formation of the Reservation..... 77
  - Energy Resource Development..... 80
  - Energy Rights-of-Way ..... 81
  - Case Studies ..... 90
- Energy Rights-of-Way on the Navajo Indian Reservation ..... 105**
  - Formation of the Reservation..... 105
  - Energy Resource Development..... 110
  - Energy Rights-of-Way ..... 113
  - Case Studies ..... 120
- Summary..... 144**
- Bibliography ..... 146**
  - Unpublished Documents ..... 146
  - Personal Communications..... 146
  - Internet Sites ..... 146
  - Statutes at Large..... 147
  - Federal Register ..... 148
  - Regulations ..... 148
  - Government Publications..... 148
  - Dissertations and Theses ..... 149
  - Articles and Papers..... 149
  - Books ..... 150

## List of Maps

**Figure 1.** Ute territory in the nineteenth century. .... 20  
**Figure 2.** Oil and gas fields on the Uintah and Ouray Reservation..... 24  
**Figure 3.** Southern Ute land cessions and current reservation. .... 47  
**Figure 4.** Morongo Indian Reservation. .... 80  
**Figure 5.** Navajo Indian Reservation with satellite reservations, in Arizona, Utah, and  
New Mexico. .... 108

## List of Tables

**Table 1.** Compensation for energy rights-of-way on the Uintah and Ouray Indian Reservation. .... 31  
**Table 2.** Compensation for energy rights-of-way on the Southern Ute Indian Reservation. .... 54  
**Table 3.** Compensation for energy rights-of-way on the Morongo Indian Reservation..... 87  
**Table 4.** Compensation for energy rights-of-way on the Navajo Indian Reservation. .... 117

## Introduction

Section 1813 of the Energy Policy Act of 2005 requires the U.S. Department of the Interior and the U.S. Department of Energy to complete a study of issues regarding energy rights-of-way on tribal land. The Act calls for the study to include (1) an analysis of historic rates of compensation paid for energy rights-of-way on tribal land; (2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation; (3) an assessment of tribal self-determination and sovereignty interests involved; and (4) an analysis of relevant national energy transportation policies. The Department of the Interior has asked Historical Research Associates, Inc. (HRA), to prepare a report addressing the first component of the study: historic rates of compensation.

This report begins with a brief overview of statutes and regulations governing rights-of-way on tribal lands. The remainder of the report presents case studies of four Indian reservations—the Uintah and Ouray Indian Reservation, the Southern Ute Indian Reservation, the Morongo Indian Reservation, and the Navajo Indian Reservation—to examine historic rates of compensation for rights-of-way. Each case study consists of a discussion of how the reservation was created, an overview of energy resources on the reservation, a table listing rates that have been paid for various energy rights-of-way, and four specific examples of right-of-way negotiations.

## Abbreviations

APS	Arizona Public Service
BIA	U.S. Department of the Interior, Bureau of Indian Affairs
BLM	U.S. Department of the Interior, Bureau of Land Management
CEPC	California Electric Power Company
CERT	Council of Energy Resource Tribes
CPI	Consumer Price Index
CPIU	Consumer Price Index – All Urban Consumers
FERC	Federal Energy Regulatory Commission
FPC	Federal Power Commission
HRA	Historical Research Associates, Inc.
Interior	Department of the Interior
IRA	Indian Reorganization Act of 1934
kV	kilovolt
MAPCO or Mid-America	Mid-America Pipeline Company
mcf	thousand cubic feet
MCM	thousands of circular mil
MMBTU	million British thermal units
MOU	Memorandum of Understanding
NAPI	Navajo Agricultural Products Industry
NOG	Navajo Nation Oil and Gas Company
ROW	right-of-way
SCE	Southern California Edison
Secretary	Secretary of the Interior
Section 1813	Section 1813 of the 2005 Energy Policy Act
TWPC	Transwestern Pipeline Company

## Rights-of-Way on Tribal Lands: Statutes and Regulations

The federal government’s trust responsibility toward Native Americans includes oversight of rights-of-way crossing Indian lands. Statutes and regulations governing these rights-of-way have sought to address two sometimes conflicting goals: protecting the integrity of Indian lands, and facilitating growth of transportation, communication, and energy supply networks.

The history of statutes and regulations governing rights-of-way can be divided into three major periods. During the first phase, spanning the 1880s to 1899, Congress enacted a separate law for each right-of-way it authorized over Indian lands. In the second phase, beginning in 1899, Congress passed legislation affecting all rights-of-way of a particular kind, such as a 1904 act authorizing the Secretary of the Interior (Secretary) to grant easements for oil and gas pipelines on Indian lands. The current phase began in 1948, when Congress passed a law establishing general rules for all rights-of-way on Indian lands. Among its provisions, the 1948 act included language requiring tribal consent for any right-of-way crossing the land of “organized” tribes.<sup>1</sup>

The historical overview that follows addresses rights-of-way on tribal lands generally, paying special attention to energy-related easements. It also explains the statutory and regulatory provisions dealing with tribal consent, compensation, and tenure—central issues in current debates over easements on tribal lands.

### Early Right-of-Way Legislation, 1880s-1898

During the last two decades of the nineteenth century, Congress enacted over 100 separate laws granting specific rights-of-way on Indian reservations. These early statutes primarily involved easements for railroad, telegraph, and telephone lines.<sup>2</sup> Congress generally required the company obtaining the right-of-way to pay damages or compensation as determined by the

---

<sup>1</sup> The Act of February 5, 1948 (62 Stat. 17) required consent from tribes with governments organized under one of three statutes: Act of June 18, 1934, the Act of May 1, 1936, or the Act of June 26, 1936.

<sup>2</sup> Under most of these acts, telegraph and telephone lines were generally included in the railroad right-of-way grant. These statutes can be found in Charles Kappler’s *Indian Affairs: Laws and Treaties* (Washington, D.C.: Government Printing Office, 1904), vol. 1, passim (206-685).

Secretary. The acts often required that Indian consent be obtained, either to the right-of-way itself or to the amount of compensation.<sup>3</sup> Statutes for railroad rights-of-way through Indian Territory (present-day Oklahoma) required payment of annual rentals in addition to compensation for damages and for the land used.<sup>4</sup> Early acts generally did not limit the tenure of the easement, apart from providing that when the land ceased to be used for the purpose granted, it would revert to the tribe.<sup>5</sup> Nearly all the early statutes specified the maximum width of the rights-of-way and required that applicants conduct surveys and file maps of the route with the Secretary.

### Consolidation of Rights-of-Way Statutes, 1899-1947

Starting with legislation in 1899, Congress ended the practice of passing a separate law for each right-of-way over Indian land and instead gave the Secretary general authority to grant particular kinds of rights-of-way. This meant that, beginning in 1899, a company wanting a right-of-way across an Indian reservation no longer had to seek congressional authorization. Instead, the company applied directly to the Secretary of the Interior, who would approve the right-of-way if the company complied with the terms of the general statute.

---

<sup>3</sup> For examples, see the Act of August 5, 1882 (22 Stat. 299) granting a right-of-way to Arizona Southern Railroad Co. through the Papago Indian Reservation in Arizona; Section 3 of the Act of March 2, 1889 (25 Stat. 852) granting a right-of-way to Forest City and Watertown Railroad Co. through the Sioux Indian Reservation; Section 2 of the Act of June 6, 1894 (28 Stat. 87) granting a right-of-way to Albany and Astoria Railroad Co. through the Grand Ronde Indian Reservation in Oregon.

<sup>4</sup> The Act of August 2, 1882 (22 Stat. 181) granting a right-of-way for a railroad and telegraph line through lands owned by the Choctaw and Chickasaw Nations required quarterly payments to the nations in addition to damages (see Section 4 of the act). Subsequent rights-of-way over Indian Territory lands included provisions for rental payments using similar language: “Said company shall also pay, as long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum for each mile of railway.” For examples, see Section 5 in the Act of July 4, 1884 (23 Stat. 69), granting a right-of-way to Gulf, Colorado and Santa Fe Railway Co. through Indian Territory and the Act of March 23, 1898 (30 Stat. 341), granting a right-of-way to Denison, Bonham and New Orleans Railway Co. through Indian Territory. A few statutes for rights-of-way over Indian lands outside of Indian Territory contain the same provision. See Section 5 in the Act of January 16, 1889 (25 Stat. 647), granting a right-of-way to Moorhead, Leech Lake and Northern Railway Co. through the White Earth Indian Reservation in Minnesota; Section 5 in the Act of February 23, 1889 (25 Stat. 684), granting a right-of-way to Yankton and Missouri Valley Railway Co. through the Yankton Indian Reservation in Dakota; and Section 4 in the Act of July 6, 1892 (27 Stat. 83), authorizing Marinette and Western Railroad Co. to construct a railroad through the Menominee Reservation in Wisconsin.

<sup>5</sup> For examples, see Section 2 in the Act of July 4, 1884 (23 Stat. 69), granting a right-of-way to Gulf, Colorado and Santa Fe Railway Co. through Indian Territory; Section 2 in the Act of January 17, 1887 (24 Stat. 361) granting a right-of-way to Maricopa and Phoenix Railway Co. through the Gila River Indian Reservation in Arizona; and Section 1 in the Act of February 24, 1896 (29 Stat. 12), granting a right-of-way to Brainerd and Northern Minnesota Railway Co. through the Leech Lake Indian Reservation in Minnesota. One act, the Act of April 18, 1896 (29 Stat. 95) granting a right-of-way over part of the Sac and Fox and Iowa Indian Reservation in Kansas-Nebraska, referred to the railroad company obtaining the right-of-way as the “lessee in perpetuity.”

The Act of March 2, 1899, ushered in the new era. After two decades of authorizing more than 100 specific rights-of-way to railroad companies, Congress established a general process applying to all railroad easements on Indian lands. Any company in the United States could apply to the Secretary of the Interior for a right-of-way for a railway, telegraph, or telephone line. As long as the Secretary was satisfied that the company had made the application in good faith and could construct the necessary facility, the right-of-way was granted. The Secretary also determined the amount of compensation that the company would pay the affected tribe, including damages to improvements and to adjacent lands.<sup>6</sup>

Although prior legislation had allowed telegraph and telephone lines within a railroad right-of-way on Indian land, Congress addressed easements for telephone or telegraph lines *outside* of railroad lines in the Indian Department appropriations act of March 3, 1901. Section 3 of the act authorized the Secretary to grant easements through any Indian reservation for the construction, operation, and maintenance of telephone and telegraph lines outside railroad rights-of-way. The Secretary determined the compensation to be paid to the tribes and gave final authorization for the lines' construction. The Secretary could also assess an annual tax on the lines for the benefit of the Indians.<sup>7</sup>

Congress passed additional legislation in 1902 dealing with railroad, telegraph, and telephone line easements in Indian Territory only.<sup>8</sup> The 1902 act required the payment of full compensation for the land taken by the right-of-way and for all damages to individual owners and to the tribe or Indian nation. The railroad company and the tribe or nation could negotiate the amount of compensation. The statute provided for “three disinterested referees” when the parties failed to agree.<sup>9</sup>

Congress dealt with rights-of-way for oil and gas pipelines on Indian lands in 1904. At that time, the development of oil and gas resources was becoming a major contributor to the country's economy, and the construction of pipelines to convey these products to market was

---

<sup>6</sup> Act of March 2, 1899 (30 Stat. 990).

<sup>7</sup> Any tax assessed on the lines could not exceed \$5 for each 10 miles of line. See Section 3 of the Act of March 3, 1901 (31 Stat. 1058, 1083).

<sup>8</sup> See Act of February 28, 1902 (32 Stat. 43). Section 23 of the act repeals the Act of March 2, 1899, for the tribes in Oklahoma and Indian Territory.

<sup>9</sup> Act of February 28, 1902 (32 Stat. 43). Section 15 details the compensation process. This act also included an annual rental payment (\$15 per mile) to be paid to the Secretary of the Interior (see Section 16).

becoming more common. With the Act of March 11, 1904, Congress provided general authority to the Secretary to grant rights-of-way for oil or gas pipelines traversing Indian reservations. The act authorized the Secretary to grant easements across tribal and allotted lands of any Indian reservation, and it contained provisions similar to the earlier railroad, telephone, and telegraph right-of-way acts. For example, the law stated that no parties could construct pipelines across Indian lands without authorization from the Secretary, who would also determine the amount of compensation. As with the 1901 act for telegraph and telephone easements, Congress gave the Secretary authority to assess an annual tax on the pipelines for the benefit of the Indians. The act restricted the tenure of the right-of-way to 20 years, although the Secretary was authorized to extend the easement for another 20 years, “upon such terms and conditions as he may deem proper.”<sup>10</sup>

In 1911, Congress authorized easements for electric power lines over Indian reservations and other lands. The annual appropriation act for the U.S. Department of Agriculture that year provided

that the head of the department having jurisdiction over the lands be . . . authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way . . . upon the public lands, national forests and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power . . .

A subsequent provision explained that “reservation” meant “any national park, national forest, military, Indian, or any other reservation.” The statute stipulated that the term of the easement could not exceed 50 years, but it made no reference to compensation or damages.<sup>11</sup>

In the early 1920s, the Federal Power Commission (FPC) became involved in the federal government’s administration of rights-of-way for certain electric transmission lines over tribal lands, a role that its successor, the Federal Energy Regulatory Commission (FERC), continues to play today. The Federal Water Power Act, as amended in 1935, gave the FPC authority to issue licenses for constructing dams, reservoirs, and associated transmission lines on the public lands

---

<sup>10</sup> Act of March 11, 1904 (33 Stat. 65). This law stated that any tax assessed on the pipelines could not exceed \$5 for each 10 miles of line. This is the same wording found in the 1901 right-of-way act for telephone and telegraph lines. The Act of March 2, 1917 (39 Stat. 969, 973), an Indian appropriations act, amended the provision for the Secretary’s approval of maps to allow the Secretary to issue temporary permits.

<sup>11</sup> Act of March 4, 1911 (36 Stat. 1235, 1253-1254). The Act of May 27, 1952 (66 Stat. 95) amended the 1911 act by including “poles and lines for communication purposes, and for radio, television, and other forms of communication” and by redefining the width of the right-of-way.

and reservations of the United States. These lands, according to the act, included national forests, tribal lands within Indian reservations, and military reservations. The statute mandated that licenses would be issued “only after a finding by the [FPC] that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.” Likewise, the license would “contain such conditions as the Secretary of the department under whose supervision such reservation falls . . . deems necessary for the adequate protection and utilization of such reservations.”<sup>12</sup> The 1935 amendment to the Federal Water Power Act provided that when licenses were issued involving the use of “tribal lands within Indian reservations, the Commission shall, . . . subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge” for the use of the right-of-way. It also defined the tenure for the licenses as “not exceeding fifty years.” During that 50-year period, the charges for use of the right-of-way could be adjusted with the FPC’s approval. Adjustments could occur at the end of the first 20 years and then “at periods of not less than ten years thereafter . . .”<sup>13</sup>

## The Act of February 5, 1948

On February 5, 1948, Congress enacted legislation that remains the principal statute governing rights-of-way across tribal lands today. It gave the Secretary authority to grant rights-of-way “for all purposes, subject to such conditions as he may prescribe,” across any lands held in trust for Indians. The act required “the consent of the proper tribal officials” for any easement on lands belonging to a tribe organized under the IRA, the Act of May 1, 1936 (which extended the IRA to the Territory of Alaska), or the Act of June 26, 1936 (known as the Oklahoma Indian Welfare Act).<sup>14</sup> The consent provision did not specifically address tribes *not* organized under one of these three acts.

---

<sup>12</sup> Act of August 26, 1935 (49 Stat. 803 at 838, 840); see also 16 U.S.C. (2004) Sections 796 (2), 797 (e). This provision may give the Department of the Interior and other departments the ability to impose conditions on projects within Indian and other federal reservations. See Charles R. Sensiba, “Who’s in Charge Here? The Shrinking Role of the Federal Energy Regulatory Commission in Hydropower Relicensing,” *University of Colorado Law Review* 70 (Spring 1999): 606-607.

<sup>13</sup> Act of August 26, 1935 (49 Stat. 803 at 843, 841). Interestingly, FERC has generally allowed tribes to negotiate the rates stipulated in the licenses with the hydroelectric licensees. These negotiations have long been understood to include things like power value and cost of replacement power, as opposed to land values.

<sup>14</sup> Act of February 5, 1948 (62 Stat. 17).

In regard to payment, the 1948 act stated, “No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just.” The legislation did not specify the tenure of rights-of-way, nor did it explicitly repeal earlier rights-of-way statutes, meaning that the terms of tenure delineated in those earlier statutes continued to apply. Likewise, the 1948 act did not amend or repeal the Federal Water Power Act, so the FPC’s authority over certain electric transmission lines remained in effect.<sup>15</sup>

## Federal Regulations Concerning Rights-of-Way Over Indian Lands

Periodically, the U.S. Department of the Interior (Interior) issued regulations specifying how rights-of-way statutes were to be administered.<sup>16</sup> On May 22, 1928, the Secretary released comprehensive regulations governing rights-of-way over Indian lands, which the Government Printing Office published in booklet form in 1929.<sup>17</sup> The 1928 regulations covered oil and gas pipelines, electricity transmission lines, railroads, telephone and telegraph lines, roads, drainage projects, and irrigation projects, as well as other types of rights-of-way.

The regulations specified that no one could survey, locate, or build on Indian lands for right-of-way purposes without obtaining permission from the Secretary of the Interior. The applicant applied first for permission to survey, then for permission to proceed with construction, and finally for the actual right-of-way. The Secretary could grant authority to proceed with construction before full compliance with the regulations, provided the applicant deposited twice the actual damages that construction would cause. The regulations required the applicants to prepare maps of location and field notes to accompany the right-of-way application.<sup>18</sup>

---

<sup>15</sup> Act of February 5, 1948 (62 Stat. 17).

<sup>16</sup> The Office of Indian Affairs, the Bureau of Indian Affairs’ predecessor, had previously developed regulations based on the earlier right-of-way acts. For example, regulations delineated after the passage of the Act of March 3, 1901, which granted rights-of-way for telephone and telegraph lines, included the following language on compensation (dated March 26, 1901): “The conditions on different reservations throughout the country are so varied that it is deemed inadvisable to prescribe definite rules in the matter of determining the tribal compensation and damages for right-of-way. As a rule, however, the United States Indian agent, or a special United States Indian agent, or Indian inspector will be designated to determine such compensation and damages, subject to the approval of the Secretary of the Interior.” U.S. Department of the Interior, *Annual Report of the Commissioner of Indian Affairs* (Washington, D.C.: Government Printing Office, 1901), 639-40.

<sup>17</sup> The 1928 regulations were published as *Regulations of the Department of the Interior Concerning Rights of Way Over Indian Lands* (Washington, D.C.: U.S. G.P.O, 1929).

<sup>18</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Sections 1-15.

Following the description of the general process for obtaining authority for a right-of-way, the regulations delineated the rules for specific types of rights-of-way. The provisions for oil and gas pipelines required applicants to apply for rights-of-way under the Act of March 11, 1904, as amended, unless otherwise provided in the statutes cited in this section of the regulations. The regulations required the burying of pipelines to a sufficient depth to avoid interference with cultivation; to keep roads open while pipelines were being laid under them, and to place pipelines under the beds of ravines, canyons, or waterways they crossed, or upon a suitable superstructure.<sup>19</sup> In addition, the regulations stated,

To avoid loss to the Indians in the handling of oil or gas produced from their lands, the superintendent or other officer in charge is hereby authorized in his discretion to grant temporary permission for applicants for oil or gas pipe line rights of way to proceed at their own risk with the construction of such lines, provided they first deposit twice the amount of damages which the superintendent or other officer in charge estimates will result therefrom and also files written agreement to comply promptly with the requirements of the law and these regulations.<sup>20</sup>

For power projects, the regulations required applications for rights-of-way on tribal lands to be made under the Act of February 1, 1901, or the Act of March 4, 1911, “except where the power is generated by the use of hydroplants. In such cases,” the regulations continued, “a separate application covering the tribal lands must be filed with the Federal Power Commission under the Federal water power act [sic] of June 10, 1920 (41 Stat. L. 1063), and separate regulations promulgated by the Federal Power Commission.”<sup>21</sup>

After dealing with each category of right-of-way, the regulations addressed compensation and damages. Section 71 specified, “Except as provided in section 30 hereof no applicant should independently attempt to negotiate for a right of way with or pay any money therefor direct to any tribe of Indians or the owner of any restricted Indian allotment.” The next section designated the superintendent or other officer in charge as the appropriate person to appraise the land and calculate damages involved in the right-of-way. The superintendent was then to

---

<sup>19</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Sections 30-39.

<sup>20</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Section 31.

<sup>21</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Section 43.

prepare two schedules of damages, one for tribal lands and one for allotted lands, filling in the actual damages as the information was obtained in the field.<sup>22</sup>

Section 78 provided guidelines for appropriate use charges for rights-of-way. It deferred to the Federal Water Power Act for transmission lines from hydroelectric projects on tribal land, noting that Section 9(e) of that act stated that the Federal Power Commission “shall fix a reasonable charge” for the use of tribal lands. Section 78 also indicated that “assessments for oil or gas pine [sic] lines should not be less than 25 cents per rod . . . .”<sup>23</sup>

Some of the sections dealing with applications for specific types of rights-of-way addressed tribal involvement in the process, although the sections for oil and gas and for power projects did not. The general provisions on compensation and damages, however, stated that

Where tribal lands are involved, all railroad and other right-of-way applications of more than ordinary importance should be presented to the tribe in general council assembled. A record of the proceedings should be kept and a duly authenticated copy of such minutes should be attached to the schedule. Except in the case of railroads the approval of the Secretary of the Interior may be given in his discretion, even though no amicable settlement has been reached with the Indians. However, it is required that every effort be made to bring about an amicable agreement whenever reasonably possible.<sup>24</sup>

The regulations did not define what constituted an application “of more than ordinary importance.” In allowing the Secretary to approve such a right-of-way at his discretion, the regulations implied that tribal consent was not mandatory.

In 1938, the first Code of Federal Regulations was issued. It codified the 1928 regulations, with amendments that had been made in the intervening ten years, as Title 25, Part 256. The bulk of the regulations remained as they were in 1928. But passage of the Indian Reorganization Act in 1934 triggered a change to the general provisions for compensation and damages. Section 256.83 specified,

Where tribal lands are involved, belonging to a tribe which is organized under the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476), all right-of-way applications must be presented to the tribal council or other authorized representative body; and, in the case of unorganized tribes, all railroad rights-of-way and others of more than ordinary importance, should likewise be thus submitted to the council or representative body of the

---

<sup>22</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Sections 71-71, 76, and 78.

<sup>23</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Section 78.

<sup>24</sup> *Regulations . . . Concerning Rights of Way Over Indian Lands*, Section 79.

tribe. A record of the proceedings should be kept and a duly authenticated copy attached to the schedule.<sup>25</sup>

Again, the regulations did not define “more than ordinary importance.” The 1938 revision of this section eliminated the language regarding the Secretary’s discretion in granting approval when no amicable settlement had been reached. It did not, however, explicitly state that tribal consent was required before the right-of-way was approved.

## Federal Regulations Since 1951

In 1951, Interior published new regulations governing rights-of-way on Indian lands, revising the 1938 and subsequent regulations in response to the Act of February 5, 1948.<sup>26</sup> Section 256.3(a) of the regulations provided that “No right-of-way shall be granted over and across any restricted lands belonging to a tribe, nor shall any permission to survey or to commence construction be issued with respect to any such lands, without the prior written consent of the tribal council.” This provision, and the regulations as a whole, did not distinguish between tribes with governments organized under the IRA (or other statutes) and tribes not organized by statute. The regulations defined “tribe” as “a nation, tribe, band, pueblo, community, or other group of Indians residing on a reservation, rancheria, or other reserve within the continental United States or Alaska.” “Tribal council,” the term used in the consent provision, was defined as “the official council, business committee, or other body, or the governor or other individual, authorized to represent a tribe in consenting to the granting of the rights-of-way provided for in this act.”<sup>27</sup>

Applications for permission to survey, for permission to commence construction, and for the right-of-way itself were to be made through the Bureau of Indian Affairs (BIA) Superintendent of the reservation involved.<sup>28</sup> The Superintendent had the authority to grant approval for surveys, construction, and rights-of-way, if he or she was satisfied that the applicant had complied with the appropriate regulations. As before, the Superintendent was empowered to

---

<sup>25</sup> 25 CFR 256.83 (1938).

<sup>26</sup> 16 FR 8578-8583. The regulations appeared in Title 25, Part 256, of the Code of Federal Regulations.

<sup>27</sup> 16 FR 8579, 8578 (Sections 256.3 and 256.2).

<sup>28</sup> Prior to 1947, the Bureau of Indian Affairs was called the Office of Indian Affairs. This report uses “Bureau of Indian Affairs,” regardless of time period, to avoid confusion. The Superintendent is the top BIA official of a BIA agency. He or she reports to an Area Director (now Regional Director), the top BIA official of a BIA Regional Office (formerly Area Office), which has jurisdiction over several agencies.

grant permission to begin construction at the same time or after a permit to survey was issued, provided that the applicant deposited twice the estimated damages for survey and construction and agreed in writing to comply with the other regulations.<sup>29</sup>

In addition, the regulations required that “as soon as practicable” after an application for a right-of-way was filed, the Agency Superintendent would “cause an appraisal to be made of the damages due the landowners.” The regulations did not prescribe an appraisal method. Based on the appraisal, the Superintendent would then “prepare separate schedules for the individual lands and for the tribal lands traversed by the right-of-way,” showing what acreage was taken, the value per acre, damages to improvements, adjoining land or other property, and total amount of damages due to each land owner. The applicant would deposit the total amount of damages identified on the schedules with the Superintendent, who would place the money in a special deposit account in the Individual Indian Monies Trust Fund. After the application was approved, the money would be distributed to the landowners.<sup>30</sup>

According to the regulations, a right-of-way was an easement or permit, valid for the period stated in the grant. It was terminated once the use for which it had been granted was discontinued and it had been abandoned. The duration of a grant of easement varied with the type of right-of-way. For railroads (and their associated telephone and telegraph lines) and for public roadways, the tenure was “without limitation as to term of years.” For oil or gas pipelines, the duration was limited to 20 years, with a possible renewal for another 20 years.<sup>31</sup> Rights-of-way for all other purposes (which would include electric lines not exempted by Section 256.2[b]), were limited “to a period of not to exceed 50 years” and could be renewed for a similar term.<sup>32</sup> Section 256.2(b) specifically excluded “primary hydroelectric transmission lines over and across tribal lands” from the regulations, stating that “applications for such rights-of-way must be filed with the Federal Power Commission.”<sup>33</sup>

---

<sup>29</sup> 16 FR 8579-80 (Sections 256.3, 256.4, 256.5, 256.7 and 256.16).

<sup>30</sup> 16 FR 8580 (Sections 256.14, 256.15).

<sup>31</sup> This limitation reflects a provision of the Act of March 11, 1904, granting rights-of-way for oil and gas pipelines, which remained in effect after passage of the Act of February 5, 1948.

<sup>32</sup> 16 FR 8580 (Section 246.19). This limitation is based on the Act of March 4, 1911, granting of rights-of-ways for electric power lines, which also remained in effect after passage of the 1948 act.

<sup>33</sup> 16 FR 8579. It should be noted that Section 256.27 consists of regulations pertaining to power projects on Indian trust lands, but it applies to projects not excluded by Section 256.2 (b). (16 FR 8582-8583.)

Like the earlier versions, the 1951 regulations included sections applying to particular kinds of rights-of-way. For example, Section 256.25 contained rules specific to oil and gas pipelines. Subpart (c) of that section allowed applicants for oil or gas pipeline easements to apply for land for pumping stations or tank sites. Subpart (e) stated that by accepting the right-of-way, the applicant agreed to allow the Secretary of the Interior to inspect the applicant's books and records "in order to obtain information pertaining in any way to oil or gas produced from restricted lands or other lands under the jurisdiction of the Secretary."<sup>34</sup>

Regulations for projects related to the generation, transmission, or distribution of electric power, apart from those exempted under Section 256.2(b), were delineated in Section 256.27. All applications for such projects were to be referred by the Superintendent to the Division of Water and Power in the Office of the Secretary (or other designated agency) "for consideration of the relationship of the proposed project to the power development program of the United States." If the project did not "conflict with the program of the United States," the Division of Water and Power would so notify the BIA Area Director, who would then inform the Superintendent to proceed.<sup>35</sup>

By accepting a right-of-way for a transmission line of 33 kV or more on Indian lands, the applicant agreed to allow the United States certain rights over the line and other facilities constructed on or across the right-of-way. Interior could utilize any surplus capacity of the line beyond what the applicant's operations required. Interior could also increase the capacity of the line at its own expense and then utilize the surplus capacity. The United States reserved the right to acquire the line and other facilities at a cost determined by one representative each of the applicant and Interior, and a third representative chosen by the other two.<sup>36</sup>

In 1957, Interior reorganized Indian right-of-way regulations and placed them under Part 161 of Chapter 25.<sup>37</sup> The 1957 regulations were substantially the same as those published in 1951. Section 161.27 differed from the earlier 256.27 in that it applied only to projects involving generation, transmission, or distribution of electric power of 33 kV or higher. The exemption

---

<sup>34</sup> 16 FR 8581 (Sections 256.25[c], 256.25[e]).

<sup>35</sup> 16 FR 8582 (Section 256.27).

<sup>36</sup> 16 FR 8582 (Section 256.27).

<sup>37</sup> 22 FR 10581-10588.

from the regulations of “primary hydroelectric transmission lines over and across tribal lands” remained.<sup>38</sup>

Aside from a few revisions made in 1960 (the most important of which was changing the maximum tenure of oil and gas pipeline rights-of-way from 20 years to 50 years), the regulations did not change until 1968.<sup>39</sup> At the end of 1968, Interior published a complete, revised version of Part 161. Because numerous tribal groups had “strongly objected” to a proposed revision allowing rights-of way on lands of tribes “not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act without tribal consent,” Interior retained the tribal consent language that had appeared in earlier regulations. However, the new regulations eliminated advance construction on rights-of-way. “It is believed,” noted Commissioner of Indian Affairs Robert Bennett, “that giving permission to construct in advance of the grant of right-of-way does not serve the best interest of the landowners.”<sup>40</sup> The new regulations also changed the tenure for oil and gas pipelines and for electric transmission lines to a period “without limitation as to term of years,” although such changes applied only to those easements granted under the 1948 act, not to those granted under other legislation.<sup>41</sup>

Other revisions involved new rules for determining compensation. According to Section 161.12, “the consideration for any right-of-way granted or renewed under this Part 161 shall be not less than the appraised fair market value of the rights granted, plus severance damages, if any, to the remaining estate.”<sup>42</sup> This is the first time the regulations included a section titled “Consideration for right-of-way grants” and the first time they used the term “fair market value.” Although the 1948 statute had used the phrase “such compensation as the Secretary of the Interior shall determine to be just,”<sup>43</sup> prior regulations had only dealt with “damages.”

Since 1968, Interior has made several small but important changes to the regulations. For example, the language of the regulation concerning consent of the Indian landowners was altered

---

<sup>38</sup> 22 FR 10585 (Section 161.27).

<sup>39</sup> 25 FR 7979.

<sup>40</sup> 33 FR 19803-19804.

<sup>41</sup> 33 FR 19807 (Section 161.18). The exclusion of primary hydroelectric transmission lines from the regulations remained (Section 162.2[c]).

<sup>42</sup> 33 FR 19807 (Section 161.12).

<sup>43</sup> Act of February 5, 1948 (62 Stat. 17).

in 1971, becoming more succinct and referring specifically to the tribe rather than the tribal council. It now reads, “No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.”<sup>44</sup> In addition, the section addressing compensation for rights-of-way was revised in 1980 to state,

the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.<sup>45</sup>

The duration of grants of easement remained the same as in prior regulations. The regulations were redesignated in 1982 as Part 169 of Title 25.<sup>46</sup>

## Process for Obtaining a Right-of-Way

Under the current regulations, a specific process must be followed to obtain a right-of-way over Indian land. A company first has to file an application for permission to survey a right-of-way with the Secretary (or a designated representative). The application must include the written consent of the landowners, a check for double the estimated damages, an indemnity agreement, and a charter or articles of incorporation. If the application meets these conditions, the Secretary can grant permission to survey.<sup>47</sup>

After making the survey, the company has to submit a written application, containing corporate documents, an executed stipulation (the terms of which are spelled out in Section 169.5), and “maps of definite location” with field notes. The applicant also has to provide a deposit of the total estimated consideration and damages, which the Secretary can increase if he or she determines that the total amount is not adequate to compensate the landowners. As long as the tribe has provided written consent (as stipulated in Section 169.3), the Secretary has the

---

<sup>44</sup> 25 CFR 169.3(a). Unless otherwise noted, all subsequent references to the Code of Federal Regulations are to the 2006 version.

<sup>45</sup> 25 CFR 169.12.

<sup>46</sup> 47 FR 13327, March 30, 1982.

<sup>47</sup> 25 CFR 169.4.

authority to grant the requested right-of-way “upon satisfactory compliance with the regulations in this part 169,” after which the grantee can begin construction.<sup>48</sup>

The regulations also explain the process for renewing a right-of-way. Application for renewal has to be submitted “on or before the expiration date.” “If the renewal involves no change in the location or status of the original right-of-way grant,” the regulations continue, the applicant can so certify, and, as long as the tribe consents, the Secretary can then grant the renewal after receiving the proper payment.<sup>49</sup>

Under certain circumstances, the Secretary can terminate the right-of-way. These include failure of the grantee to comply with terms or conditions of the grant or with the regulations, using the right-of-way over the space of two years for purposes other than those for which it was granted, and abandonment. The regulations instruct the Secretary to provide written notice to the grantee 30 days before termination. If the grantee fails to correct the deficiency within the 30 days, then the Secretary can terminate the right-of-way.<sup>50</sup>

## Summary

Although earlier regulations required that compensation amounts be presented to tribes in general council before rights-of-way were executed (implying, but not specifically stating that tribal consent was necessary), federal regulations since 1951 have explicitly required tribal consent before the Secretary of the Interior approves a right-of-way over tribal land. Interior has not placed any constraints on tribal consent—the current regulations do not prevent a tribe from choosing *not* to consent, for whatever reason. In some circumstances (spelled out in the regulations), the Secretary may grant rights-of-way over individually owned Indian lands without consent of the owner(s). But the regulations do not give the Secretary authority to circumvent tribal consent.<sup>51</sup> Congress has not amended the 1948 act’s consent requirement, which (according to the language of the statute) applies only to tribes organized under certain statutes.

---

<sup>48</sup> 25 CFR 169.15.

<sup>49</sup> 25 CFR 169.19.

<sup>50</sup> 25 CFR 169.20.

<sup>51</sup> Note that federal regulations continue to exempt certain electric transmission lines from the provisions related to easements over tribal lands.

Tenure limits for rights-of-way vary according to the statute under which the easement is granted. The regulations do not require a minimum tenure. The general practice, as shown in the case studies that follow, has been to limit oil and gas pipeline easements to 20-year terms and electric transmission easements to 50-year terms.

Finally, the present regulations require compensation that is “not less than but not limited to the fair market value of the rights granted,” plus damages.<sup>52</sup> They do not specify what form compensation may take. In the past, compensation was generally computed on a dollars-per-rod or dollars-per-acre basis. More recently, as the case studies below indicate, some tribes have negotiated for alternative forms of compensation, such as throughput charges or partial ownership of the lines.

---

<sup>52</sup> 25 CFR 169.12.

## Case Studies: Methodology

To analyze historic rates of compensation for energy rights-of-way over Indian lands, this report uses four reservations as case studies: the Uintah and Ouray Indian Reservation, the Southern Ute Indian Reservation, the Morongo Indian Reservation, and the Navajo Indian Reservation. These four were selected in part because of the willingness of the tribes to open their records for research, and in part because of the prevalence of energy rights-of-way on the reservations. Historians from HRA, accompanied by personnel from the Department of the Interior, traveled to each reservation and examined both tribal and BIA Agency records pertaining to rights-of-way. Information for the Southern Ute and Navajo Reservations was supplemented with documents collected from the files of El Paso Western Pipelines in Colorado Springs, Colorado. While the following discussion does not address every energy right-of-way on every Indian reservation, it highlights some of the important factors in compensation negotiations and provides examples of right-of-way rates since 1948.

In preparing this report, HRA agreed to protect confidential and proprietary information at the request of the participating tribes. Representatives of the Ute Indian Tribe on the Uintah and Ouray Reservation asked HRA not to disclose company names or to discuss negotiations that have occurred since 2002. The Navajo Nation Department of Justice asked HRA not to reveal dollar figures involved in its agreements with Transwestern Pipeline Company starting in 1984, or dollar figures involved in its 2001 agreement with Questar Southern Trails Pipeline Company. HRA was also asked not to discuss any currently active Navajo negotiations. HRA decided independently not to write about active negotiations involving any of the participating tribes because of their sensitive nature. None of these limitations impeded HRA's ability to complete the report as it had originally been conceived.

Preparing the tables of right-of-way data posed some unanticipated problems. HRA was not able to gather exactly equivalent data for all four reservations, so the column headings differ slightly from one table to another. The sheer number of easements on certain reservations made it impossible to include everything in the tables. HRA tried to limit its data collection to "major" energy rights-of-way, but the meaning of "major" necessarily differed among the reservations. Before each table, HRA has included explanations of the specific data collection and presentation methods used.

# Energy Rights-of-Way on the Uintah and Ouray Indian Reservation

## Formation of the Reservation

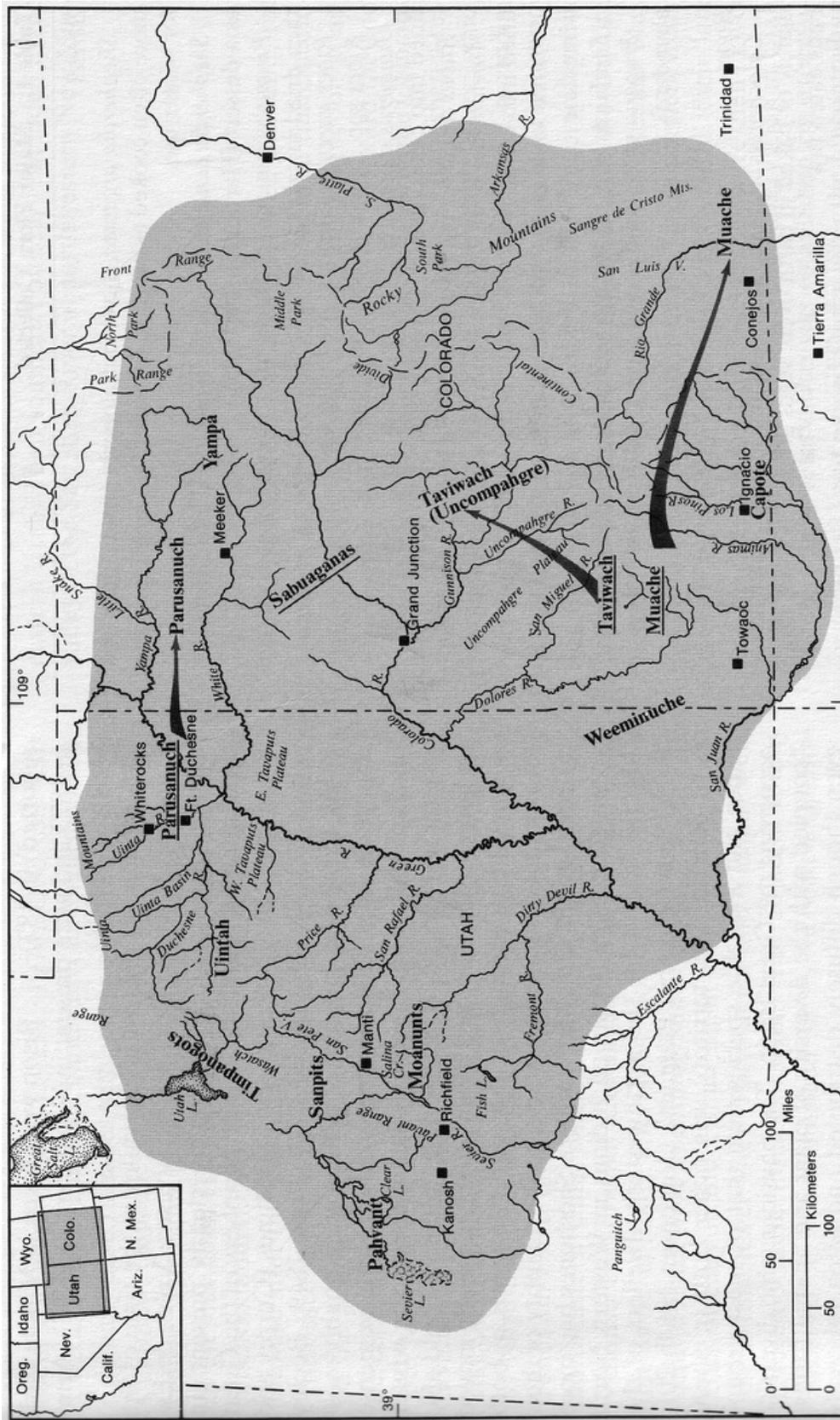
Located in the Uintah Basin of northeast Utah, the Uintah and Ouray Indian Reservation features varied terrain ranging from high mountain desert in the central part of the basin to more vegetated mountain ranges. Elevations on the reservation vary from 5,600 feet to over 11,000 feet. The basin covers approximately 11,500 square miles, and the exterior boundaries of the reservation enclose just over four million acres, reaching from the Utah-Colorado border west to the Wasatch Range. The northern portion of the reservation is the most heavily populated.<sup>53</sup>

Before the arrival of non-Indians, the Ute Indians occupied considerable territory in the Rocky Mountains and Great Basin. They subsisted by hunting, fishing, and gathering, moving seasonally to take advantage of different food sources. Hunting and foraging parties generally stayed within the same regions and became identified as territorial bands. The Ute bands and their territories included the Mouache in southern Colorado and northern New Mexico; the Capote in the San Luis Valley and north-central New Mexico; the Weeminuche in the San Juan River Valley and northwestern New Mexico; the Tabeguache (or Uncompahgre) in the valleys of the Gunnison and Uncompahgre Rivers in Colorado; the White River Ute (Parusanuch and Yampa) near the White and Yampa Rivers; the Uintah Ute in the Uintah Basin, located in northwest Colorado and northeastern Utah; the Pahvant, situated west of the Wasatch Mountains; the Timpanogots around Utah Lake in north-central Utah; the Sanpits in the Sanpete Valley in central Utah; and the Moanunts near the upper Sevier River and Otter Creek areas in Utah (see Figure 1).<sup>54</sup>

---

<sup>53</sup> Veronica E. Velarde Tiller, ed., *American Indian Reservations and Trust Areas* (Washington, D.C.: U.S. Department of Commerce, 1996), 573.

<sup>54</sup> Katherine M.B. Osburn, *Southern Ute Women: Autonomy and Assimilation on the Reservation, 1887-1934* (Albuquerque: University of New Mexico Press, 1998), 9-10; Donald Callaway, Joel Janetski, and Omer C. Stewart, "Ute," in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 11, *Great Basin*, ed. Warren L. D'Azevedo (Washington, D.C.: Smithsonian Institution, 1986), 338-40.



**Figure 1.** Ute territory in the nineteenth century. Source: Donald Callaway, Joel Janetski, and Omer C. Stewart, "Ute," in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 11, *Great Basin*, ed. Warren L. D'Azavedo (Washington, D.C.: Smithsonian Institution, 1986), 337.

The influx of Mormon settlers into present-day Utah in 1847 led to conflicts with several Ute bands, largely because the Mormons encroached on Ute territory. In order to dispel the conflicts, Indian agents recommended that the Timpanogots, Sanpits, Pahvant, and Uintah bands be relocated to a reservation in the Uintah Basin. This met with the approval of Brigham Young, president of the Mormon church, who deemed the area “one vast contiguity of waste,” worthless for any agricultural endeavors.<sup>55</sup> Accordingly, on October 3, 1861, President Abraham Lincoln issued an Executive Order establishing the Uintah Valley (Uintah) Reservation in the northeastern corner of Utah for these bands. By 1870, many band members had relocated to the reservation.<sup>56</sup>

Responding to friction between Indians and non-Indians in Colorado, the Commissioner of Indian Affairs also removed the White River Ute to the Uintah Reservation in the early 1880s. The Uncompahgre band was removed as well, but to its own reservation. An Executive Order dated January 5, 1882, established the Uncompahgre (Ouray) Reservation, which bordered the southeastern portion of the Uintah Reservation, for these Indians. In 1886, the Uncompahgre (Ouray) Reservation and the Uintah Reservation were consolidated as the Uintah and Ouray Reservation, encompassing nearly four million acres. In 1912, the Agency headquarters was moved from Whiterocks to Fort Duchesne, Utah.<sup>57</sup>

The reservation was not left untouched, however. In 1886 and 1888, non-Indian miners found gilsonite on the reservation, leading Congress to remove 7,004 acres of land from the reservation’s eastern end. Miners agitated for more land, and in 1894, Congress created a commission to allot the Uncompahgre band and to open surplus lands on the Ouray portion of the reservation to non-Indian settlement.<sup>58</sup> Because of a lack of suitable agricultural lands, the commission also decided to provide allotments to the Uncompahgre from the Uintah portion of

---

<sup>55</sup> As cited in David Rich Lewis, “Uintah-Ouray Indian Reservation,” *Utah History Encyclopedia*, Allan Kent Powell, ed. (Salt Lake City: University of Utah Press, 1994), online edition, <<http://www.onlineutah.com/uintah-ourayreservationhistory.shtml>> (May 1, 2006) [hereafter cited as Lewis, “Uintah-Ouray Indian Reservation”].

<sup>56</sup> Lewis, “Uintah-Ouray Indian Reservation”; “Executive Order of October 3, 1861,” in Charles J. Kappler, *Indian Affairs: Laws and Treaties*, vol. 1, 900 [hereafter cited as Kappler, vol. 1].

<sup>57</sup> Lewis, “Uintah-Ouray Indian Reservation”; “Executive Order of January 5, 1882,” in Kappler, vol. 1, 901; Fred A. Conetah, *A History of the Northern Ute People* (Salt Lake City, Utah: Uintah-Ouray Ute Tribe, 1982), 118; Joseph G. Jorgensen, *The Sun Dance Religion: Power for the Powerless* (Chicago: The University of Chicago Press, 1972), 55.

<sup>58</sup> “Act of August 15, 1894 (28 Stat. 286),” in Kappler, vol. 1, 546.

the reservation. In 1898, Congress stipulated that Uintah and White River Ute would be compensated \$1.25 per acre for any lands given to the Uncompahgre, and unallotted lands on the Ouray part of the reservation would become part of the public domain. In the six years that followed, the Uncompahgre received 384 allotments.<sup>59</sup>

At the same time, plans were underway to allot the Uintah and White River Ute. In 1898, Congress passed an act authorizing a commission to allot lands on the Uintah portion of the reservation “with the consent of the Indians properly residing” thereon.<sup>60</sup> The Uintah and White River Ute resisted allotment, and the commission assigned to allot the reservation found little land fit for farming or grazing. Nevertheless, in 1902, Congress authorized the Secretary of the Interior to provide allotments to the Uintah and White River Ute, with or without their consent. Heads of family would receive 80 acres each, and each family member would obtain an additional 40 acres. The remaining “surplus” lands would be sold for \$1.25 an acre, excepting a 250,000-acre tribal grazing reserve running for 60 miles along the foothills of the Uinta Mountains.<sup>61</sup> By 1906, the government had allotted the majority of the reservation, and the surplus land had been opened for settlement.<sup>62</sup>

During this period, the federal government made several changes to the boundaries of the Uintah and Ouray Reservation. In 1905, it removed over one million acres for inclusion in the Uinta National Forest, and in 1909, it took another 56,000 acres for the Strawberry Valley Reclamation Project. Because of these withdrawals, as well as the sale of surplus lands after allotment occurred, the Uintah and Ouray Reservation shrank to approximately 360,000 acres by 1909. After organizing under the Indian Reorganization Act of 1934 as the Ute Indian Tribe of the Uintah and Ouray Reservation, the Northern Ute (as the bands on the reservation collectively became known) instituted a land acquisition program. In addition, the federal government

---

<sup>59</sup> David Rich Lewis, *Neither Wolf Nor Dog: American Indians, Environment, and Agrarian Change* (Oxford: Oxford University Press, 1994), 53-54; Conetah, *A History of the Northern Ute People*, 120-122. See also “Act of June 7, 1897 (30 Stat. 62),” “Act of March 1, 1899 (30 Stat. 924),” and “Act of June 19, 1902 (32 Stat. 742),” in Kappler, vol. 1, 621, 686, 799.

<sup>60</sup> “Act of June 4, 1898 (30 Stat. 429),” in Kappler, vol. 1, 642-643. The act also provided for the cession of surplus unallotted lands to the United States.

<sup>61</sup> Lewis, *Neither Wolf Nor Dog*, 54-55, 57. See also “Act of May 27, 1902 (32 Stat. 245)” and “Act of June 19, 1902 (32 Stat. 742),” in Kappler, vol. 1, 753, 799; “Act of March 3, 1903 (32 Stat. 982),” in Kappler, vol. 3, 17-18.

<sup>62</sup> Uintah and Ouray Agency Annual Narrative Report, 1912, National Archives Microfilm Publication M-1011, *Superintendents’ Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1907-1938* [hereafter cited as M-1011], Roll 158 (Uintah and Ouray Agency), Section V, Allotments, 36.

returned some 726,000 acres in the Hill Creek Extension to the tribe in 1948.<sup>63</sup> By 1985, tribal land on the reservation totaled over one million acres, while allotments made up approximately 14,000 acres.<sup>64</sup>

## Energy Resource Development

The Ute Indian Tribe's reservation lands span several important oil and gas fields (see Figure 2), and these resources became significant sources of income to tribal members in the second half of the twentieth century. Major oil companies began exploring the lands of the Uintah Basin in 1941, and the tribe received its first oil royalties in 1949—approximately \$125 per capita.<sup>65</sup> In 1952 and 1953, the tribe received \$3.7 million from mineral extraction, but this had decreased to \$775,000 by the 1962-1963 fiscal year.<sup>66</sup> As more companies became aware of the rich oil fields underlying the Uintah and Ouray Reservation, they began an accelerated drilling program that led to a 401 percent increase in production between 1968 and 1972. By June 30, 1972, the reservation had 35 tribal oil wells and two individual wells, providing as much as 72 percent of the total tribal income.<sup>67</sup>

With increased production in the 1970s, the Ute Indian Tribe began to assert itself more aggressively in lease negotiations, assuming administrative control of that program from the BIA. As one scholar described it, under the new system, the tribe's Energy and Mineral Resources Division would make recommendations to the Tribal Business Committee (consisting of two representatives from each of the Uintah, White River, and Uncompahgre bands) about what lands to lease and what bids to accept. The Committee would then inform the BIA, which

---

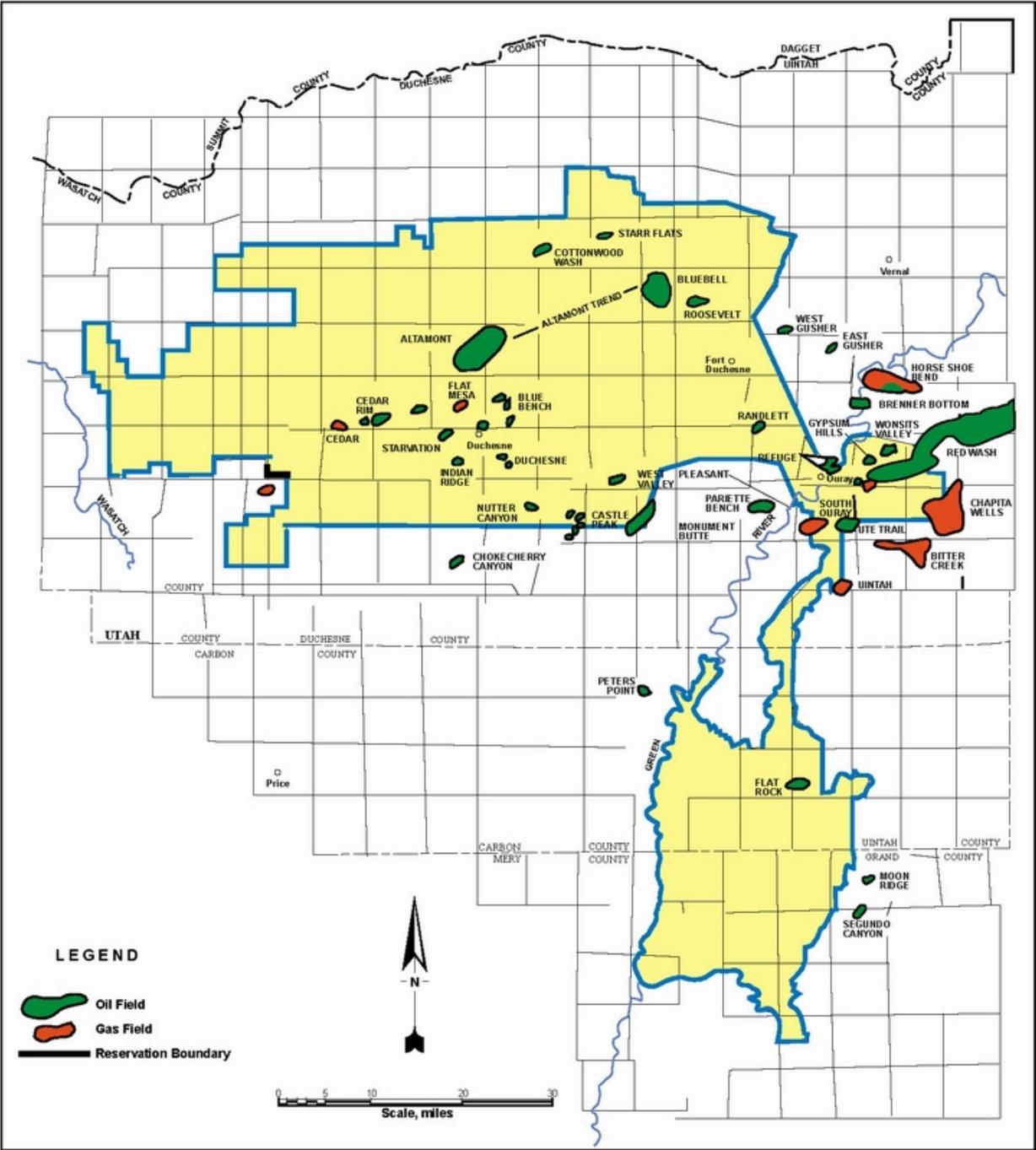
<sup>63</sup> Lewis, "Uintah-Ouray Indian Reservation"; see also Jorgensen, *The Sun Dance Religion*, 55.

<sup>64</sup> Lewis, "Uintah-Ouray Indian Reservation"; U.S. Department of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands: Lands Under Jurisdiction of the Bureau of Indian Affairs* (Washington, D.C.: U.S. Department of the Interior, 1985), 25.

<sup>65</sup> Stephanie Romeo, "Concepts of Nature and Power: Environmental Ethics of the Northern Ute," *Environmental Review* 9, no. 2 (1985): 153; Conetah, *A History of the Northern Ute People*, 150.

<sup>66</sup> Martha C. Knack, "Indian Economies, 1950-1980," in *Handbook of North American Indians*, ed. William Sturtevant, vol. 11, *Great Basin*, ed. Warren L. D'Azevedo (Washington, D.C.: Smithsonian Institution, 1986), 580.

<sup>67</sup> United States Department of the Interior, Bureau of Indian Affairs, Planning Support Group, *The Uintah and Ouray Indian Reservation: Its Resources and Development Potential* (Billings, Mont.: United States Department of the Interior, 1974), 24-25.



**Figure 2.** Oil and gas fields on the Uintah and Ouray Reservation. Source: U.S. Department of Energy, Energy Efficiency and Renewable Energy, “Northern Ute Indian Tribe of the Uintah and Ouray Reservation: Atlas of Oil & Gas Plays,” <[http://www.eere.energy.gov/tribalenergy/guide/pdfs/uintah\\_ouray.pdf](http://www.eere.energy.gov/tribalenergy/guide/pdfs/uintah_ouray.pdf)> (April 4, 2006).

would usually follow the tribe's requests.<sup>68</sup> According to anthropologist Joseph G. Jorgensen, "the Tribe refused to let long-term leases, [and] refused to accept fifteen percent royalty contracts." Instead, tribal officials "wrote all-new lease contracts, demanding royalties from 25 to 35 percent." Under these terms, the Ute Indians began receiving approximately \$15 million in annual royalties.<sup>69</sup> By the mid-1990s, 490 wells were in production on leases covering more than 102,000 acres.<sup>70</sup> In 2005, the Ute Indian Tribe established its own energy company, called Ute Energy, in order to develop the tribe's oil and gas resources. In doing so, the Ute worked with the Jurrius Group, headed by John Jurrius, which had been advising the tribe on energy issues since 2001, to negotiate oil and gas leasing agreements and to establish working interests and joint ventures with energy companies.<sup>71</sup>

## Energy Rights-of-Way

With oil and natural gas production so important on the Uintah and Ouray Reservation, numerous rights-of-way have been negotiated for pipelines, wells, gathering stations, and access roads. Because the oil that is produced on the reservation has a large paraffin content, making its pour point quite high (between 90 degrees to 130 degrees Fahrenheit), it is difficult to transport by pipeline, meaning that no major oil pipelines originate on reservation lands.<sup>72</sup> Instead, the main energy pipelines crossing the reservation are natural gas lines. In addition, several electric transmission and distribution lines traverse the reservation. The Federal Energy Regulatory Commission (FERC) regulates those pipelines and transmission lines that are interstate conveyances. Other major energy rights-of-way on the reservation include large diameter pipelines (12 inches or more), high-pressure pipelines, local electric distribution lines, well site access roads, compressor sites, and gas collecting plants.

---

<sup>68</sup> Romeo, "Concepts of Nature and Power," 155.

<sup>69</sup> Joseph G. Jorgensen, "Sovereignty and the Structure of Dependency at Northern Ute," *American Indian Culture and Research Journal* 10, no. 2 (1986): 85.

<sup>70</sup> Tiller, *American Indian Reservations and Trust Areas*, 573-74.

<sup>71</sup> "Ute Tribe Forms Energy Firm," *Deseret Morning News*, 27 October 2005.

<sup>72</sup> See U.S. Department of the Interior, Bureau of Indian Affairs, Planning Support Group, *The Uintah and Ouray Indian Reservation*, 27. Oil's pour point is the lowest temperature of the resource before the formation of significant amounts of wax crystals.

The negotiation of energy rights-of-way on the Uintah and Ouray Indian Reservation can be divided into two different periods. The first, beginning with the passage of the Act of February 5, 1948, extended roughly until 2002. During this time period, the Ute Indian Tribe was responsible for consenting to applications for rights-of-way, including compensation amounts, acting on recommendations by BIA officials. For much of the period, the tribe largely accepted whatever the BIA regarded as adequate and rarely questioned compensation rates, which were set using land appraisals. Tribal ordinances dealing with grants of access to tribal land, for example, proclaimed that surface use and damage payments (as determined by appraisals) were generally adequate compensation for rights-of-way. In addition, for a time in the late 1960s and early 1970s, the tribe passed blanket resolutions covering all rights-of-way on tribal lands. Tribal Resolution No. 72-388, passed on October 25, 1972, for example, stated that the Tribal Business Committee authorized “the Realty Office of the Bureau of Indian Affairs to grant a right of way as long as they meet or exceed the fair market value and approval of R. O. Curry, Director of Resources for the Ute Indian Tribe.”<sup>73</sup> Under this system, the BIA coordinated with the tribe’s Director of Resources and the Director would either concur with or object to the granting of the right-of-way. In making these determinations, the Director often stipulated that the right-of-way be granted as long as the tribe received “fair market value” for the easement.<sup>74</sup>

What constituted fair market value, however, was a complicated question that the BIA attempted to resolve through the appraisal process. According to BIA policy, appraisals were performed on each easement in order to determine the character of the requested acreage, its past uses, and the sale price of similar tracts. The BIA would then use the appraisal to decide whether a company’s compensation offer—usually a per acre or per rod rate—was adequate. On November 29, 1973, for example, a company submitted an application to the Uintah and Ouray Agency to construct a lateral flow oil pipeline connecting two oil wells.<sup>75</sup> In September 1974, the Agency Superintendent requested that the Phoenix Area Office make an appraisal of the affected land, and Appraiser Lee H. Cinnamon received this task. On May 13, 1975, Cinnamon

---

<sup>73</sup> Quotation in Resolution No. 72-388, October 25, 1972, File ROW No. H62-1973-01, 4616-P3, Realty Office, Uintah and Ouray Agency, Fort Duchesne, Utah [hereafter referred to as U&O Agency].

<sup>74</sup> Dennis A. Mower, Director of Resources, Ute Indian Tribe, to Mr. William P. Ragsdale, Supt., Uintah and Ouray Agency, December 21, 1977, File ROW No. H62-1975-019, TR4616-P5, Realty Office, U&O Agency.

<sup>75</sup> District Landman, to United States Department of the Interior, Bureau of Indian Affairs, Uintah & Ouray Agency, November 29, 1973, File ROW No. H62-1975-019, TR4616-P5, Realty Office, U&O Agency.

made his report. He noted that the company had offered \$125 per acre for the right-of-way, which would cover approximately 39 acres. He explained that the land in the area was “dry pinyon-cedar and sagebrush rangeland,” although some acreage had been reseeded to crested wheatgrass. Generally, Cinnamon claimed, the land was “well adapted to range improvement practices.” Since similar land in the area had sold for \$100 to \$150 per acre, Cinnamon concluded that “the offer of \$125 per acre appears adequate compensation for the full acreage” (totaling \$4,900 for the 39 acres). However, he did not believe that the company had applied for sufficient acreage, and he recommended that an additional 8.5 acres be added, for a total of \$5,963.75, which he rounded to \$5,950.<sup>76</sup> Apparently, Cinnamon’s advice about expanding the right-of-way was not heeded, for no additional acreage was added, but the final consideration totaled \$4,893.75, or \$125 per acre, the appraised amount.<sup>77</sup>

Often, the BIA Appraiser found that the offered compensation was adequate (although one appraisal from 1966 noted that it “should in no way be construed to limit the negotiation or bargaining power of the individual allottees, the Ute Tribe, or their duly authorized representatives”<sup>78</sup>), but at times the BIA questioned the compensation that companies proposed. In June 1989, for example, a company submitted an application to the Uintah and Ouray Agency for a right-of-way for a 20-inch diameter pipeline that would cross certain sections of tribal land. Soon after, the company offered \$8,075 (\$8 per rod) in damages, basing that amount on the company’s own appraisal of the land.<sup>79</sup> Uintah and Ouray Agency Appraiser Dennis Montgomery disagreed with the company’s report, claiming the appraisal was “poorly done,” “too brief to adequately cover the subject matter,” and wrong in its valuation. Montgomery explained that “most pipeline rights-of-way are transacted at \$10.00 per linear rod,” which was “the going rate regardless of the land type, pipe size, or right-of-way width.” The company

---

<sup>76</sup> Quotations in Appraisal Report, Ute Tribal Land, Phoenix Area No. U&O (SPEC) 18-75, Agency No. U&O ROW H62-75-19, Memorandum Opinion of Value, May 13, 1975, File ROW No. H62-1975-019, TR4616-P5, Realty Office, U&O Agency; see also United States Department of the Interior, Bureau of Indian Affairs, Request for Real Estate Appraisal ROW H62-75-19, *ibid.* It is unclear from the documents why there were lapses in time between the application, the request for appraisal, and the actual occurrence of the appraisal

<sup>77</sup> Grant of Easement for Right-of-Way, Serial No. ROW H62-75-19, File ROW No. H62-1975-019, TR4616-P5, Realty Office, U&O Agency.

<sup>78</sup> Herman Brumley, Appraiser, Branch of Real Estate Appraisal, Phoenix Area Office, to Superintendent, Uintah and Ouray Agency, January 24, 1967, File ROW No. H62-1989-29, Realty Office, U&O Agency.

<sup>79</sup> Senior Property Agent to U.S. Department of the Interior, Bureau of Indian Affairs, July 21, 1989, File ROW No. H62-1989-153, 4616-P3, Realty Office, U&O Agency.

appraiser had apparently discounted the \$10 per rod rate by 20 percent “based on the subject right-of-way being 15’ in width versus one being 50’ in width.” However, the appraiser had offered “no comparable data to back this adjustment.” The company’s appraisal also compared the tracts of land in question to other parcels “some 50 to 60 miles” away, which “lack[ed] any resemblance to the subject.” Since tribal trust lands could not be condemned, and since other tribes had “negotiated for rights-of-way which far exceed the compensation received by fee owners,” Montgomery could not understand why appraisals determining fair market value continued to utilize “data gathered under threat of condemnation . . . [in] situations where this threat does not exist.”<sup>80</sup>

Upon receiving Montgomery’s report, Phoenix Area Office Chief Appraiser Francis Sedlacek agreed that the company’s appraisal was inadequate. He recommended that the company provide a fully-documented appraisal, and he also suggested that the Ute Indian Tribe try to obtain \$10 per rod “plus some type of tax based on the number of gallons that pass through the pipe” as compensation.<sup>81</sup> Ultimately, the tribe received \$8,025.70 in damages and a one-time rental fee of \$30,513.60, as well as a \$1,500.00 contribution to the Ute Indian Tribe scholarship fund.<sup>82</sup>

Along with appraisal issues, this example highlights the different methods of compensation that the Ute Indian Tribe began to explore in the 1980s. Instead of receiving only a lump sum for damages, the tribe also required annual rental fees (which were sometimes paid up front rather than each year) and donations to its scholarship fund. It is unclear from the existing documents whether the Tribal Business Committee was the entity initiating these proposals or whether they originated from BIA personnel. However, it is likely that since the tribe was exploring new methods of compensation for oil and gas leases, it was also the developer of the rights-of-way proposals. The tribe continued to ask for other forms of compensation into the 1990s. The duration of the rights-of-way also changed over time. In the 1950s and 1960s, pipeline and electric transmission line easements were usually granted for 50 years or without a time limit. In

---

<sup>80</sup> Dennis A. Montgomery to Francis Sedlacek, n.d., File ROW No. H62-1989-153, 4616-P3, Realty Office, U&O Agency.

<sup>81</sup> Francis M. Sedlacek, Area Chief Appraiser, Review Statement, August 16, 1989, File ROW No. H62-1989-153, 4616-P3, Realty Office, U&O Agency.

<sup>82</sup> See Grant of Easement for Right-of-Way, Serial No. ROW-H62-89-153, File ROW No. H62-1989-153, 4616-P3, Realty Office, U&O Agency; Resolution No. 89-195, November 20, 1989, *ibid*.

the 1970s, 1980s, and 1990s, however, the duration of a grant of easement was usually 20 years, sometimes with an option to renew.

In addition, the tribe began to use surface access agreements in the 1990s to encompass oil and gas leases and pipeline rights-of-way in one contract. One of these, negotiated in 1997, asked for \$1,325 per acre for facility sites and \$10.00 per rod for “linear rights-of-way,” as well as “a one-time fee of 10% of the acreage or linear rod use amount.” The agreement ran for 20 years with an option to renew for an additional 20; if such option was exercised, the rates were increased to \$1,400 per acre for facility sites and \$12.50 per rod for linear rights-of-way.<sup>83</sup>

In 2001, the Ute Indian Tribal Business Committee passed a new ordinance dealing with grants of access to tribal lands. This ordinance (01-006) outlined “a flexible, modern regulation process designed to achieve fair market value, in lieu of the inflexible, outdated per-acre determinant of value.”<sup>84</sup> It described how the right-of-way process would occur on the reservation. Under the system, when the BIA received a posting request for a right-of-way, it would route it to the tribe’s Energy and Minerals Department, Severance Tax Department, and Royalty Auditing Department. The BIA Realty Secretary would coordinate on-site inspections with the applicant, the BIA Environmental Coordinator, and the tribe’s Energy and Minerals technician, in order to complete an environmental assessment of the land. Thereafter, the company would submit a formal application and maps to the BIA Realty Office, and the Realty Officer would send the applications, maps, and environmental assessment to the tribe’s energy advisors (the Jurrius Group). In coordination with the tribe’s Energy and Minerals Department, the advisors, which had counseled with the tribe on energy matters since 2001, would examine the application. Such examinations would include determinations of the tribe’s negotiating position, the preparation of compensation options that the tribe could use, an evaluation of the applicant’s prior performance on the reservation, and actual negotiations with the applicant. From this examination, the advisors would develop a recommendation on the proposal and present it to the Tribal Business Committee for its consideration. The Business Committee would

---

<sup>83</sup> Resolution No. 98-060, February 23, 1997, copy provided by Energy and Minerals Department, Ute Indian Tribe, Fort Duchesne, Utah.

<sup>84</sup> As quoted in Susan F. Tierney and Paul J. Hibbard (Analysis Group) in Cooperation with the Ute Indian Tribe of the Uintah and Ouray Reservation, “Energy Policy Act Section 1813 Comments: Report of the Ute Indian Tribe of the Uintah and Ouray Reservation for Submission to the US Departments of Energy and Interior,” May 15, 2006, 71, copy at <<http://1813.anl.gov/documents/docs/ScopingComments/index.cfm>> (May 31, 2006).

then prepare a signed resolution either accepting, modifying, or rejecting the application, which would be sent to the BIA. If consent was granted, the BIA would prepare the grant of easement and an authority to construct letter, which would be approved and signed by the Agency Superintendent and sent to the applicant.<sup>85</sup>

Under this system, the Ute Indian Tribe has pursued other means of compensation rather than a flat per-acre or per-rod fee. These include throughput fees, usually ranging from one cent to thirty cents per thousand cubic feet of natural gas (mcf), measured at a certain point along the right-of-way; working interests in oil and gas wells; ownership of pipelines; and ownership of oil and gas wells. According to tribal representatives, these methods of compensation allow the tribe to recoup the costs of managing rights-of-way, as well as helping make it financially solvent.<sup>86</sup> The different approaches to compensation also square with the tribe's financial plan, ratified by tribal membership on December 20, 2001, which states the Business Committee's commitment to manage the tribe's assets in order to "achieve greater socio-economic well-being for current and future Tribal members."<sup>87</sup>

The following table (Table 1), arranged according to date of application, delineates the compensation and duration of some of the energy rights-of-way that have been concluded on the Uintah and Ouray Indian Reservation since 1948. The listed easements are representative samples of natural gas pipelines and electric transmission and distribution lines (the focus of this study), selected with the aid of the Ute Indian Tribe's Energy and Minerals Department. Some other rights-of-way pertaining to energy, such as access roads, gas compressor stations, and power stations, have been included for comparative purposes. Because of the Ute Indian Tribe's concerns with confidentiality, company names have not been included in the table.<sup>88</sup>

---

<sup>85</sup> Bureau of Indian Affairs, Uintah & Ouray Agency, Branch of Real Estate Services, "Rights-of-Way Processing Procedures, Revised 9/27/03," copy provided by Johnna Blackhair, Realty Officer, Branch of Real Estate Services, U&O Agency; Tierney and Hibbard, "Energy Policy Act Section 1813 Comments," 70-71.

<sup>86</sup> Notes on a presentation made by Cameron Cuch, Analyst, Ute Energy, and Lynn Becker, Land Manager, Ute Indian Tribe Energy and Minerals Department, April 10, 2006.

<sup>87</sup> As cited in Tierney and Hibbard, "Energy Policy Act Section 1813 Comments," 73.

<sup>88</sup> The information presented in this table was gleaned from rights-of-way files held by the Realty Office of the Uintah and Ouray Agency in Fort Duchesne, Utah.

**Table 1.** Compensation for energy rights-of-way on the Uintah and Ouray Indian Reservation.

Application Date	ROW No.	Purpose	Acreage	Compensation	Original Offer	Appraised Value	Date of Tribal Consent	Duration	Comments
06/30/1960	H62-1989-070 (FERC regulated)	138 kV powerline	78.564 (allotted and tribal land)	\$764.00 (tribal land only) "plus any damages as ascertained and appraised by the Bureau of Indian Affairs"			06/07/1960 (Tribal Resolution No. 60-142)	No delineated time limit in any of the documents	
08/02/1961	H62-1989-123 (FERC regulated)	20-inch pipeline	21.62	\$540.50; additional \$18,671 on 09/16/1991 for a 1.37 acre deviation within right-of-way		\$25 per acre	08/18/1961 (Tribal Resolution No. 61-180)	50 years beginning 06/09/1961	
02/21/1962	H62-1989-073 (FERC regulated)	10-inch gas pipeline lateral	19.58 tribal land (21.56 acres total)	\$489.50	\$25.00 per acre	\$10.00 per acre	06/05/1961 (Tribal Resolution No. 61-115); 08/18/1961 (Tribal Resolution No. 61-180); both amended by Tribal Resolution No. 61-220, 10/09/1961 as to duration (also accepted a lump sum payment rather than damages and rental)	50 years (originally 20 years)	
06/23/1965	H62-1966-01	8-inch gas pipeline	6.2	"Payment of damages as determined" (Tribal Resolution No. 64-201)	\$25.00 per acre	\$25.00 per acre	09/14/1964 (Tribal Resolution No. 64-201)		
10/18/1966	H62-1989-029 (FERC regulated)	4-inch gas pipeline	3.535	\$316.00	\$88.00 per acre	\$88.00 per acre (notes that the appraisal "should in no way be construed to limit the negotiation or bargaining power of the individual allottees, the Ute Tribe, or their duly authorized representatives.")	07/15/1966 (Tribal Resolution No. 66-163)	50 years beginning 07/26/1966	
03/21/1969	H62-1989-119	Compressor station site	3.67	\$126.75 and "other good and valuable consideration"			07/31/1969 (no tribal resolution was apparently passed)	Without limit as long as easement was used for the compressor station	This was where all natural gas from Eastern Utah gas fields was gathered and pressurized for transport
09/05/1972	H62-1973-01	69 kV electric powerline	11.413	\$1,764.00	\$150.00 per acre	\$150.00 per acre	10/25/1972 (Tribal Resolution No. 72-388)	50 years, ending 07/20/2022	
11/29/1973	H62-1975-019	Access road and lateral flow oil pipeline to connect and service Ute Tribal wells	39.146	\$4,893.75	\$125.00 per acre	\$125.00 per acre	09/05/1974 (Tribal Resolution No. 74-261)	20 years beginning 04/03/1972	Renewed as a mineral access agreement in 1992 for \$10 per rod (\$9,710 total)
02/03/1978	H62-1978-005	69 kV electrical power transmission line	3.78	\$378.00	\$100.00 per acre	\$100.00 per acre		50 years beginning 04/05/1978	
01/12/1979	H62-1979-006	7.2/12.5 kV electrical power transmission line	7.9	\$791.00	\$100.00 per acre			50 years beginning 01/12/1979	Was a conversion from a service line agreement to a right-of-way
09/10/1979	H62-1979-28	Natural gas pipeline	1.084	\$1,195.80 (for five different lines); minimum of \$50 per acre			10/10/1979 (Tribal Resolution No. 79-161); date on grant of easement is 07/25/1986	20 years beginning 09/10/1979	Renegotiated in 1997 as part of surface use agreement for \$1,325 per acre for facility sites, \$10.00 per rod for linear rights-of-way, and a one-time fee of 10% of the acreage or linear rod use amount—see Tribal Resolution No. 98-060
07/18/1980	H62-1980-31	4 ½-inch natural gas pipeline	2.947	\$250.00 per acre	\$50.00 per acre	\$50.00 per acre	1980 (Tribal Resolution No. 80-159)	20 years beginning 07/18/1980	Renegotiated in 1997 as part of surface use agreement for \$1,325 per acre for facility sites, \$10.00 per rod for linear rights-of-way, and a one-time fee of 10% of the acreage or linear rod use amount—see Resolution No. 98-060
08/11/1980	H62-1980-032	4 ½-inch natural gas pipeline	2.362	\$590.50	\$50.00 per acre			20 years beginning 08/11/1980	Renewed in 1998
	H62-1980-032—Renewal	4 ½-inch natural gas pipeline	2.362	\$2,597.75 (\$12.50 per rod)			02/23/1998 (Tribal Resolution No. 98-060)	20 years with an option to renew for an additional 20 years	Renewed as part of surface use agreement

**Table 1.** Compensation for energy rights-of-way on the Uintah and Ouray Indian Reservation.

Application Date	ROW No.	Purpose	Acreage	Compensation	Original Offer	Appraised Value	Date of Tribal Consent	Duration	Comments
04/03/1981	H62-1981-031	7.2/12.5 kV power distribution line		\$650.00	\$1,000 per acre	\$800.00 per acre (\$520.00 total)	05/14/1981 (Tribal Resolution No. 81-71)	20 years beginning 05/14/1981	
02/18/1983	H62-1983-018 (FERC regulated)	12-inch gas pipeline	8.55	\$4,275.00	\$500.00 per acre	\$500.00 per acre	05/17/1983 (Tribal Resolution No. 83-121)	20 years beginning 05/17/1983	
08/31/1983	H62-1984-049B	Cathodic Protection Groundbed to Pipeline	0.15	\$351.50	\$10 per rod (\$866.00 total)	\$10 per rod	11/29/1983 (Tribal Resolution No. 83-306)	20 years beginning 11/29/1983	
03/26/1984	H62-1984-017	Powerline	2.06	\$487.10; annual rental fee of \$24.36	\$500.00 per acre	\$500.00 per acre	05/05/1984 (Tribal Resolution No. 84-113); corrected on 02/18/1986 (Tribal Resolution No. 86-30)	20 years beginning 05/10/1984	
10/03/1984	H62-1985-020	Powerline	1.824	\$910.93; annual rental fee of \$46.00	\$500.00 per acre	\$500.00 per acre	01/29/1985 (Tribal Resolution No. 85-18)	20 years beginning 01/29/1985	Appraisal is dated 02/01/1985
04/09/1987	H62-1988-023	Wellsite, access road, powerline, flowline, and gasline, 5,703.04 feet in length, 30 feet wide	4.844	\$5,454.30			1987 (Tribal Resolution 87-148)	20 years beginning 07/14/1987	
07/28/1987	H62-1987-039	Powerline and substation to an oil field	5.492	\$2,745.00 for surface damages and an annual rental fee of \$137.25	\$500.00 per acre	\$500.00 per acre	11/10/1987 (Tribal Resolution No. 87-244)	20 years beginning 11/10/1987	
12/04/1987	H62-1987-010	Powerline	2.061	\$500.00; annual rental fee of \$25.00		\$500.00 per acre	02/23/1988 (Tribal Resolution No. 88-26)	20 years beginning 02/23/1988	
06/01/1989	H62-1989-149	Powerline to serve an oil well	0.623	\$310.00 (possibly with a lump sum payment of \$3,638.16 and a \$350.00 contribution to Ute Tribe scholarship fund)	\$500.00 per acre	\$500.00 per acre	1989 (Tribal Resolution No. 89-166)	20 years beginning 09/13/1989	
06/16/1989	H62-1989-153 (FERC regulated)	20-inch OD gas pipeline	4.560	\$8,025.70 for surface damages; one time rental fee of \$30,513.60; \$1,500.00 to Ute Tribe scholarship fund		\$8.00 per rod; \$100.00 per acre for staging area	11/20/1989 (Tribal Resolution No. 89-153)	20 years beginning 11/20/1989	BIA disagreed with appraisal done by company
07/31/1990	H62-1990-091	Powerline to serve an oil well	0.562	\$168.00 for surface damages; one time rental fee of \$1,259.71; \$100.00 to Ute Tribe scholarship fund	\$300.00 per acre for damages	\$168.00 (\$300.00 per acre)	10/23/1990 (Tribal Resolution No. 90-165)	20 years beginning 10/23/1990	
09/05/1990	H62-1990-095	Powerline to serve an oil well	1.286	\$385.81 for surface damages; lump sum rental fee of \$3,277.13; \$327.71 to tribal scholarship fund		\$640.00 (\$500.00 per acre)	03/05/1991 (Tribal Resolution No. 91-31)	20 years beginning 03/05/1991	
02/21/1992	H62-1992-080 (FERC regulated)	Natural gas pipeline, gathering lines, and compressor station	Approximately 78 total	\$3,000.00 per acre for pipeline and compressor site; \$1,325.00 per acre for gathering lines; \$25,000.00 to tribal scholarship fund (\$238,537.00 total)			1992 (Tribal Resolution No. 92-122)	20 years beginning 08/25/1992	Tribe originally wanted to use a throughput fee or to participate in a joint venture
10/11/1999	H62-2000-024	Wellsite access road	4.759	\$6,305.58	\$1,325.00 per acre			20 years beginning 12/07/1999	
11/08/1999	H62-2000-157	Powerline	1.215	\$1,210.00				20 years beginning 05/08/2000	
06/29/2000	H62-2000-253	WVFU Lateral #6W	6.422	\$8,477.04 (\$1,400 per acre). Payment would increase by 4 percent each year following the fifth anniversary of the effective date			10/26/2000 (Tribal Resolution No. 00-267)	20 years beginning 09/20/2000	Authorized as part of an amendment to a surface use access agreement
06/29/2000	H62-2000-291	WVFU Lateral #5	7.321	\$9,663.72 (\$1,400 per acre). Payment would increase by 4 percent each year following the fifth anniversary of the effective date			10/26/2000 (Tribal Resolution No. 00-267)	20 years beginning 09/27/2000	Authorized as part of an amendment to a surface use access agreement
06/29/2000	H62-2000-290	WVFU Lateral #3	4.334	\$5,720.88 (\$1,400 per acre). Payment would increase by 4 percent each year following the fifth anniversary of the effective date			10/26/2000	20 years beginning 09/27/2000	Authorized as part of an amendment to a surface use access agreement
10/12/2005	Business Lease No. 14-20-H62-5546	Gas conditioning plant	6.874	\$9,967.30 estimated damages (\$1,450 per acre); throughput fee of up to \$0.05/mcf of gas measured at the inlet			11/08/2005 (Tribal Resolution No. 05-314)	The life of gas production to the gas plant	
No date on application	H62-2005-439	6-inch natural gas pipeline	31.71	No damage fee (joint venture with Ute Tribe in ownership, construction, and operation)					

## Case Studies

In order to explain more fully the negotiation of compensation rates for energy rights-of-way on the Uintah and Ouray Indian Reservation, four case studies have been selected. These examples were chosen to cover negotiations in different decades, representing the types of compensation received and the level of tribal participation that occurred during each decade. These discussions are based solely on tribal and BIA records; company records have not been examined. The case studies consist of a right-of-way for a 138-kilovolt (kV) powerline, negotiated in 1960; an easement for a 69 kV electrical power transmission line, granted in 1978; a right-of-way for a 12-inch natural gas pipeline, negotiated in 1983; and an easement for an interstate gas pipeline and related appurtenances, granted in 1992. Because of confidentiality issues, companies are not identified by name in the following narrative, nor is it possible to discuss negotiations that have occurred since 2002.

### ROW No. H62-1989-070

In the spring of 1960, a company (hereafter referred to as Company A) applied to the BIA Uintah and Ouray Agency to survey certain lands on the Uintah and Ouray Indian Reservation to be used for a “high tension power line.” On March 29, 1960, the Tribal Business Committee of the Ute Indian Tribe passed a resolution authorizing the survey. According to this resolution, the line, called the Carbon-Ashley Valley 138 kV Line, would run from Castle Gate, Utah (located south of the reservation in Carbon County), to a proposed phosphate plant and to Flaming Gorge Dam, approximately 40 miles north of Vernal, Utah. Once the survey was completed, the resolution stated, a “formal application” would be forthcoming.<sup>89</sup>

Before the formal application for the right-of-way was received, Company A requested “advance permission” from Agency Superintendent M. M. Zollar to construct the powerline over tribal and allotted lands. Company A explained that the line would traverse 2.4 miles of tribal land and 4.1 miles of allotted land, and would consist of “double wood pole structures [and] three 397.5 MCM [thousands of circular mil] conductors,” requiring a right-of-way 100 feet wide. Company A forwarded a check for \$6,838 to the Agency, representing double the

---

<sup>89</sup> Resolution No. 60-62, March 29, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency.

estimated damages. Of this amount, \$1,528 applied to tribal lands (meaning that \$764 was the actual amount that the tribe would receive).<sup>90</sup> On June 7, 1960, the Tribal Business Committee consented to this application, accepting \$764 as the proper amount for damages to tribal land.<sup>91</sup>

Three weeks later, Company A submitted its formal application for the right-of-way, stating that it needed the “occupancy and use of certain Indian Tribal and Allotted lands” for the construction, maintenance, and operation of “a certain 138 kV electric power transmission line.”<sup>92</sup> Superintendent Zollar transmitted the application to Phoenix Area Director F. M. Haverland so that it could be approved by the Office of the Assistant Secretary of the Interior for Water and Power Development, as mandated by federal regulations (this had to occur in order to ensure that the proposed project did not conflict with the overall power development program of the United States). Zollar “strongly recommended” the approval of the application because the powerline would be “distinctly to the advantage of the Uintah Basin.”<sup>93</sup> The Assistant Secretary of the Interior for Water and Power Development cleared the project on July 15, 1960, and in August, Superintendent Zollar requested that a real estate appraisal be made.<sup>94</sup> The records do not indicate whether such an appraisal ever took place and, if so, what amount it listed as adequate compensation for the right-of-way. However, records do indicate that the BIA transferred \$764 of the deposit made by Company A to the Ute Indian Tribe on September 19, 1961, after receiving an affidavit of completion. This affidavit noted that construction of the line had commenced on April 13, 1960 (after the Tribal Business Committee had consented to the survey application but before it had authorized the right-of-way itself), and that it was completed

---

<sup>90</sup> Assistant Attorney to Mr. M. M. Zollar, Superintendent, U.S. Department of the Interior, Bureau of Indian Affairs, Uintah and Ouray Agency, June 6, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency. A circular mil is a standard unit of measurement of a round conductor.

<sup>91</sup> Resolution No. 60-142, June 7, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency.

<sup>92</sup> “Application for Grant of Easement to Construct, Maintain and Operate a 138 kV Transmission Line Over Uintah and Ouray Indian Tribal and Allotted Land in the State of Utah,” June 30, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency.

<sup>93</sup> M. M. Zollar, Superintendent, to Mr. F. M. Haverland, Area Director, July 6, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency.

<sup>94</sup> M. M. Zollar, Superintendent, Request for Real Estate Appraisal, August 10, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency.

on October 10, 1960.<sup>95</sup> The duration of the right-of-way is not delineated in the documents, but it was still in effect in January 2002.<sup>96</sup>

Throughout the completion of this right-of-way, tribal involvement mainly consisted of consenting to the survey application and the actual right-of-way application. The Business Committee apparently accepted the amount of compensation offered by Company A without an appraisal since the request for appraisal was dated after the resolution had been passed and after construction had begun.

### **ROW No. H62-1978-005**

In February 1978, a company (hereafter referred to as Company B) applied for a right-of-way to construct a 69 kV transmission line over 3.78 acres of tribal land. This line would “provide adequate power and reliability of service to the area west of Roosevelt in Duchesne County,” and would require an easement 3,297 feet long and 50 feet wide. To compensate the Ute Indian Tribe for damages to the land, Company B offered \$100 per acre.<sup>97</sup> Company B already had a few 69 kV lines traversing parts of the reservation; one of these, to which the Tribal Business Committee consented in 1956, had garnered \$1 per pole and a \$5 per mile annual rental fee for the Ute Tribe.<sup>98</sup>

After receiving Company B’s application, Adelyn H. Logan, Realty Officer for the Uintah and Ouray Agency, requested that the Phoenix Area Office conduct an appraisal of the land. In March 1978, she informed Company B that it could begin constructing the power line “at your own risk.”<sup>99</sup> According to Company B’s affidavit of completion, it actually commenced building the power line on February 3, 1978, the date of its formal application to the Uintah and Ouray

---

<sup>95</sup> Affidavit of Completion of Construction, November 3, 1960, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency; M. M. Zollar, Superintendent, to unknown, August 25, 1961, *ibid.*; Public Voucher for Refunds, Voucher No. 462-67-62, *ibid.*

<sup>96</sup> Company A Representative to Landowner, January 28, 2002, File ROW H62-1989-070, 4616-P3, Realty Office, U&O Agency.

<sup>97</sup> Application for Grant of Right-of-Way, February 3, 1978, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency.

<sup>98</sup> See Resolution No. 56-92, June 26, 1956, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency; Resolution No. 56-24, June 26, 1956, *ibid.*

<sup>99</sup> Quotation in Adelyn H. Logan, Realty Officer, to Company B Representative, March 13, 1978, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency; Logan, Request for Real Estate Appraisal, February 14, 1978, *ibid.*

Agency.<sup>100</sup> In April 1978, Francis M. Sedlacek, Phoenix Area Office appraiser, made his report on “just compensation” for the right-of-way. He defined that term as “the amount of loss for which a property owner has established a claim to compensation” and “the payment of market value of the real estate which was taken.” According to Sedlacek, the “highest and best use” of the land involved (meaning “the most profitable, likely, and available use to which a property can be put”) was dry grazing. Other dry grazing lands in the vicinity had sold anywhere from \$50 to \$200 per acre in 1977. Because “the granting of a right of way usually requires something less than the fee value of the land involved, since the surface is disturbed very little and the bulk of the rights remain with the landowner,” Sedlacek believed that Company B’s offer of \$100 per acre was “just compensation.” Since the right-of-way covered 3.78 acres of tribal land, Sedlacek declared, the Ute Indian Tribe should receive \$378.<sup>101</sup>

The Tribal Business Committee never passed a resolution consenting to the grant of easement to Company B, but Dennis A. Mower, Director of Resources of the Ute Indian Tribe, sent a letter to BIA Superintendent Pat Ragsdale of the Uintah and Ouray Agency concurring with the grant on May 30, 1978.<sup>102</sup> Since the Tribal Business Committee passed blanket resolutions in the 1970s authorizing rights-of-way as long as the Tribal Resources Department approved (explained above), a resolution specific to this right-of-way was apparently unnecessary. Mower did not specifically state how much he believed the tribe should receive for the easement, but on May 16, the BIA collected \$378 from Company B.<sup>103</sup> Company B completed construction of the powerline on June 16, 1978, but, for unclear reasons, the official grant of easement was not executed until January 31, 1980. According to that document, the Ute Indian Tribe received \$378 for the right-of-way, which would last for a 50-year period beginning April 5, 1978.<sup>104</sup>

---

<sup>100</sup> Affidavit of Completion, January 3, 1979, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency.

<sup>101</sup> Francis M. Sedlacek, Memorandum Opinion of Value, U&O ROW H62-78-5, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency.

<sup>102</sup> Dennis A. Mower, Director of Resources, Ute Indian Tribe, to Mr. Pat Ragsdale, Superintendent, Uintah and Ouray Agency, May 30, 1978, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency.

<sup>103</sup> Bill for Collection No. 1214144, May 16, 1978, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency.

<sup>104</sup> Grant of Easement for Right-of-Way, Serial No. ROW H62-78-5, File ROW No. H62-1978-005, 4616-P3, Realty Office, U&O Agency; see also Affidavit of Completion, January 3, 1979, *ibid.* It is unclear from the records why April 5 was chosen as the date of commencement.

The negotiations for this right-of-way are a good example of how the Uintah and Ouray Tribal Business Committee delegated the responsibility of easement approval to the tribe's Resources Department in the 1970s. Unlike the previous case study, the compensation was based on an appraisal conducted by the BIA, which designated the highest and best use of the land and determined what similar tracts had sold for in 1977. Because rights-of-way allowed landowners to maintain the "bulk" of their rights, the appraiser did not believe that the full fee value of the land should be provided; instead, the amount should only be something to offset the damages to the land.

### **ROW No. H62-1983-18**

In November 1982, a company (hereafter referred to as Company C) applied to the BIA for permission to survey for rights-of-way on tribal lands. Company C planned on constructing a 12-inch transmission line from a gas field in the northeastern part of the reservation to a natural gas compressor station southwest of the field.<sup>105</sup> Uintah and Ouray Agency Realty Officer Prudy M. Daniels requested that an appraisal be made of the area in December 1982, noting that Company C had offered \$500 per acre for damages.<sup>106</sup> At the same time, Agency Superintendent L. W. Collier, Jr., authorized Company C to proceed with its survey.<sup>107</sup>

It is unclear whether an appraisal or survey was ever performed at that time, but in February 1983, Company C submitted its application for the right-of-way. According to the document, Company C wanted an easement 12,417 feet long and 30 feet wide, where it would construct a "12-inch natural gas lateral pipeline . . . to be used in the control and service of natural gas taken" from the gas field. The easement would involve 8.55 acres of tribal land, and Company C offered \$500 per acre (totaling \$4,275) for damages.<sup>108</sup>

---

<sup>105</sup> Application for Permission to Survey for Right-of-Way, November 22, 1982, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

<sup>106</sup> Request for Real Estate Appraisal, ROW H62-83-18, December 8, 1982, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

<sup>107</sup> L. W. Collier, Jr., Superintendent, to Company C Representative, December 6, 1982, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

<sup>108</sup> Quotation in Application for Right-of-Way, February 18, 1983, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency; see also Property Agent to U.S. Department of the Interior, Bureau of Indian Affairs, Uintah and Ouray Agency, March 7, 1983, *ibid.*

In May 1983, the Uintah and Ouray Tribal Business Committee passed a resolution authorizing the BIA Agency's Realty Branch to grant the right-of-way as long as the \$500 per acre was found to "meet or exceed the market values" and as long as the tribe's Director of Resources approved the action. The Committee also directed that a "five-year review clause" be added to the grant of easement, stipulating that, after five years, "a review of monetary consideration and compliance checks" would occur. "Whether or not damages increase," the resolution stated, "will depend on the manner of compliance to right-of-way stipulations or current economic conditions."<sup>109</sup>

At the time the Business Committee passed its resolution, no appraisal of the land in question had been performed. For unknown reasons, the appraisal did not occur until March 1984, nearly a year after the tribe's consent to the right-of-way and after Company C had completed construction of the pipeline (which began on May 2 and which ended two months later on July 13, 1983). At that time, Uintah and Ouray Agency Appraiser Dennis Montgomery reported that he had "carefully reviewed" Company C's offer "in relation to known land qualities and real estate values in the area." Such a review had convinced him that \$500 per acre was "with in [*sic*] a realistic range of value for the subject as of December 6, 1982," especially since "the bulk of rights" would "remain with the landowner." Area Reviewing Appraiser Francis M. Sedlacek approved Montgomery's conclusions on April 3, 1984.<sup>110</sup> A July 1984 letter from the Agency Superintendent listed the appraised value as \$10 per rod rather than \$500 per acre, but stated that the amount provided by Company C for damages was "acceptable."<sup>111</sup> Therefore, in August 1984, Superintendent M. Allan Core issued the grant of easement to Company C, indicating that the tribe had received a flat fee of \$4,275 with no annual rental fee. The agreement would last for 20 years beginning May 17, 1983, the date that the Tribal Business Committee provided its authorization. It also included the Business Committee's provision that the easement would be

---

<sup>109</sup> Resolution No. 83-121, May 17, 1983, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

<sup>110</sup> Quotation in Dennis A. Montgomery, Appraisal Report, Review Statement, March 2, 1984, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency; see also Affidavit of Completion, September 24, 1984, *ibid*.

<sup>111</sup> Superintendent to Company C Representative, July 20, 1984, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

“reviewed every five-years [*sic*] for determination of compliance and adjustment for payment of damages according to current economic conditions.”<sup>112</sup>

Since the duration of the agreement was 20 years, Company C sent an application for renewal in 2003, received by the Uintah and Ouray Agency on May 7, 2003. Company C did not make a firm offer of compensation in the renewal, stating only that it would pay “all damages and compensation . . . determined by the Secretary [of the Interior] to be due the landowners and authorized users and occupants of the land.”<sup>113</sup> There is no indication from this document that the renewal ever occurred, or, if it did, what compensation was received, but the line was shown on a 2006 tribal map depicting natural gas pipelines on the reservation.

This case study highlights how the Tribal Business Committee assumed a slightly more active position in right-of-way negotiations in the 1980s, although it continued to rely on its Resources Department and the BIA to ensure that the compensation was appropriate. Although the tribe did not require any other kind of compensation other than a flat damage fee, it is apparent from this example that it was moving in other directions. For one thing, the grant of easement referred to an annual rental fee (although in this case it was listed as “.00”). For another, the Business Committee required that the right-of-way be reviewed every five years in order to adjust the compensation to current economic conditions.<sup>114</sup>

### **ROW No. H62-1992-80**

In the 1990s, the Ute Indian Tribe requested forms of compensation other than flat damage fees for rights-of-way. It also used surface use and access agreements to cover the leasing of oil and gas wells and the rights-of-way necessary to facilitate their production. These stipulations were emphasized in the negotiations of an interstate natural gas pipeline.

In 1991, a company (hereafter referred to as Company D) sent an application to the Uintah and Ouray Agency requesting permission to survey a right-of-way for portions of a natural gas pipeline running from southern Wyoming through northwest Colorado to a location south of

---

<sup>112</sup> Grant of Easement for Right-of-Way, Serial No. ROW H62-83-18, August 17, 1984, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

<sup>113</sup> Application for Right of Renewal, Serial No. ROW H62-83-18, File ROW No. H62-1983-18, 4616-P3, Realty Office, U&O Agency.

<sup>114</sup> Unfortunately, the file for this right-of-way does not include information about whether these five-year reviews were performed, and, if so, whether the rates were adjusted.

Vernal, Utah. The pipeline would cross 28.5 acres of the Uintah and Ouray Reservation. Company D would also construct a compressor site (involving 14.1 acres) and four natural gas gathering pipelines (covering 21.6, 11.1, 1.5, and 1.6 acres respectively). It is unclear from the records whether the BIA granted permission for the survey, but, in February 1992, Company D submitted applications for the different rights-of-way involved in the project. For example, the application for one of the gathering lines noted that a right-of-way 8,850 feet long and 50 feet wide, covering 11.077 acres of tribal land, was necessary to construct a 10-inch line and a meter station site. Company D proposed in this document that the grant of easement be for 30 years, although it did not specify a compensation rate.<sup>115</sup> Apparently, the Uintah and Ouray Tribal Business Committee met soon after to consider the applications and decided to require a donation to the Ute Tribe Scholarship Fund as a condition of approval. Accordingly, Company D deposited \$250 in the fund on April 29, 1992.<sup>116</sup>

Meanwhile, the BIA asked Robert S. Thompson III, the Ute Indian Tribal Attorney, to present to the Business Committee a resolution authorizing the requested easements. Thompson did so on April 29, 1992, but the Business Committee “declined to act on the resolution.” Instead, it asked Thompson “to pursue . . . a right-of-way fee based on the throughput of the proposed twenty inch gas transport line.”<sup>117</sup> It is unclear why the tribe proposed a throughput fee at this time; perhaps it was acting on suggestions such as those made by Phoenix Area Office Chief Appraiser Francis Sedlacek in 1989 that the tribe examine the possibility of using “some type of tax based on the number of gallons that pass through the pipe” as a method of compensation, or perhaps consultations with other tribes influenced its actions.<sup>118</sup> Whatever the reason, Thompson reported his progress to the Business Committee toward the end of May 1992. He noted that the completed gas transmission line would be “two hundred miles in length,”

---

<sup>115</sup> Right of Way Application, February 21, 1992, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency.

<sup>116</sup> Supervisor, Land, to Ute Indian Tribe, April 29, 1992, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency.

<sup>117</sup> Robert S. Thompson, III, to Uintah and Ouray Tribal Business Committee, May 26, 1992, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency. This memorandum states that Thompson presented the BIA-supported resolution to the tribal business committee on May 29, but since the letter was written May 26, the actual date was probably April 29.

<sup>118</sup> Francis M. Sedlacek, Area Chief Appraiser, Review Statement, August 16, 1989, File ROW No. H62-1989-153, 4616-P3, Realty Office, U&O Agency.

covering parts of Utah, Colorado, and Wyoming. Most of the line in Utah would cross Bureau of Land Management (BLM) land except for four miles which would traverse Ute Indian tribal land. Thompson explained that the BLM had already offered its approval for construction, as had FERC.<sup>119</sup>

According to Thompson, Company D had proposed to use “a corridor approach” in constructing the pipeline, which would “minimize surface disturbance and damage.” Under the corridor system, the pipeline would actually be “two ten-inch lines running parallel to one another within the same right-of-way.” To compensate the tribe for any damages, Company D had offered \$2,000 per acre for a 25-acre easement and \$4,500 for a five-year business lease covering the compressor site. This would supplement the \$250 the corporation had already given to the tribal scholarship fund. In addition, Company D would raise no objection to having the duration of the easement be 20 years with a tribal option to renegotiate or cancel the grant at that time. The Business Committee had rejected this offer, Thompson summarized, leading to the request that he examine the possibility of granting rights-of-way “on a per mcf charge for gas passing through the pipeline,” probably totaling between a half-cent and a cent per mcf.<sup>120</sup>

After receiving the Business Committee’s request, Thompson relayed its desires to Company D. In his words, Company D “declined the per mcf fee format” for three reasons: it had never been required to provide such compensation in the past, only 2 percent of the total length of the pipeline would cross tribal land, and it would be impossible to finalize whatever contracts were necessary before construction commenced in two weeks. Instead, Company D increased its compensation offer. According to Thompson, Company D was now willing to pay \$2,500 per acre, donate more to the scholarship fund, and enter into a joint venture arrangement with the tribe for gathering lines to the mainline, thereby increasing tribal revenue. Thompson recommended that the tribe accommodate Company D along these lines rather than continuing to pursue a throughput fee, arguing that the pipeline and its “introduction of a new interstate market” would “positively impact gas prices and open markets to Reservation producers that did not previously exist.” Thompson also claimed that Company D was “willing to pay more for

---

<sup>119</sup> Thompson to Uintah and Ouray Tribal Business Committee, May 26, 1992. This memorandum states that Thompson presented the BIA-supported resolution to the tribal business committee on May 29, but since the letter was written May 26, the actual date was probably April 29.

<sup>120</sup> Thompson to Uintah and Ouray Tribal Business Committee, May 26, 1992.

rights-of-way than most tribal permittees” and that, even though a throughput fee would generate more money, Company D’s offer “in and of itself” was “not unattractive.” In addition, Thompson related, “it does not make a great deal of sense to anger or put off a company with which the Tribe can do business in the future.” Finally, Thompson suggested that if Company D did not “live up to its commitments to hire tribal members and to joint venture gathering lines,” the tribe could levy “a possessory tax” on the line at a later time.<sup>121</sup>

After receiving Thompson’s report, the Business Committee sent a letter to Company D outlining two separate compensation proposals: the levying of a throughput fee or the entering of a joint venture arrangement. A few days later, Company D responded, rejecting the throughput fee outright because it had already fixed transportation and gathering rates for its consumers and would be unable to change these rates in order to recover the expense. Company D also claimed that it could not enter into a joint venture agreement at that time (because of the pending construction date), although it expressed interest “in pursuing a joint venture with the Tribe in the future.” Therefore, Company D made a counteroffer. Under this arrangement, it would pay \$3,000 per acre for the pipeline and compressor station under a 20-year business lease for the compressor site and a 20-year grant of easement for the pipeline. For the four gathering lines, Company D would provide \$1,325 per acre. It would also donate \$25,000 to the Ute Tribe scholarship fund and it would ask its contractors to employ 35 to 40 members of the tribe on the construction projects.<sup>122</sup> The final offer exceeded \$200,000 in monetary considerations.<sup>123</sup>

It is unclear exactly what happened after Company D made this offer to the Business Committee, although the Committee apparently approved the transaction. In any case, on June 10, 1992, the Uintah and Ouray Agency received a check for \$238,537 as payment for the pipeline, the compressor station, and the gathering lines.<sup>124</sup> After receiving that payment, the BIA authorized Company D to proceed with construction, and in October 1992, grants of

---

<sup>121</sup> Thompson to Uintah and Ouray Tribal Business Committee, May 26, 1992.

<sup>122</sup> Company D Representative to Mr. Luke J. Duncan, Chairman, Ute Tribal Committee, Northern Ute Indian Tribe, June 4, 1992, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency.

<sup>123</sup> Counterproposal, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency.

<sup>124</sup> Bill for Collection, June 10, 1992, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency. One document in this file indicates that Tribal Resolution No. 92-122 approved the arrangement, but that resolution was not present in the file. The file does contain an unsigned and unnumbered resolution from 1992 authorizing the BIA to approve the grant of easement, but it appears to be in draft, rather than final, form. See Real Estate Services, ROW/MAA Database Checklist, January 14, 2004, *ibid.*; Resolution No. \_\_\_\_, Ute Indian Tribe, *ibid.*

easement were completed for the various pipeline parts. According to the grants, the agreements would run for 20 years beginning August 25, 1992, and, after five years, would be reviewed in order to determine whether increases were necessary.<sup>125</sup>

The negotiations over rights-of-way for Company D's pipeline indicates how the Ute Indian Tribe explored other methods of compensation in the 1990s, including throughput fees. Where the throughput idea originated is unclear from the records, but the Business Committee abandoned the notion after it became clear that Company D objected strongly to it and after Tribal Attorney Thompson recommended against it. Ultimately, the agreement with Company D provided substantially more to the tribe than most grants of easement on the reservation, in part, perhaps, because of the round of negotiations that had occurred. In this example, the tribe seemed to be actively engaged in the process, rather than just responding to BIA recommendations.

## Summary

These four case studies indicate how rights-of-way for electric transmission lines and natural gas pipelines have been negotiated on the Uintah and Ouray Reservation since 1948. In many cases, tribal involvement consisted of passing resolutions consenting to a proposed grant of easement, usually for the amount of compensation determined by the appraisal process. For electric transmission lines, the fees usually consisted of a per acre rate, while natural gas pipelines included a surface damage payment and, in later years, annual rental fees and contributions to the tribal scholarship fund. By the 1990s, the Ute Tribe had taken a more active role in the negotiation process, even proposing different methods of compensation such as throughput fees and instructing tribal attorneys to engage actively in negotiations. This active participation has continued into the twenty-first century.

---

<sup>125</sup> See Grant of Easement for Right-of-Way, October 2, 1992, File ROW No. H62-1992-80D, 4616-P3, Realty Office, U&O Agency; Superintendent to Company D Representative, n.d. (ca. June 12, 1992), *ibid*.

# Energy Rights-of-Way on the Southern Ute Indian Reservation

## Formation of the Reservation

Oral tradition states that Senawahv, the Creator, gave lands to the Ute at the time of creation, covering most of present-day eastern Utah and western Colorado and extending southward into present-day New Mexico. Research in anthropology, archaeology, and linguistics suggests the Ute arrived in the region around AD 1000 as part of a larger Uto-Aztecan migration north from Mexico. Eventually, 12 distinct bands of Ute people occupied large parts of present-day Utah and Colorado, and a portion of northern New Mexico (see Figure 1—Ute Territory in the Nineteenth Century). The Southern Ute Reservation, first established in 1868 as the Consolidated Ute Reservation, primarily encompassed the three bands at the southeastern end of Ute territory, the Weeminuche, Capote, and Muache. In 1895, the reservation was divided into Ute Mountain (Weeminuche) and Southern Ute (Muache and Capote).<sup>126</sup>

The earliest contacts between Southern Ute bands and Europeans occurred around the late 1500s and early 1600s, when Spaniards moved up the Rio Grande Valley and into present-day northern New Mexico and southern Colorado. As the Ute incorporated Spanish-introduced horses, material objects, and food items into their economy, they transformed their subsistence patterns, political organization, and cultural practices.<sup>127</sup> Relations between the Ute and the Spanish oscillated between conflict and alliance over the next 200 years.

In 1821, Mexico won its independence from Spain and allowed trade with the United States for the first time. Twenty-five years later, the United States launched an invasion into Mexico, sparked by a border dispute between Texas and Mexico but fueled by American interest in territorial and economic expansion. The 1848 Treaty of Guadalupe Hidalgo, which ended the conflict, resulted in the cession of Mexico's northern frontier region to the United States. The

---

<sup>126</sup> Virginia McConnell Simmons, *The Ute Indians of Utah, Colorado, and New Mexico* (Boulder: University Press of Colorado, 2000), 1, 14, 18, 23.

<sup>127</sup> Simmons, *The Ute Indians*, 29-30.

United States now claimed jurisdiction over the Ute, along with other Indian groups in the ceded region.

In the years following 1848, more and more non-Indians crossed or settled on the lands of the Southern Ute bands. Conflicts resulted, especially with military personnel charged with “controlling” the Indians. Military officers would send detachments to punish Ute bands accused of depredations, and the bands would retaliate in kind. In 1849, New Mexico Territorial Governor James S. Calhoun addressed the situation by negotiating a treaty with the Ute, known as the Treaty of Abiquiu. This treaty acknowledged U.S. jurisdiction over the Ute and proposed that reservations be created for them, although no official boundaries were proposed. Despite this agreement, the encroachment of non-Indians on Ute lands continued, prompting Ute raids against various settlements. One of the problems that the United States had, according to historian Virginia McConnell Simmons, was that the Ute were “scattered over such a vast region, it was impossible for agents to keep track of them except when they came into an agency.” This, coupled with the desire of many non-Indians to possess Ute lands (in part because of a gold rush in 1858 and 1859 that led to the creation of Colorado Territory in 1860), convinced the federal government to create a formal Ute reservation.<sup>128</sup>

In 1863, the Tabeguache (Uncompahgre) Ute signed the Treaty of Conejos, or Tabeguache Treaty, whereby the United States took one-fourth of all Ute land, even though only the Tabeguache signed the agreement. The treaty ceded all Ute land on which settlers in Colorado had established towns, mines, and homesteads. Yet conflicts between the Ute and non-Indians continued, and in 1868, the federal government negotiated another treaty with the Ute that ceded most Ute lands to the federal government. In return, the government created the Consolidated Ute Reservation out of roughly 12 million acres in Colorado west of the Continental Divide. The Muache, Capote, and Weeminuche were supposed to live on this reservation, but many were reluctant to relocate. The federal government ultimately sent a military escort in 1878 to guide the Ute to the reservation.<sup>129</sup>

---

<sup>128</sup> Simmons, *The Ute Indians*, 83-105 (quotation on p. 103).

<sup>129</sup> “Treaty with the Utah—Tabeguache Band, 1863,” in *Indian Affairs: Laws and Treaties*, 2:856-59; “Treaty with the Ute, 1868,” in *ibid.*, 2:990-96; Simmons, *The Ute Indians*, 117.

The acreage of the Consolidated Ute Reservation was reduced over time. In the 1860s and 1870s, the discovery of minerals in the San Juan Mountains led to the encroachment of miners on Ute land, while Spanish-speaking settlers from New Mexico continued to settle on Ute land along the San Juan River and its tributaries. These non-Indians pressed for more Ute territory, claiming that the Indians had more than enough, leading to the negotiation of the Brunot Agreement in 1873. Under this accord, which Congress ratified in 1874, the Ute ceded land in the San Juan area to the federal government in exchange for annuities apportioned according to population.<sup>130</sup>

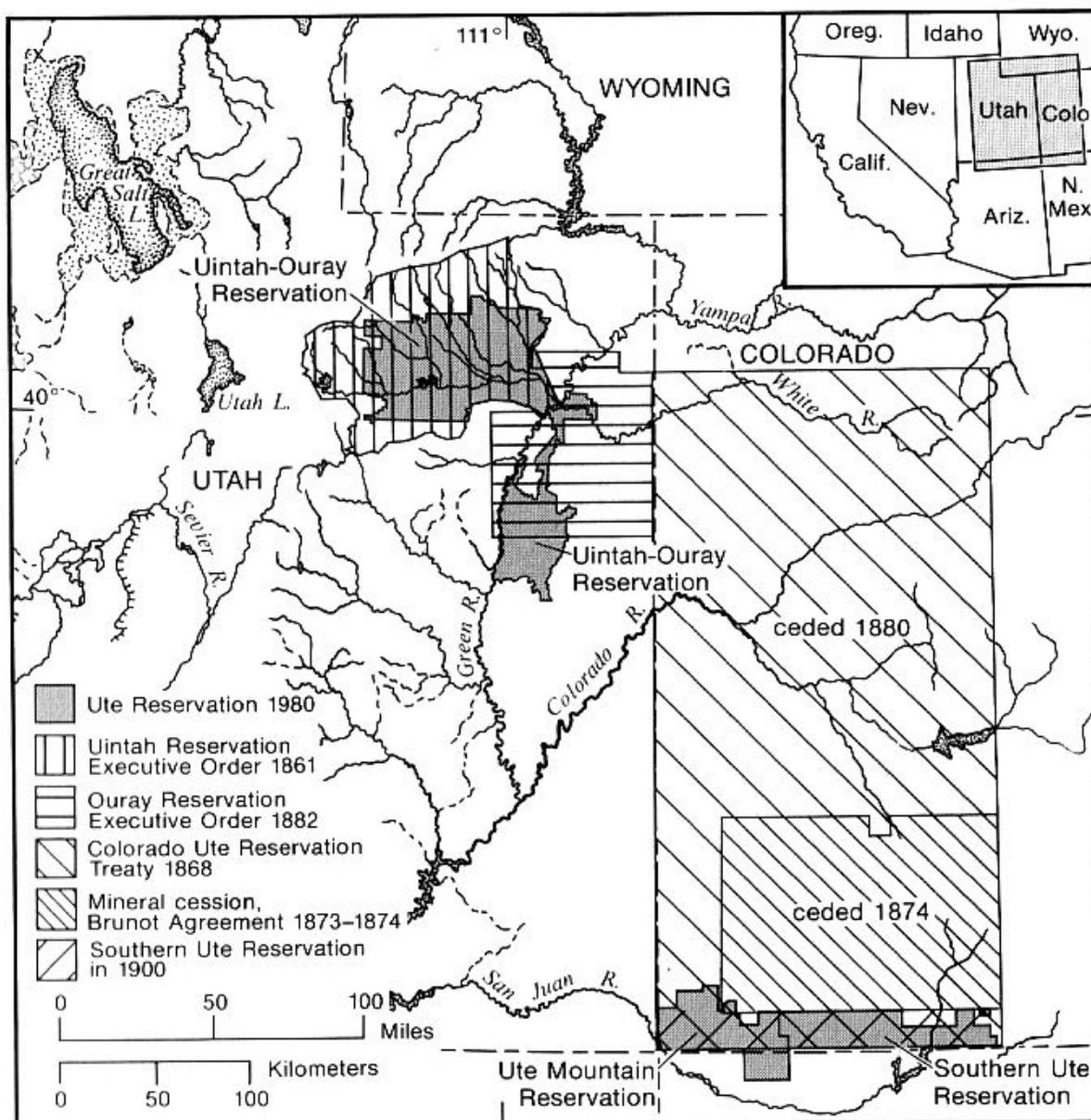
The Ute lost more land following the Meeker Massacre of 1879. In this incident, Captain Jack, the leader of a band of White River Ute, killed Indian Agent Nathan Meeker and ten other non-Indians. In response, Coloradoans demanded that the Ute be removed from the state. On June 15, 1880, Congress ratified an agreement with the Ute whereby the bands ceded most of the remaining lands of the Consolidated Ute Reservation in Colorado, leaving only a strip of land along the New Mexico border. The western part of this strip was subsequently designated the Ute Mountain Ute Reservation for the Weeminuche in 1895, leaving only the eastern portion as the present Southern Ute Reservation, inhabited by the Muache and Capote bands.<sup>131</sup> Southern Ute lands totaled approximately 681,000 acres and consisted of mountainous terrain and mesas ranging in elevation from 5,940 feet to 9,200 feet (see Figure 3).<sup>132</sup>

---

<sup>130</sup> Simmons, *The Ute Indians*, 147-150; U.S. Congress, Senate, *Assets of the Confederated Bands of Utes, Etc.*, 56th Cong., 1st sess., 1900, S. Doc. 213.

<sup>131</sup> “Act of June 15, 1880 (21 Stat. 199),” in *Indian Affairs: Laws and Treaties*, 1:180-186; Richard K. Young, *The Ute Indians of Colorado in the Twentieth Century* (Norman: University of Oklahoma Press, 1997), 27-31; Callaway, Janetski, and Stewart, “Ute,” 355.

<sup>132</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” April 25, 2006, 2-3, copy provided by the Southern Ute Indian Tribe.



**Figure 3.** Southern Ute land cessions and current reservation. Source: Donald Callaway, Joel Janetski, and Omer C. Stewart, "Ute," in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 11, *Great Basin*, ed. Warren L. D'Azevedo (Washington, D.C.: Smithsonian Institution, 1986), 355.

The Act of June 15, 1880, also called for allotments to be made on the Southern Ute Reservation. The law stated that heads of family should receive one-quarter of a section (160 acres) and additional grazing land not to exceed another quarter. Single people over 18 years of age, as well as individuals under 18 years, were to receive one-eighth of a section and additional

grazing land not to exceed another eighth. The government would issue restricted fee patents to the Indians, which would make allotments non-taxable and inalienable for 25 years or “until such time thereafter as the President of the United States may see fit to remove the restriction.”<sup>133</sup>

The allotment terms of the 1880 agreement were never executed for the Southern Ute. Therefore, in 1895, Congress passed the Hunter Act, which implemented the allotment arrangements of the 1880 law and provided that, after allotment, any “surplus” lands would become part of the public domain and be “subject to entry under the desert, homestead, and town-site laws.”<sup>134</sup> Under the terms of the Hunter Act, 371 Muache and Capote Ute had obtained allotments by April 14, 1896, totaling 72,811 acres. These tracts were generally situated along Los Pinos River, although some were located by the Animas and La Plata Rivers. In 1899, the Commissioner of Indian Affairs reported that 360 patents had been issued and delivered to Southern Ute Indians. That same year, a proclamation issued by President William McKinley opened the unallotted portion of the reservation to settlement, totaling 523,079 acres. This land was sold to non-Indians for \$1.25 per acre, removing most of it from Ute ownership.<sup>135</sup>

In the early 1900s, non-Indians put constant pressure on the Southern Ute to sell their allotted lands. By 1934, non-Indians had purchased 33,500 acres—46 percent of the allotted area. This left many Southern Ute landless, while others retained only small tracts. However, in the 1930s, unallotted land remaining unclaimed under McKinley’s presidential proclamation, totaling approximately 220,000 acres, was restored to the Southern Ute land base, increasing the amount of tribal land on the reservation.<sup>136</sup> In 1947, tribal land totaled 280,338 acres, while allotted land comprised 13,815 acres. By 1985, these totals had become 307,561 and 2,409, respectively.<sup>137</sup>

---

<sup>133</sup> “Act of June 15, 1880 (21 Stat. 199),” in *Indian Affairs: Laws and Treaties*, 1:180-86.

<sup>134</sup> “Act of February 20, 1895 (28 Stat. 677),” in *Indian Affairs: Laws and Treaties*, 1:555-57; Young, *The Ute Indians of Colorado in the Twentieth Century*, 35-38.

<sup>135</sup> “By the President of the United States of America: A Proclamation (31 Stat. 1947),” in Kappler, vol. 1, 994-1000; *Sixty-Eighth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* (Washington, D.C.: Government Printing Office, 1899), 43; Young, *The Ute Indians of Colorado in the Twentieth Century*, 37-38.

<sup>136</sup> Young, *The Ute Indians of Colorado in the Twentieth Century*, 52; Consolidated Ute Agency Annual Narrative Report, 1930, 1932, 1933, 1934, 1935, M-1011, Roll 29 (Consolidated Ute); Simmons, *The Ute Indians*, 248.

<sup>137</sup> U.S. Congress, Senate Committee on Interior and Insular Affairs, *Indian Land Transactions: Memorandum of the Chairman to the Committee on Interior and Insular Affairs, United States Senate, An Analysis of the Problems and Effects of Our Diminishing Indian Land Base, 1948-57* (Washington, D.C.: Government Printing Office, 1958), 401; U.S. Department of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands: Lands Under Jurisdiction of the Bureau of Indian Affairs* (Washington, D.C.: U.S. Department of the Interior, 1985), 7.

In 2006, the Southern Ute Tribe estimated its tribal estate as 308,000 acres and its allotted lands as 4,000 acres.<sup>138</sup>

## Energy Resource Development

In the second half of the twentieth century, oil and gas became the key economic energy resources for the Southern Ute. The reservation was not well suited for agriculture, but productive oil, gas, and coal reserves in the San Juan Basin lay within its borders.<sup>139</sup> Revenue from oil and gas production became significant beginning in the 1940s and increased in the 1950s. The BIA reported \$1,478,630 in total income from oil and gas in fiscal year 1952, for example, while per capita payments from oil and gas leases reached a high of \$1,200 in 1958.<sup>140</sup>

Under the leadership of Chairman Leonard Burch, the Southern Ute Tribal Council (composed of six members elected to three-year terms) decided to become more involved in oil and gas leasing approval in the 1970s. The council placed a moratorium on further leasing in 1974 and then, in 1980, created an Energy Resource Office “in order to gather information regarding the Tribe’s natural gas resources and to assist in monitoring pre-existing lease compliance.”<sup>141</sup> Such actions helped to generate large profits: the tribe received over \$1.2 million in 1975 and nearly \$2.8 million in 1981. In the 1980s, the tribe also investigated other leasing arrangements, whereby the Southern Ute would participate in mineral development agreements with various companies.<sup>142</sup>

An energy downturn in the mid-1980s caused oil and gas income to plummet, and by 1987, the tribe was receiving only half of what it had obtained in earlier years. In an effort to gain

---

<sup>138</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 3. The reservation itself encompassed approximately 720,000 acres. See Steve Jackson, “Rough Waters,” *Westword*, June 13, 1996, copy at <[www.westword.com](http://www.westword.com)> (May 16, 2006).

<sup>139</sup> Young, *The Ute Indians of Colorado in the Twentieth Century*, 135.

<sup>140</sup> U.S. Congress, House, *Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs*, 82d Cong., 2d sess., 1952, H. Rept. 2503, 87.

<sup>141</sup> Thomas H. Shipps to Mr. Bob Middleton and Mr. David Meyer, May 15, 2006, copy at Energy Policy Act Section 1813: Indian Lands Rights-of-Way Study, “Comments and Information,” <<http://1813.anl.gov/documents/docs/ScopingComments/index.cfm>> (May 17, 2006).

<sup>142</sup> Jackson, “Rough Waters”; U.S. Department of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Land and Income from Surface and Subsurface Leases* (Washington, D.C.: U.S. Department of the Interior, 1975), 98; Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* (Lawrence: University Press of Kansas, 1990), 135.

more control over the terms of energy development, the Southern Ute formed the Red Willow Production Company in 1992 to operate oil and gas wells and leases entered by the tribe. In January 1993, the tribe purchased 51 active gas wells, which had originally been developed by other companies under leasing arrangements. The tribe assigned operation of 21 of them to Red Willow and retained royalty interests in the other 30. In 1994, the tribe entered into a joint venture with the Stephens Group to purchase a natural gas gathering system from the Western Gas Supply Company (more commonly known as WestGas), forming the Red Cedar Gathering Company. The tribe had a 51 percent ownership in Red Cedar, and it used Red Cedar to pursue gas production from coalbed methane wells. In order to manage Red Willow and Red Cedar (as well as other real estate and construction enterprises), the tribe created the Southern Ute Growth Fund, a private equity investment fund, in 1999. By 2006, the Growth Fund estimated its investment value at more than \$2 billion.<sup>143</sup>

## Energy Rights-of-Way

Because of the amount of oil and gas on the Southern Ute Indian Reservation, and because of its location along the Colorado-New Mexico border, numerous energy rights-of-way cross tribal land. Natural gas pipelines constitute the most prevalent type of energy easement. These include:

- interstate transmission lines, regulated by FERC and consisting of “high pressure, large diameter, cross-country pipelines requiring wide easements for construction and ongoing operation”;
- intrastate transmission lines, which deliver gas to municipalities such as Durango and Bayfield;
- third-party gathering lines, through which nonproducers gather gas for “producers downstream of each well”;
- on-lease producer gathering lines, constructed by the producers themselves;
- off-lease producer gathering lines, whereby “producers . . . contract to carry other producer’s gas (from a different lease) in their pipelines.”

---

<sup>143</sup> Southern Ute Growth Fund, “Mission & History,” <<http://www.sugf.com/about.htm>> (May 17, 2006); Young, *The Ute Indians of Colorado in the Twentieth Century*, 187, 207-208; Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 10-12; “Testimony of Neal McCaleb, Assistant Secretary-Indian Affairs, on Tribal Good Governance Practices and Economic Development Before the Committee on Indian Affairs, U.S. Senate,” July 18, 2001, <<http://indian.senate.gov/2001hrgs/tribalgov071801/mccaleb.PDF>> (February 16, 2005).

Other types of energy rights-of-way on the reservation include those for liquefied natural gas pipelines, water disposal pipelines, and road access. Electric transmission lines also cross the reservation, although they are not nearly as prevalent as pipelines. Rights-of-way for electrical works consist of one interstate transmission line (a 50-year easement negotiated in 1963, for which the tribe received \$2,920) and several intrastate transmission lines, feeders, substations, and distribution lines managed by the La Plata Electric Association.<sup>144</sup>

The Act of February 5, 1948, mandated that the Southern Ute Tribe, like other tribes organized under the Indian Reorganization Act of 1934, provide consent before the BIA granted rights-of-way over tribal lands. Before the 1970s, the tribe largely followed the recommendations of the BIA when deciding whether compensation rates were adequate, and most compensation up to that time consisted of per acre or per rod surface damage fees. In the 1970s, however, the tribe became more active in setting both compensation rates and compensation methods. The methods included contributions to a Southern Ute scholarship fund, annual rental fees, land trades, investment opportunities, and throughput fees. The tribe also became more involved in the operation of pipelines. In 1989, tribal officials declared the opening of a “new era . . . in which the Tribe will participate more actively in the operations associated with gas transportation as a form of compensation for pipeline rights-of-way.”<sup>145</sup>

By the twenty-first century, a set procedure governed the right-of-way approval process on the Southern Ute Indian Reservation. According to one document, the process began when the BIA received an application for permission to survey. After granting such permission, the BIA notified the tribe’s Department of Natural Resources, which would issue a Proposed Project Notification. Upon the applicant’s completion of the survey, representatives from the company, the BIA, and the tribe’s Departments of Natural Resources and Energy would make an on-site visit to decide whether any cultural resource or environmental issues needed to be considered.

---

<sup>144</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 5-7; “Durango-State Line 115 kV Line Across Southern Ute Indian Tribal Land, La Plata County, Colorado,” File Western CO Power Co. 115 kV Power Line, FY 63, 4616-P3, Realty Office, Southern Ute Agency, Ignacio, Colorado [hereafter referred to as Southern Ute Agency]; Resolution No. 2420, February 26, 1963, *ibid*.

<sup>145</sup> Quotation in Thomas H. Shipps to Mr. Leonard I. Lord, Senior Right-of-Way Negotiator, El Paso Natural Gas Company, July 1, 1989, File El Paso Nat’l Gas Co., Realty Office, Southern Ute Agency; see also Shipps to Middleton and Meyer, May 15, 2006; Southern Ute Indian Tribe, “Tribal Lands Rights-of-Way Study: Southern Ute Information Briefing to Historical Research Associates,” April 25, 2006, in Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands.”

Each representative would then submit a report, and the BIA would present the right-of-way request to the Southern Ute Tribal Council. The Council would pass a resolution either approving or rejecting the application and, if the Council consented to the right-of-way, the BIA would approve the grant of easement “with stipulations attached that address mitigation of environmental, archeological and threatened and endangered species concerns.”<sup>146</sup>

Compensation negotiations, however, largely occurred between the tribe and the companies themselves, with little BIA involvement. Appraisals were seldom performed on tribal land, mainly because the tribe had set general compensation rates for particular types of easements. In 1979, for example, the Council, on the recommendation of the tribe’s Department of Natural Resources, passed a resolution setting the minimum rate for rights-of-way that were 20 rods or less at \$200. This charge, the Council explained, was “based on increased land values, economical conditions and comparables in acquisition of rights-of-way,” as well as “man hours and administrative costs.”<sup>147</sup>

Similarly, in 1985, the Tribal Council issued a blanket policy for pipelines less than 10 ¾ inches in outside diameter. The tribe’s intention, according to attorney Thomas H. Shipps, was “to make costs uniform for all oil and gas related activities, whether pipeline, well pad, or access road” and to connect “those charges . . . to the estimated actual market value of land rather than an arbitrary figure.” The Southern Ute also wanted to “recognize the difference in compensation for surface damage and the price for permission to cross tribal lands.”<sup>148</sup> The specific rates of compensation, as set by Tribal Resolution No. 85-47 on April 30, 1985, depended on the type of land that the right-of-way crossed. Easements over Class A lands (agricultural or irrigated lands) required \$1,250 per acre or \$21.03 per rod. Those traversing Class B lands (range land) would cost \$500 per acre or \$8.52 per rod. Resolution No. 85-47 also stipulated that the fees would rise by 10 percent each year.<sup>149</sup> According to Shipps, this represented a “significant increase” in the

---

<sup>146</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 7-8.

<sup>147</sup> Resolution No. 6499, July 17, 1979, File El Paso Natural Gas Company Agreement, Realty Office, Southern Ute Agency.

<sup>148</sup> Thomas H. Shipps to Tribal Council, Southern Ute Indian Tribe, December 31, 1986, File El Paso Natural Gas Company Agreement, Realty Office, Southern Ute Agency.

<sup>149</sup> Resolution No. 85-47 (with attachments), April 30, 1985, in Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands.”

charges for Class A lands, although the grazing land rates actually saved some companies money.<sup>150</sup>

Periodically, the tribe revised the rates for small diameter oil and gas pipelines, and, by 2003, the charges were \$4,000 per acre for Class A lands and \$3,000 per acre for Class B lands. The tribe also levied a \$1,000 per acre charge if the pipeline ran over lands other than those included in a company's oil or gas lease.<sup>151</sup> The set charges did not apply to pipelines larger than 10 ¾ inches in diameter or for interstate pipelines. For those, "arms-length negotiations" occurred "on a case by case basis" according to "the value of the asset and the needs of the Tribe." Those needs included whether the pipeline would transport tribal gas, whether the tribe would have a working interest in the facilities, and whether the operator had a good reputation for meeting its obligations.<sup>152</sup>

Table 2 delineates the compensation and duration of some of the energy rights-of-way that have been concluded on the Southern Ute Indian Reservation since 1948. Because appraisals are not a prominent part of right-of-way negotiations over tribal land, the column for appraisals has been eliminated. The listed easements are representative samples of natural gas pipelines and electric transmission lines (the focus of this study), selected with the aid of members of the Southern Ute Growth Fund and the Southern Ute Agency Realty Office. Electric transmission lines come first (organized chronologically by company), and natural gas pipelines follow (also organized chronologically by company). Entries for right-of-way renewals follow the original right-of-way, regardless of chronology.

---

<sup>150</sup> Shipps to Tribal Council, December 31, 1986.

<sup>151</sup> Resolution No. 2003-222 (with attachments), November 3, 2003, in Southern Ute Indian Tribe, "Overview of Energy Rights-of-Way on Southern Ute Tribal Lands."

<sup>152</sup> Southern Ute Indian Tribe, "Overview of Energy Rights-of-Way on Southern Ute Tribal Lands," 8-9.

**Table 2.** Compensation for energy rights-of-way on the Southern Ute Indian Reservation.

Company Name	Purpose	Acreage	Compensation	Original Offer	Application Date	Date of Tribal Consent	Duration	Comments
Western Colorado Power Company	115KV power line, 100 feet in width	9.12	\$2,920.00	\$1 per rod		02/27/1963	50 years beginning 06/25/1963	
La Plata Electric Association	115 kV power transmission line		\$111,904.00			05/08/1990 (date of grant of easement)	35 years	
La Plata Electric Association	115 kV power transmission line	16.68	\$23,652.00 surface damage fee; \$1,334 annual rental fee (total of \$70,356.00)			08/14/1990 (Tribal Resolution No. 90-100)	35 years beginning 08/14/1990	
La Plata Electric Association	Single phase power line		\$35,560.00			09/22/1992 (date of grant of easement)	10 years	
La Plata Electric Association	69 kV power transmission line	20.49	\$12,294.00 surface damage fee; \$16,392.00 grant of permission fee (total of \$28,686.00)		12/03/1994 (permission to survey application)	12/03/1996 (Tribal Resolution No. 96-227)	50 years ending 12/03/2002	Retroactive right-of-way (line was first constructed in 1952); renewed in 2004 (see below)
La Plata Electric Association	Renewal of right-of-way for 69 kV power transmission line (see above)	20.49	\$20,490.00 (grant of permission fee)			02/24/2004 (Tribal Resolution No. 2004-44)	10 years beginning 12/03/2002	
Pacific Northwest Pipeline	2,128.95 rods of liquid oil pipelines, 50 feet in width		\$4,257.90			05/05/1958 (Tribal Resolution No. 1380)		
Pacific Northwest Pipeline	9.83 miles of pipeline 50 feet in width		\$3,145.60	Double the damages estimated	04/07/1958	12/17/1958 (Tribal Resolution No. 1477)		Pacific Northwest became El Paso Natural Gas Company Appraisal date: 05/16/1962
Western Slope Gas Company	8-inch natural gas transmission line and gathering system (Ignacio Gathering System)	262.32	\$13,837.38 (\$1 per rod)	\$1 per rod or \$320 per lineal mile	06/29/1961	07/06/1961 (Tribal Resolution No. 1935)	50 years	
Western Slope Gas Company, Document Dept. No. 100698	Four additional gathering lines to the Ignacio Gathering System; other gathering lines as needed for same system		\$1 per rod	\$1 per rod or \$320 per lineal mile	06/27/1963 and 10/29/1963	11/07/1963 (Tribal Resolution No. 2716)	50 years	
Mid-America Pipeline Company (MAPCO) NM36320 & C-29366	6.641 miles of a 10-inch interstate liquid hydrocarbons pipeline	Approximately 40	\$32,280.05 (one source says \$33,571.20); \$50,000.00 contribution to scholarship fund (\$5,000.00 over 10 years)	\$15.00 per rod	05/12/1980 (amended 9/18/1980)	08/26/1980 (Tribal Resolution No. 80-79)	10 years beginning 10/01/1980	Renewed in 1992 and 1999 (see below)
Mid-America Pipeline Company (MAPCO) NM36320 & C-29366	Renewal of previous right-of-way (see above)	Approximately 40	\$425,000.00	\$60,300 for a perpetual right-of-way or \$140,000 for a 20-year right-of-way	04/28/1988	02/19/1992 (Tribal Resolution No. 92-26)	10 years beginning 10/01/1990	If pipeline needed relocating because of Animas-La Plata Reclamation Project, the tribe would charge no additional fees for rerouting. It would also issue a tax credit for any possessory tax subsequently levied.
Mid-America Pipeline Company (MAPCO)	Renewal of previous right-of-way (see above); new 16-inch pipeline	Approximately 40	\$1,360,000.00 (\$320.00 per rod)	\$1,360,000.00	03/01/1999 (discussions occurred beginning 05/1998)	02/02/1999 (Tribal Resolution No. 99-18)	12 years ending 09/30/2010	
Northwest Pipeline	Pipelines less than 10 inches in outside diameter		One-time payment of \$200,000.00; one time contribution of \$50,000.00 to tribal scholarship fund. For those rights-of-way applied for or renewed in 1981, an additional \$12/rod; 1982, \$14/rod; 1983, \$17.28/rod; 1984, \$20.74/rod; 1985, \$24.89/rod; 1986-1990, renegotiated prior to 1/1/1986			01/27/1981 (Tribal Resolution No. 81-6)	10 years	Blanket grant of authorization for pipelines and pipeline renewals at the yearly delineated rates
Northwest Pipeline	30-inch natural gas pipeline		\$350,000.00 one-time payment; right to use up to 12,500 MMBTU per day to transport gas into interstate commerce with an operational charge of \$.07 per MMBTU utilized.			08/21/1990 (Tribal Resolution No. 90-107)	15 years beginning 08/21/1990	Construction of new pipeline where an abandoned 4.5-inch liquid hydrocarbon line existed

**Table 2.** Compensation for energy rights-of-way on the Southern Ute Indian Reservation.

Company Name	Purpose	Acreage	Compensation	Original Offer	Application Date	Date of Tribal Consent	Duration	Comments
Western Gas Supply Company (WestGas)	Pipelines and gathering systems for coalbed methane transmission	No set acreage	Throughput fee of \$.015 MMBTU measured at Arkansas Loop Compressor Station			08/29/1990 (Tribal Resolution No. 90-108)	11 years beginning 08/27/1990	Blanket grant of rights-of-way on west end of Southern Ute Indian Reservation; amended in 1991 (Tribal Resolution No. 91-99)
Red Cedar Gathering Company	Pipelines and gathering systems	No set acreage	Throughput fee of \$.015, increasing to \$.0175 on 01/01/2001, and raised on 01/01/2009 and every five years thereafter by a set formula			07/28/1994 (Tribal Resolution No. 94-106)	Until 12/31/2036	Blanket grant of rights-of-way on Southern Ute Indian Reservation
TransColorado Gas Transmission Company	Gas transmission pipeline	1.02	\$1,525.68 surface damage compensation; \$5,085.61 grant of permission fee; total of \$6,611.29			04/28/1998 (Tribal Resolution No. 98-60)	15 years beginning 04/28/1998	Compensation was determined by the rates set in Tribal Resolution No. 85-47, as amended on January 17, 1990, December 28, 1999, and November 3, 2003
Williams Gas Processing Company (WGPC)	Renewal of all rights-of-way that expired on or before 12/31/2000 (approximately 350 pipelines).		First renewal period (08/01/2002 to 08/31/2003): \$164,000.00 per month  Second renewal period (09/01/2003 through 08/31/2007): Transfer of approximately 91 miles of pipeline to the Southern Ute Indian Tribe, valued at \$5,800,000.00  Three additional renewal options, with compensation based on investment opportunities totaling \$24,300,000.00  Additional compensation: providing of 30 MMcf of gas capacity in WGPC's Trunk C system and purchase of 10 MMcf per day from Southern Ute Indian Tribe for three years			2002 (Tribal Resolution No. 2002-156)	First renewal period: 01/01/2001-08/31/2003  Second renewal period: 09/01/2003-08/31/2007  Third renewal period: 09/01/2007-08/31/2012  Fourth renewal period: 09/01/2012-08/31/2017  Fifth renewal period: 09/01/2017-08/31/2022	WGPC acquired Northwest Pipeline and became the owner of Northwest's pipelines  Compensation for any new rights-of-way would be the surface damage costs of the pipelines (and grants would terminate no later than 07/31/2022)
BP America Production Company-208 (Lease No. 14-20-151-15)	4-inch gas pipeline and 2-inch water disposal line; well site and access road	0.512 for the pipelines; 1.7 acres for the well site and access road	\$1,536.00 (\$3,000.00 per acre) for the pipelines; \$5,100.00 (\$3,000.00 per acre) for the well site and access road		09/19/2005	04/05/2005(Tribal Resolution No. 2005-99)	10 years	Compensation was determined by the rates set in Tribal Resolution No. 85-47, as amended on January 17, 1990, December 28, 1999, and November 3, 2003
BP America Production Company-206A (Lease No.14-20-151-15)	4-inch gas production line and 2-inch water disposal line; well site and access road	2.715 for the pipelines; 1.50 for the well site and access road	\$8,145.00 (\$3,000.00 per acre) for the pipelines; \$4,500.00 (\$3,000.00 per acre) for the well site and access road		10/14/2005	05/24/2005 (Tribal Resolution No. 2005-133)	10 years	Compensation was determined by the rates set in Tribal Resolution No. 85-47, as amended on January 17, 1990, December 28, 1999, and November 3, 2003
BP America Production Company-224A (Lease No. I-22-IND-2788)	Compressor site; access road; 16-inch suction and 12-inch discharge pipeline; 16-inch suction and 4-inch water pipeline	4.132 for compressor site; 2.175 for access road; 0.084 for 16-inch suction and 12-inch discharge pipeline; 1.35 for 16-inch suction and 4-inch water pipeline	\$33,056.00 for compressor site; \$10,872.50 for access road; \$1,008.00 for 16-inch suction and 12-inch discharge pipeline; \$16,200.00 for 16-inch suction and 4-inch water pipeline ; \$61,136.50 total			08/23/2005 (Tribal Resolution No. 2005-224)	10 years	Compensation was determined by the rates set in Tribal Resolution No. 85-47, as amended on January 17, 1990, December 28, 1999, and November 3, 2003
53594	Pipeline main and laterals		\$7,040.00 for pipeline		08/20/1953	08/20/1953(Tribal Resolution No. 594)	20 years with option to renew	See below (two ROWs in one file)
53997	Gathering system		\$9,600.00 for gathering system		08/24/1953			
53594 & 53997	Damages for pipeline and gathering system		\$1.51 per rod total, \$9,295.71 for damages	\$1.00 per rod base		04/31/1955 (Tribal Resolution No. 700)		See previous two ROWs
58041	Lateral pipelines		\$1.00 per rod	\$1.00 per rod	01/09/1958	01/17/1958 (Tribal Resolution No 1366)	20 years beginning 1958	

**Table 2.** Compensation for energy rights-of-way on the Southern Ute Indian Reservation.

Company Name	Purpose	Acreage	Compensation	Original Offer	Application Date	Date of Tribal Consent	Duration	Comments
El Paso Natural Gas Company	Renewal of pipeline 27.60 miles in length		\$79,154.03	\$208,000.00 for 63.283 mile ROW, rental fees and new ROWs for ten years.	10/21/1974	07/26/1979	10 years ending 06/30/1989	Dozens of ROWS per single agreement. BIA split single application into 3 grants of ROWs. Only two in file. Third may have been the grant of easement over allotted lands that was also a part of the contract.
El Paso Natural Gas Company (mainline)	24-inch pipeline, 60 feet in width.		\$1.00 per rod	\$1.00 per rod	06/29/1956	07/16/1956 (Tribal Resolution No. 997)	20 years beginning 07/16/1956	
El Paso Natural Gas Company	Renewal of multiple ROWs (including mainline)		\$607,515.00 for 10 years plus agreement to purchase royalty gas from tribe and assist tribe in selling its royalty gas into interstate commerce	\$110,000.00 for renewal to 2000 plus \$3.00 per rod for new ROWs for 20 years		07/17/1979 (Tribal Resolution No. 6501)	10 years beginning 06/30/1979	Agreement and Tribal Resolution set rates for new ROWs. Base costs equaled \$10.00 per rod. The basic rate rose 20% for five years. The tribe reestablished the rate schedule in 1986. See file.
El Paso Natural Gas Company	Renewal of El Paso rights-of-way set to expire on 06/30/1989		\$1.3 million	\$600 per acre (\$349,326.60)	1/5/1989	01/17/1990 (Tribal Resolution No. 90-10)	10 years beginning 02/05/1990	
El Paso Natural Gas Company	Renewal of all El Paso rights-of-way set to expire on 02/05/2000		Southern Ute paid El Paso \$2 million and granted rights-of-way for mainline and Blanco Gathering System in exchange for the Colorado Dry Gas Gathering System	Annual payments of \$25,122 for 10 years or a \$303,507.12 lump sum payment	05/13/1998	03/21/2000 (Tribal Resolution No. 2000-42)	20 years beginning	

## Case Studies

In order to explain more fully the negotiation of compensation rates for energy rights-of-way on the Southern Ute Indian Reservation, four case studies have been selected. Each case study involves a different time period on the reservation and each includes different methods of compensation, as well as varying levels of tribal participation, thus making them representative of the types of negotiations that occurred at various times on the reservation. The examples include an easement for an eight-inch natural gas transmission line (and appurtenant gathering lines), concluded with Western Slope Gas Company in 1961; a right-of-way for a 10-inch liquid hydrocarbons pipeline, negotiated in 1979 and 1980 with Mid-America Pipeline Company; rights-of way for El Paso Natural Gas mainline transmission facilities; and blanket grants of easements to WestGas and to the Red Cedar Gathering Company as part of an effort to stimulate coalbed methane production. Files from El Paso Natural Gas and from Red Cedar were consulted for these case studies; the records of other companies were not examined.

### Western Slope Gas Company Pipeline Gathering System

In the 1950s, natural gas production became an important growth industry in southwestern Colorado. Situated in the San Juan Basin, the Southern Ute Indian Reservation was a prime location for the extraction of natural gas. One company interested in the development of natural gas was the Western Slope Gas Company, first incorporated in 1952. In the spring of 1961, it developed plans to construct an eight-inch natural gas transmission line to convey gas from the Ignacio Gas Field in La Plata County to various points within Alamosa, Archuleta, Conejos, La Plata, Mineral, and Rio Grande Counties. Part of the pipeline's proposed route crossed Southern Ute tribal land, so on April 26, 1961, Western Slope requested permission from the BIA Consolidated Ute Agency (which, at the time, had jurisdiction over the Southern Ute Reservation) to survey the line. Although the Agency's Realty Office transmitted the application to the Southern Ute Tribal Council for its consideration, Superintendent James F. Canan verbally authorized the work before the Council considered the request. After the Council informed the

Realty Office that it granted permission for the survey, Canan transmitted the official authorization to proceed to Western Slope.<sup>153</sup>

In June 1961, Western Slope received a certificate of public convenience and necessity from the State of Colorado Public Utilities Commission authorizing construction of the entire pipeline. After completing the survey over Southern Ute lands, Western Slope submitted an application for “natural gas transmission pipeline and gathering system rights-of-way” to the Consolidated Ute Agency.<sup>154</sup> According to the application, Western Slope needed a right-of-way 50 feet wide for a 50-year term, and it proposed to pay either \$1 per rod or \$320 per lineal mile for damages to the land.<sup>155</sup>

The Southern Ute Tribal Council met on July 5, 1961, and passed a resolution consenting to Western Slope’s application, recommending that the Agency Superintendent grant the right-of-way. Acting Superintendent J. A. Scarber informed Western Slope on July 6, 1961, that its application had been approved, claiming that the authorization was granted by him in his role as Acting Superintendent and not by the Tribal Council, which “does not have final approval on such rights of way.”<sup>156</sup> Neither the tribal resolution nor Scarber’s authorization referred to any compensation amounts, but, in July 1963, Western Slope transmitted \$13,837.88 (\$1 per rod) to the Consolidated Ute Agency to cover the damages caused by the pipeline’s construction.<sup>157</sup>

---

<sup>153</sup> Quotation in Southern Ute Tribal Council to Realty Office, May 3, 1961, File Right of Way—Western Slope Gas Company Pipeline Gathering System, Realty Office, Southern Ute Agency; see also Bruce MacCannon, Superintendent, Western Slope Gas Company, to Mr. James F. Canan, Superintendent, Consolidated Ute Agency, April 26, 1961, *ibid.*; MacCannon to Canan, May 2, 1961, *ibid.*; Canan to Western Slope Gas Company, May 12, 1961, *ibid.*

<sup>154</sup> Western Slope Gas Company to Mr. James F. Canan, Superintendent, Consolidated Ute Agency, June 29, 1961, File Right of Way—Western Slope Gas Company Pipeline Gathering System, Realty Office, Southern Ute Agency.

<sup>155</sup> Superintendent, Consolidated Ute Agency, Re: Application of Western Slope Gas Company for rights-of-way Across Indian Lands for a Natural Gas Transmission Pipeline and Gathering System (with attached Exhibit A), File Right of Way—Western Slope Gas Company Pipeline Gathering System, Realty Office, Southern Ute Agency.

<sup>156</sup> Quotation in J. A. Scarber, Acting Superintendent, to Western Slope Gas Company, July 6, 1961, File Right of Way—Western Slope Gas Company Pipeline Gathering System, Realty Office, Southern Ute Agency; see also Resolution No. 1935, July 6, 1961, *ibid.*

<sup>157</sup> See Superintendent to Western Slope Gas Company, August 8, 1963, File Doc. Dept. No. 100698, Realty Office, Southern Ute Agency; Benjamin G. Hoy, Acting Superintendent, to Western Slope Gas Company, July 26, 1963, *ibid.*; United States Department of the Interior, Bureau of Indian Affairs, Field Receipt No. 603995, August 19, 1963, *ibid.*

That same year, Western Slope applied for additions to the gathering system, consisting of the construction of gathering lines to connect “four additional producing wells.”<sup>158</sup> Western Slope also wanted permission from the tribe to construct any other gathering lines that would be necessary in the future “to convey natural gas from wells on Indian lands and other lands in the area to the plants and transmission lines” of Western Slope. As with the initial right-of-way, these grants were to be for a term of 50 years, and the corporation would pay \$1 per rod or \$320 per lineal mile for damages.<sup>159</sup> The Southern Ute Tribal Council gave its consent on November 5, 1963, stating that it granted “perpetual permission to survey routes for subsequent construction of natural gas pipelines to connect existing and future shut-in gas wells to the gathering system.”<sup>160</sup> Accordingly, Acting Superintendent Scarber authorized the construction of the gathering lines on November 13, 1963.<sup>161</sup> The total dollar amount of compensation that the Southern Ute received from this right-of-way is not clear, although the rate paid was \$1 per rod.

This example indicates how negotiations for natural gas pipelines generally occurred in the initial years after the passage of the Act of February 5, 1948. The Southern Ute Tribal Council gave its consent, but apparently did not participate in the actual setting of rates. At times, the tribe also made blanket authorizations to companies such as Western Slope, although there is no indication whether Western Slope utilized the “perpetual permission” that the tribe granted.

### Mid-America Pipeline Company Liquid Hydrocarbons Pipeline

In the late 1970s, the Mid-America Pipeline Company (also known as MAPCO, Inc.) proposed to extend an existing liquefied petroleum gas pipeline from New Mexico into Colorado, Utah, and Wyoming. This pipeline, which would transmit liquid hydrocarbons, would be 10 inches in diameter and would “parallel an existing Northwest Pipeline Company pipeline, crossing [Bureau of Land Management], Forest Service, BIA, state and private lands.”<sup>162</sup> Part of

---

<sup>158</sup> Western Slope Gas Company to Superintendent, June 27, 1963, File Doc. Dept. No. 100698, Realty Office, Southern Ute Agency.

<sup>159</sup> Western Slope Gas Company to the Superintendent, Consolidated Ute Agency, October 29, 1963 (with attached Stipulations), File Doc. Dept. No. 100698, Realty Office, Southern Ute Agency.

<sup>160</sup> Resolution No. 2716, November 7, 1963, File Doc. Dept. No. 100698, Realty Office, Southern Ute Agency.

<sup>161</sup> J. A. Scarber, Acting Superintendent, to Western Slope Gas Company, November 19, 1963, File Doc. Dept. No. 100698, Realty Office, Southern Ute Agency.

<sup>162</sup> State Director, Bureau of Land Management, New Mexico, to Director, March 2, 1979, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

the proposed line would run through the Southern Ute Indian Reservation, and, in February 1979, Mid-America asked the tribe for permission to survey the pipeline right-of-way. The Southern Ute Tribal Council issued a one-year permit to Mid-America for the survey, contingent on the company paying a \$1,000 permit fee.<sup>163</sup>

After completing the survey, Mid-America applied to the Southern Ute for an easement. The company estimated that the pipeline, described as “an interstate common carrier pipeline system” used to “collect and transport . . . mixed stream liquid hydrocarbons,” would cross nearly seven miles of tribal land, and it offered to pay \$15.60 per rod as compensation, totaling \$33,571.20.<sup>164</sup> The tribe rejected this proposal, and in August 1980, Mid-America made a new offer. Under these terms, it would pay \$15 per rod for the right-of-way, totaling \$32,285, and would also make an annual contribution to the Southern Ute Tribe scholarship fund for the duration of the easement (10 years). The first donation would be \$1,500, and Mid-America would increase its payment by 10 percent each year, for a total contribution of \$23,918. Therefore, the total compensation offered was \$56,203.<sup>165</sup>

It is unclear exactly what happened next, but, in August 1980, the Tribal Council, based on an analysis conducted by Robert. R Aitken, the Southern Ute’s Energy Resource Coordinator, passed a resolution authorizing the right-of-way in return for a \$15 per rod payment and “other good and valuable consideration.”<sup>166</sup> The “other” consideration consisted of the scholarship payment, which, according to a tribal receipt, had become an annual payment of \$5,000 over ten years, totaling \$50,000. After receiving the Tribal Council’s approval, the Southern Ute Agency prepared the grant of easement for the right-of-way, signed on October 1, 1979, indicating

---

<sup>163</sup> Leonard C. Burch, Chairman, Southern Ute Indian Tribal Council, to Mr. Eugene C. Bell, Attorney at Law, March 19, 1979, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency; David W. Robbins to Mr. Frank E. Maynes, February 22, 1979, *ibid.* The tribe’s Natural Resources Division had originally recommended a \$500 fee, but Frank Maynes, tribal attorney, suggested the higher charge. Vida Peabody, Secretary, Southern Ute Indian Tribal Council, to Executive Office, March 22, 1979, *ibid.*

<sup>164</sup> Quotation in Vida Peabody, Secretary, Southern Ute Indian Tribal Council, to Executive Office, November 28, 1979, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency; see also David W. Robbins to Mr. Leonard Birch [*sic*], Chairman, Southern Ute Indian Tribal Council, May 6, 1980, *ibid.*; Robbins to Burch, July 28, 1980, *ibid.*

<sup>165</sup> David W. Robbins to Mr. Leonard Burch, Chairman, Southern Ute Indian Tribal Council, August 6, 1980, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency. The company originally wanted a 20-year grant of easement, but the tribe refused, insisting on ten years. See Vida Peabody, Secretary, Southern Ute Indian Tribal Council, to Executive Office, August 8, 1980, *ibid.*

compensation of \$32,280 and “other good and valuable consideration.” The grant would be valid for ten years.<sup>167</sup>

In 1985, five years from the grant of easement’s expiration, Mid-America representatives met with tribal officials to discuss a renewal. At that time, the company “proposed to exchange land for a permanent right-of-way—an acre for an acre.” The Tribal Council rejected this plan, telling company officials to examine “alternate avenues . . . other than the land exchange.”<sup>168</sup> This apparently ended any discussions about renewal at that time.

In April 1988, Kristen E. Cook, General Counsel for Mid-America, restarted the negotiations by submitting two proposals to the Southern Ute. As background to the offer, Cook noted that Mid-America had paid “from \$5 to \$20 per rod for permanent right-of-way acquisitions on non-Indian properties” in the vicinity, and that the Bureau of Land Management (BLM) was obtaining “\$20.15 per acre per year for pipeline rights-of-way in La Plata County, Colorado.”<sup>169</sup> Based on that information, Cook outlined the first proposal, which revolved again around exchanging land for a permanent easement. This time, however, Mid-America would provide “approximately five acres of unencumbered land for one acre of right-of-way.” Estimating the fair market value of the tribal land that the pipeline crossed at \$300 per acre, Cook proposed that Mid-America “buy land valued at \$300 times 201 acres (40.25 x 5) for total land purchases valued at \$60,300.” This would provide the tribe with compensation of roughly \$28 per rod.<sup>170</sup>

As an alternative plan, Cook suggested that Mid-America pay an annual fee for a 20-year easement. The initial charge would be \$3,300, and this payment would escalate by 10 percent each year, eventually totaling \$140,000. The company would have the option to renew the

---

<sup>166</sup> Quotation in Resolution No. 80-79, August 26, 1980, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency; see also Robert R. Aitken, Energy Resource Coordinator, to The Southern Ute Tribal Council, August 5, 1980, *ibid*.

<sup>167</sup> Grant of Easement for Right-of-Way, MAPCO, Inc., October 1, 1980, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency; The Southern Ute Tribe, Receipt No. 18760, *ibid*.

<sup>168</sup> Edna Frost, Secretary, Southern Ute Indian Tribal Council, to Energy Department, December 17, 1985, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>169</sup> Kristen E. Cook to Frank E. (Sam) Maynes, Esquire, April 28, 1988, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>170</sup> Proposal A, attachment to Cook to Maynes, April 28, 1988.

easement year-to-year after the 20-year term had expired, paying \$20,000 annually “for so long as Mid-America chooses to renew the permit.”<sup>171</sup>

The Southern Ute Tribal Council discussed these proposals in June 1988 and decided that neither was acceptable. Instead, the tribe presented counteroffers for both a 10-year and a 25-year grant, developed by using FERC guidelines for certifying “a rate-base tariff fee.” According to these calculations, the tribe proposed that it receive as much as \$236,200 for a 10-year grant and a maximum of \$497,235 for a 25-year grant.<sup>172</sup> After reviewing both Mid-America’s original offer and the tribe’s counteroffer, Southern Ute Agency Superintendent Ralph R. Pensoneau recommended that the tribe limit the grant term to 10 years “with the opportunity to reassess, or reappraise the rates at each (10) ten-year interval,” thereby allowing the tribe to “go for the high rate every term.”<sup>173</sup>

In March 1989, Mid-America proposed a new arrangement. The company asked for a perpetual right-of-way in exchange for annual contributions to the tribal scholarship fund and a lump sum payment, the amounts of which are not clear from the available records. The Tribal Council rejected this plan, noting that “as a general rule, the Tribal Council does not grant perpetual rights-of-way.” Chairman Leonard Burch made a counteroffer in November 1989, in which he laid out the factors that the tribe considered the most important in right-of-way negotiations. Although willing to grant Mid-America an easement for a 25-year period, Burch declared that “the term generally prescribed for pipeline rights-of-way is ten years.” Ultimately, he continued, the term was “an economic decision,” especially for a pipeline that merely “traverses the reservation and provides no intrinsic benefit to tribal members.” If the tribe allowed a 25-year grant instead of 10 years, Burch stated, it would expect a “higher level of consideration.”<sup>174</sup>

<sup>171</sup> Proposal B, attachment to Cook to Maynes, April 28, 1988.

<sup>172</sup> Quotations in “Mid-America Pipeline Co. (MAPCO) R-O-W,” File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>173</sup> Ralph R. Pensoneau, Superintendent, to Mr. Leonard C. Burch, Chairman, August 1, 1988, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>174</sup> Leonard C. Burch, Chairman, Southern Ute Indian Tribal Council, to Mr. S. F. Isaacs, President, Mid-America Pipeline Company, November 15, 1989, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, Realty Office, 4616-P3, Southern Ute Agency.

Burch also explained that the tribe used two approaches to develop its compensation requests, both of which FERC utilized to determine “valuations of tribal lands used by utility companies in electric power facilities.” The first was the “profitability theory,” which “essentially determines the value of the facility in relation to the overall revenues of the company, and then determines how much of that value is derived from use of tribal lands.” For example, Mid-America’s net income after taxes was \$49,331,759. If one multiplied that by .000825 (the ratio of pipeline miles crossing tribal land to Mid-America’s overall pipeline mileage), one got an “annual net income figure attributable to the tribal line segment of \$40,696.28.” According to Burch, 50 percent of that, or \$20,348, could “reasonably be attributed to MAPCO’s use of tribal land,” meaning that the tribe should receive \$20,348 annually for the pipeline. For a 25-year term, this would total \$374,810.<sup>175</sup>

The net benefit theory, by contrast, looked at how much the company would have to spend to reroute the pipeline if tribal consent was not forthcoming. Burch claimed that Mid-America would have to construct a 16.63 mile detour at a cost of \$190,000 per mile, for a total of \$3,173,841. “The current estimated cost of reconstructing the tribal line segment,” Burch continued, “would be \$1,283,926.00,” providing a total savings to the company of \$1,889,915. “We have allocated 50% of this savings to the Tribe,” Burch explained, “or \$944,577.00, for an annual savings of \$26,988.00 over the life of the line.” Based on that figure, Burch estimated “the present value of this savings for the remaining 25 year life of the line” at \$497,117.

Having conducted a “thorough review” of both of these proposals, Burch stated, the Tribal Council had determined that “a reasonable figure for a 25 year renewal of 6.726 miles of pipeline right-of-way is \$374,810 as reflected by the profitability analysis.” Because this would be “a substantial lump payment,” Burch proposed that it be spread over the years as “an annual rental based upon current through-put in the MAPCO line.” This rental would be \$0.0929 per barrel of liquefied gas conducted through the pipeline, totaling, at a projected volume of 60,000 barrels per day, \$20,348 a year, adjusted annually for inflation. If the pipeline ultimately had to be relocated due to the construction of the Animas-La Plata Reclamation Project (a proposed water project for southern Colorado), the tribe agreed to levee “no new right-of-way acquisition

---

<sup>175</sup> Burch to Isaacs, November 15, 1989.

charges or costs” for such realignment.<sup>176</sup> Mid-America did not accept this proposition and negotiations stalled.

After the right-of-way expired on October 1, 1990, both sides tried again. This time, Ross O. Swimmer, representing Mid-America, proposed that the company pay \$63,753.60 (\$30 a rod) and make a contribution to the scholarship fund of \$5,000 per year for 25 years (totaling \$125,000) for a 25-year grant of easement. Since such a payment was “considerably in excess of the total consideration paid in 1980 of \$32,280,” Mid-America asked that it be granted a tax credit if the tribe ever imposed an “applicable tribal tax.”<sup>177</sup> The tribe rejected the offer a few days later, claiming that it was receiving considerably more from other companies such as El Paso Natural Gas. In response, Swimmer provided Mid-America’s perspective on compensation. Although the company was “very desirous of reaching an agreement with the Tribe as soon as possible,” it would not simply “pay whatever the Tribe wants, especially when we may be back at the table in a relatively short time.” Whatever it agreed to pay for the renewal, Swimmer continued, was “obviously precedent for the future,” making the conclusion of “a fair and reasonable agreement” imperative.<sup>178</sup> Burch then expressed his hope that the two sides could obtain “a mutually beneficial agreement” and told Swimmer that the tribe would not hold Mid-America in trespass “so long as negotiations are being undertaken in an expeditious and good-faith manner,” even though the company’s right-of-way had expired.<sup>179</sup>

Negotiations continued for nearly another year-and-a-half, with officials of the tribe’s Energy Resources Division representing the Southern Ute. Finally, in December 1991, the two sides reached an agreement, ratified by a Southern Ute Tribal Council resolution dated February 19, 1992. Under its terms, the tribe would grant a 10-year right-of-way (effective October 1, 1990) “for the continued operation of a liquid hydrocarbon transmission pipeline crossing a total of approximately 6.641 miles of tribal land” in exchange for \$425,000 (approximately \$10,560 per acre). The tribe also agreed to provide Mid-America with either a tax credit or a reimbursement

---

<sup>176</sup> Burch to Isaacs, November 15, 1989.

<sup>177</sup> Ross O. Swimmer to Chairman Leonard Burch, Southern Ute Tribal Council, October 12, 1990, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>178</sup> Ross O. Swimmer to Chairman Leonard Burch, Southern Ute Tribal Council, October 19, 1990, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>179</sup> Leonard C. Burch to Ross O. Swimmer, October 23, 1990, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

should it impose “a possessory interest tax or business opportunity tax, applicable to MAPCO’s pipeline or operations conducted in association therewith.” Likewise, it would not charge any additional fees should Mid-America have to relocate the pipeline due to the construction of the Animas-La Plata Reclamation Project.<sup>180</sup>

In 1996, Mid-America again approached the tribe about renewing the pipeline right-of-way. It also requested that the tribe grant it an additional easement for a proposed 16-inch pipeline, which would loop the existing line, starting at Huerfano, New Mexico, and going north through the Southern Ute Indian Reservation to Daggett County, Utah. In May 1996, Mid-America’s right-of-way representatives met with the tribe’s Energy Resources Division and developed a tentative formula whereby the company would use the previous renewal amount (\$425,000) and multiply it by the Consumer Price Index—All Urban Consumers (CPIU). Using this formula, the two sides agreed that Mid-America would pay \$518,000 each for the renewal of the pipeline right-of-way and for the new easement.<sup>181</sup>

The agreement could not be executed until the proper cultural resource and environmental surveys had been conducted on the new pipeline route. Following their completion, Mid-America deposited \$1,360,000 with the BIA in January 1999 as compensation for the renewal and the new line. A few days later, the tribe’s Energy Resources Division recommended that the Tribal Council approve the arrangement, explaining that it would provide \$320 per rod, or \$16,895 per acre, for the rights-of-way, which would expire on September 30, 2010. Accordingly, the Tribal Council passed a resolution in February 1999 authorizing the rights-of-way, and Chairman Clement Frost signed an agreement amending the existing right-of-way grant on February 2, 1999.<sup>182</sup>

---

<sup>180</sup> Quotations in Agreement to Consent to Right-of-Way Renewal, No. 750-93-1053, Southern Ute Indian Tribe and Mid-America Pipeline Company, March 2, 1992, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency; see also Resolution No. 92-26, February 19, 1992, *ibid.*; Energy Resources to Tribal Council, December 9, 1991, *ibid.*

<sup>181</sup> Alan D. Wurtz, Manager, Right of Way, Mid-America Pipeline Company, to Mr. Robert Santistevan, Director, Department of Energy, Southern Ute Indian Tribe, June 19, 1998, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency.

<sup>182</sup> Resolution No. 99-18, February 2, 1999, File Mid-America Pipeline Co. (MAPCO) Pipeline Right-of-Way, 4616-P3, Realty Office, Southern Ute Agency; Agreement to Amend the Existing Right of Way Grant Effective October 1, 1990, Southern Ute Indian Tribe and Mid-America Pipeline Company, *ibid.*; Rex H. Richardson, Jr., Petroleum Land Manager, on behalf of Robert Santistevan, Director, Department of Energy of the Southern Ute Indian Tribe, to Southern Ute Tribal Council, January 22, 1999, *ibid.*; Edwin R. Peck, Jr., to Mr. Robert Santistevan, January 11, 1999, *ibid.*

The negotiations for the Mid-America liquid hydrocarbons pipeline and its two subsequent renewals highlight the degree to which the Southern Ute Indian Tribe was involved in right-of-way discussions in the 1980s and 1990s. Although the BIA still had oversight, it was largely removed from the process. Instead, the tribe and Mid-America negotiated directly with one another. This example also shows the tribe's reasoning behind its various proposals (or behind its rejection of Mid-America's offers), as well as what Mid-America hoped to accomplish with the plans it developed. At the same time, it indicates how and why negotiating an easement could become a lengthy process.

### El Paso Natural Gas Mainline

In June 1956, the El Paso Natural Gas Company (El Paso) proposed construction of a 24-inch natural gas pipeline, beginning at the Colorado-New Mexico state line and running north 6.646 miles to the Pacific Northwest Pipeline Plant. The pipeline, known as the El Paso mainline, would also run "parallel and adjacent to [the] Applicant's pipe line constructed in 1953 for a distance of 5.528 miles." Damages for the mainline were assessed at \$1 per rod, or \$320 per lineal mile, and El Paso paid the BIA a deposit of \$4,250, which was "double the estimated damages."<sup>183</sup> The following month the Southern Ute Tribal Council consented to the 60-foot right-of-way for El Paso's mainline facilities.<sup>184</sup> Another four years passed, however, before the BIA approved the drawings for this right-of-way.<sup>185</sup> Southern Ute Agency, Southern Ute Growth Fund, and El Paso corporate documents contain scant information on what negotiations, if any, preceded this initial grant of easement.

---

<sup>183</sup> Quotation in Right-of-Way Application and Stipulation, June 29, 1956, File El Paso Natural Gas Company—R/W's, Expired Rights-of-Way correspondence, File (21—renewals) Approved 7/26/79, Realty Office, Southern Ute Agency. Earlier documents sometimes refer to the pipeline associated with right-of-way No. 53594 (Trunk 4A) as the mainline. El Paso applied for this right-of-way on August 20, 1953, and the tribal council approved it in Resolution No. 594. The easement was 60 feet in width for the so-called mainline and 45 feet in width for branch and lateral lines. The BIA approved the right-of-way on November 16, 1954. See Right-of-Way Application, August 20, 1953, File (Resol. 700) 372.2 Complete, R/W Gas Pipe Line, El Paso Natural Gas Company, Realty Office, Southern Ute Agency; Resolution No. 594, August 20, 1953, *ibid.*; P. V. Fuller, Superintendent, El Paso Natural Gas Company, to Southern Ute Tribal Council, August 12, 1953, *ibid.*; K. E. Moreland, Assistant Superintendent, to Superintendent and Chairman, January 10, 1958, File Completed Right-of-Way, El Paso Natural Gas Company, Southern Ute Reservation Resolution No. 1366, *ibid.*

<sup>184</sup> Resolution No. 997, July 16, 1956, File El Paso Natural Gas Company—R/W's, Expired Rights-of-Way correspondence, File (21—renewals) Approved 7/26/79, Realty Office, Southern Ute Agency.

<sup>185</sup> "Schedule A, List of Facilities under 25 CFR 161.19, Southern Ute Indian Reservation," File Southern Ute Indian Reservation, 1966—1984—1985, File 6 of 6, Room 517, El Paso Western Pipelines, Colorado Springs, Colorado [hereafter referred to as EPWP].

Tribal and El Paso officials began discussing the terms of right-of-way renewals, including the mainline, as the 20-year terms of many El Paso easements neared conclusion in the mid-1970s. An El Paso right-of-way renewal application, dated October 21, 1974, indicated that the 6.647-mile-long mainline would expire on December 26, 1976.<sup>186</sup> However, according to El Paso, “in 1976, without any action being taken on our first renewal application, we [El Paso] submitted a second renewal application covering those projects which were to expire in 1976 and 1977.” Negotiations continued throughout 1978 and 1979.<sup>187</sup> During this period, the Southern Ute Tribe rejected El Paso’s offer of \$3.00 per rod for 20 years, because the tribe had already been charging “\$5.00 per rod for a ten year primary right of way term for the last two years.” In addition, tribal officials stated, “the Tribe is entitled to substantial damages for trespass on the rights of ways which [had] expired.”<sup>188</sup>

During the summer of 1979, the tribe and El Paso reached an agreement whereby El Paso would receive a 10-year easement for all of its rights-of-way across the reservation that had already expired or would expire prior to January 1, 1982, in exchange for a lump sum of \$607,515. The payment was meant to cover “any damages or inconveniences suffered by the Tribe due to or lack of lease development and all other damages of every kind in nature resulting from any of our Company’s past activities.” In addition, any easements across tribal land granted after June 30, 1979, and before June 30, 1989, would also expire in 1989.<sup>189</sup>

On July 17, 1979, the Southern Ute Tribal Council affirmed the July 1, 1979, agreement with El Paso. Subsequently, on August 3, 1979, the Agency Superintendent approved the

---

<sup>186</sup> “Application for Renewal of Pipeline Rights of Way,” October 21, 1974, File El Paso Natural Gas Company R/W’s, Expired Rights-of-Way Correspondence, File—(19)—10/74, Realty Office, Southern Ute Agency. This right-of-way renewal, which included No. 56178 (mainline from Blanco Plant to Pacific Northwest Compressor Station), was collectively known as R/W 74643.

<sup>187</sup> Unnamed and undated document, File Southern Ute Indian Reservation, 1990 1986—1987—1988—1989, File 7 of 7, EPWP.

<sup>188</sup> Leonard C. Burch, Chairman, to William A. Wise, Principle Counsel, March 21, 1978, File El Paso Nat’l Gas Co., Realty Office, Southern Ute Agency. The correspondence implies, although it does not make clear, that the tribe had been charging El Paso, specifically, \$5.00 per rod for the previous two years. Moreover, it is unclear which rights-of-way were affected by this rate.

<sup>189</sup> “Agreement,” August 3, 1979, File El Paso Gas Company [sic] Agreement, Realty Office, Southern Ute Agency; Quotation in unnamed and undated document, File Southern Ute Indian Reservation, 1990 1986—1987—1988—1989, File 7 of 7, EPWP. The latter document gives a June 30, 1976 date for when the agreement was reached. It is unclear what percentage of the compensation amount was for the mainline.

agreement.<sup>190</sup> Three years into the renewal period, however, El Paso officials asked the tribe to waive the annual 20 percent increase in cost per rod because of decreased sales and lower than expected inflation. The tribe rejected that proposal.<sup>191</sup>

Anticipating the second round of right-of-way expirations on the Southern Ute Reservation, El Paso applied to renew all of the expiring easements as a composite right-of-way on January 5, 1989. Along with the renewal application, El Paso submitted payment of \$349,326.60, a sum based on a previous Tribal Council resolution requiring \$600 per acre for right-of-way renewals. The application covered the mainline and gathering lines on both tribal and allotted lands. But the tribe refused to accept this offer, insisting instead on alternative forms of compensation, such as assessing a throughput charge for gas crossing tribal lands. “The tribe would like to discuss the potential of installing meters at those points on the reservation where El Paso facilities enter and leave tribal lands,” Tribal Attorney Thomas H. Shipps informed the company. Negotiations continued through the summer of 1989, even though the rights-of-way expired on June 30. Subsequently, the tribe requested \$2,638,000 for a 10-year renewal of trunk and gathering lines.<sup>192</sup> El Paso made a counteroffer later in the year, which was approximately half of the tribe’s offer, amounting to \$966,933, of which \$478,565 was for gas supply lines.<sup>193</sup> On January 17, 1990, the tribe and El Paso reached an agreement in which El Paso would pay the tribe \$1.3 million (including the amount already on deposit with the BIA) in exchange for a 10-year renewal on the expired easements.<sup>194</sup> That same day, the Tribal Council affirmed the agreement unanimously, and the BIA approved it on February 5, 1990.<sup>195</sup> Six months later, on July 18, the Southern Ute Agency Superintendent authorized the grant of easement.<sup>196</sup>

---

<sup>190</sup> Resolution No. 6501, July 17, 1979, File El Paso Gas Company [*sic*] Agreement, Realty Office, Southern Ute Agency; “Agreement,” August 3, 1979, *ibid*.

<sup>191</sup> Vida Peabody, Secretary, to Tribal Council, August 8, 1983, File El Paso Gas Company [*sic*] Agreement, Realty Office, Southern Ute Agency.

<sup>192</sup> Leonard I. Lord to File, December 1, 1989, File Renewals—Southern Ute, R/W 890003, Renewal: Southern Ute, File 1 of 3, EPWP; quotation in Thomas H. Shipps to Leonard I. Lord, Senior Right-of-Way Negotiator, July 1, 1989, *ibid*.

<sup>193</sup> “Counteroffer,” December 19, 1989, File Renewals—Southern Ute, R/W 890003, Renewal: Southern Ute, File 1 of 3, EPWP.

<sup>194</sup> “Right-of-Way Renewal Agreement and Compensation Agreement of 1990,” January 17, 1990, Records of Maynes, Bradford, Shipps & Sheftel, LLP, Durango, Colorado [hereafter referred to as Maynes et al].

<sup>195</sup> Resolution No. 90-10, January 17, 1990, Maynes et al ; “Right-of-Way Renewal Agreement and Compensation Agreement of 1990,” January 17, 1990, *ibid*. The amount actually paid by El Paso on February 6, 1990 was \$937,351.30, which an El Paso check voucher referred to as “balance of consideration due for renewal of

... continued on next page

With the 10-year easement due to expire on February 5, 2000, El Paso submitted its application for renewal of the mainline on May 13, 1998. The application set out a new 20-year term beginning February 6, 2000. Along with its application, El Paso included a check for \$77,289, “representing payment for renewal of 96.611 acres of right of way on Tribal Lands.” (The gathering facilities, now owned and operated by El Paso Field Services Company, were addressed in a separate letter dated the same day.) The attached appraisal stated that “past payments to private landowners in this area, for a perpetual right of way[,] have been on the basis of \$20.00 per lineal rod.” El Paso’s proposal was based on an appraisal of \$800 per acre for the lands in question, which assumed that that the tribe retained most property rights (such as mineral and grazing rights) on with the easements.<sup>197</sup> The mainline easements associated with Right-of-Way Renewal No. 9800192 included the line from Blanco Plant to NWP Station No. 1 (60 feet wide, 6.649 miles long); the line from NWP CO Station No. 1 to Blanco Plant (60 feet wide, 6.508 miles long); and two short rights-of-way, including a section of pipe linking the mainline to a Western Gas Supply meter station, and a 0.092-mile-long cathodic protection cable.<sup>198</sup>

Between the spring of 1998 and the summer of 1999, El Paso representatives met twice in Ignacio, Colorado, with Southern Ute negotiators. Following an August 25, 1998, meeting, El Paso officials proposed providing either “annual payments [of \$25,122 per year] for a 10-year term or a lump sum payment” of \$303,507. During these negotiations, the tribe expressed interest in acquiring the El Paso Field Services Colorado Dry Gas System, but these discussions ended when the tribe rejected El Paso’s offer the following month.<sup>199</sup> Frustrated by lack of

---

rights of way across tribal lands on the Southern Ute Indian Reservation. R/W 890003.” El Paso Natural Gas to BIA, Check and voucher, February 6, 1990, File Renewals—Southern Ute, R/W 890003, File 1 of 3, EPWP.

<sup>196</sup> “Renewal Grant of Easement for Right-of-Way,” July 18, 1990, File Renewals—Southern Ute, R/W 890003, Renewal: Southern Ute, File 1 of 3, EPWP.

<sup>197</sup> Alan A. Zinter, Manager, to BIA, May 13, 1998, with attached application and appraisal for R/W 9800192, File Renewals—Southern Ute, R/W 9800192, Renewal: Southern Ute Indian, EPWP.

<sup>198</sup> “Exhibit A,” from Grant of Easement, March 27, 2000, File Dave Anderson’s personal files, Room 526, EPWP. Documents related to the 8000 series do not appear until the 1990 renewal cycle.

<sup>199</sup> Alan A. Zinter, Manager, Titles/Controls Division, to Jerry M. Bruner, Southern Ute Indian Tribe, Energy Resource Division, July 16, 1999, 1, File Dave Anderson’s personal files, Room 526, EPWP; Rolando I. Trevino, P.E., to Jerry M. Bruner, August 25, 1998, *ibid.* According to Trevino, this offer reflected El Paso’s willingness to look “beyond ‘traditional’ compensation methods in an effort to meet the desires of the Tribe. In doing so we have also considerably increased our offer from our original filing and from what was paid on our previous renewal in 1989 (up to 97% increase).” In Option 1, mainline capacity was based on a term of 10 years, where capacity was set at 600 mmcf/day (“based on historical volumes across reservation”) and the fee was 0.00015¢/1,000 mcf.

... continued on next page

progress in the negotiations, El Paso officials adopted an action plan in the spring of 1999 to pursue “alternative avenues, including Counsel-to-Counsel discussions” should the “Southern Ute negotiating team refuse to acknowledge our request” to continue negotiations.<sup>200</sup> By the fall of 1999, one El Paso Field Services official even suggested that the company “pull the pipe out of the ground before we give into their demands.” He explained, “if we give in to the Southern Ute’s,” what might other tribes “demand” when their rights-of-way come up for renewal?<sup>201</sup>

Between November 1999 and January 2000, negotiations had “progressed significantly” and the Southern Ute Tribal Council hoped to complete all final agreements before the easements expired on February 5, 2000.<sup>202</sup> That goal was not met. Finally, the parties reached an agreement in March 2000. Attorney Thomas Shipps explained the agreement’s terms to the Tribal Council the following week. “El Paso Field Service will assign to the Tribe the Colorado Dry Gas Gathering System,” Shipps wrote, while the Southern Ute Tribe would pay \$2 million and provide renewed rights-of-way for the El Paso Field Services Blanco Gathering System and El Paso’s mainline facilities for 20-year terms. According to Shipps, the tribe would then sell the Colorado Dry Gas Gathering system to its Red Cedar Gathering Company:

The approximate price for the sale is estimated to be \$10 million; however, negotiations between the Tribe and Red Cedar are not yet completed. If those negotiations are successful, the Tribe as 51% owner of Red Cedar would essentially pay itself \$5.1 million and Kinder Morgan Operating “A” Company, the owner of 49% of Red Cedar, would pay the Tribe \$4.9 million.<sup>203</sup>

---

Subtracting the \$77,289 already on deposit with the BIA for the mainline, the fee amounted to \$251,211, or \$25,122 per year over a ten-year term. El Paso stated that “this represent[ed] a 96.81% increase from the ‘per rod,’ land based consideration paid in previous renewal.” Option II was a lump sum payment. Again, volume was estimated at 600 mmcf/day (“based on historical volumes across reservation”) and the fee was 0.00015¢/1,000 mcf, but as opposed to Option I, compensation was based on historical volumes discounted 3 percent over the 10-year term. Factoring in a \$50,000 signing bonus, the total lump sum offer was \$303,507.12—purportedly an 81.86 percent increase over the previous “per rod” renewal. See also Alan A. Zinter to Mark Leland, September 17, 1998, File Dave Anderson’s personal files, Room 526, *ibid*.

<sup>200</sup> Christopher J. Castillo to Mark Leland, March 22, 1999, File Dave Anderson’s personal files, Room 526, EPWP.

<sup>201</sup> Joe Velasquez to Frank Northup, Memorandum, November 12, 1999, File Dave Anderson’s personal files, Room 526, EPWP. It is unclear what transpired during this period to break the apparent gridlock in negotiations.

<sup>202</sup> John E. Baker, Jr., Chairman, to Winston Johnson, Vice President, January 4, 2000, File Dave Anderson’s personal files, Room 526, EPWP.

<sup>203</sup> Thomas H. Shipps to Tribal Council, March 13, 2000, SUGF. The Colorado Dry Gas System included 175 miles of gathering and transmission lines capable of delivering “30 million cubic feet of natural gas per day.” “SUIT Purchases Pipeline,” *Southern Ute Drum*, April 21, 2000, File Dave Anderson’s personal files, Room 526, EPWP.

On March 21, 2000, the Tribal Council consented to a new 20-year easement for the El Paso mainline, approved the purchase of the El Paso Field Services Colorado Dry Gas Gathering System, and consented to a new 20-year easement for the El Paso Field Services Blanco Gathering System, whose easement had expired.<sup>204</sup> In addition, Chairman John E. Baker, Jr., requested that the BIA return the original amount, plus interest, that El Paso paid to the BIA because the tribe “has received other consideration” for the grant of easement.<sup>205</sup> According to El Paso’s right-of-way manager,

as a result of these negotiations between El Paso Natural Gas Company, El Paso Field Services Company and the Southern Ute Indian Tribe there will be an exchange of assets . . . . The consideration paid to the Southern Ute Indian Tribe for the mainline renewal will be solely in the form of physical assets and no cash consideration is to be delivered to the Tribe.<sup>206</sup>

Per the tribe’s request, on March 27, 2000, the BIA granted El Paso a 20-year easement for its mainline facilities.<sup>207</sup>

This case study documents a right-of-way that not only dates to El Paso’s first decade of activity on the Southern Ute Reservation, but also demonstrates how negotiations evolved through multiple renewal cycles in the 1970s, 1980s, and 1990s. Although the first renewal of the El Paso mainline in the 1970s entailed standard forms of compensation based on per acre or per rod amounts, by the late 1980s the tribe was actively investigating alternate forms of compensation with El Paso, such as a throughput fee. The most recent renewal of the mainline, finalized in 2000, was a component of a larger exchange of assets, whereby the Southern Ute Tribe purchased the Colorado Dry Gas Gathering system and granted new rights-of-way to El Paso and El Paso Field Services for expired easements.

---

<sup>204</sup> Resolution No. 2000-42, March 21, 2000, Maynes et al.

<sup>205</sup> John E. Baker, Jr., Chairman, to Superintendent, March 27, 2000, Maynes et al.

<sup>206</sup> David R. Anderson, Right of Way Manager, to BIA, Southern Ute Agency, n.d., File Renewals—Southern Ute, R/W 9800192, Renewal: Southern Ute Indian, EPWP.

<sup>207</sup> “Grant of Easement for Right-of-Way” and attached exhibits and stipulations, March 27, 2000, File Dave Anderson’s personal files, Room 526, EPWP. The stipulations attached to the right-of-way grant required that “surface damage compensation and/or right-of-way grant of permission assessment will be paid to the Southern Ute Indian Tribe at a rate determined by the Southern Ute Energy Department as stated in the Tribal Council Policy regarding right-of-way and surface damage compensation for oil and gas facilities. All assessments shall be paid prior to construction.”

## Red Cedar Gathering Company Rights-of-Way

In the late 1980s and early 1990s, the presence of coalbed methane on the Southern Ute Indian Reservation led the tribe to propose a blanket right-of-way agreement to WestGas in exchange for a throughput fee. Ultimately, the situation created an opportunity for the Southern Ute to establish its own natural gas gathering company called Red Cedar. The negotiations over rights-of-way pertaining to coalbed methane development indicate how certain priorities of the Southern Ute dictated what kind of compensation the tribe required. In the eyes of the Southern Ute, it also showed that “partnerships between industry and the Tribe” could result in “financial success” for both parties.<sup>208</sup>

Development of coalbed methane occurred in the Ignacio Blanco Field, which underlay much of the Southern Ute Reservation. Until the late 1980s, this field had only produced marginal amounts of gas, but at the end of that decade, several companies began explorations for coalbed methane. At the same time, the Southern Ute Indian Tribe conducted a study of potential gas production from coalbed methane wells, finding “a high probability of substantial recoverable gas reserves,” especially on the west side of the reservation.<sup>209</sup> The problem, according to the tribe, was that not enough pipelines existed in the area to allow the increase in coalbed methane production that the tribe wanted. It therefore contacted several companies about expanding the pipeline infrastructure, but corporations such as El Paso Natural Gas and Williams Gas Processing Company were not as optimistic about the potential of coalbed methane on the reservation and declined to participate.<sup>210</sup>

However, WestGas, a subsidiary of the Public Service Company of Colorado, expressed interest in expanding its pipeline system. WestGas, whose operations were primarily confined to the Southern Ute Indian Reservation, “showed the inclination to expand to aggressively meet the growing needs.”<sup>211</sup> Therefore, the tribe and WestGas entered negotiations. Because the Southern Ute wanted to see coalbed methane production increase, it decided to issue a blanket grant to WestGas for “all rights-of-way crossing tribal lands necessary for construction and

---

<sup>208</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 16.

<sup>209</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 10-11.

<sup>210</sup> Thomas H. Shipps to Germain Sanchez, Department of Natural Resources, October 4, 2001, Records of the Southern Ute Growth Fund, Ignacio, Colorado [hereafter referred to as SUGF].

<sup>211</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 12.

operation of gathering systems and pipelines” in the western part of the reservation. WestGas would still need to submit individual right-of-way applications to the Southern Ute Tribal Council for its “review and approval,” but this grant would facilitate and guarantee the approval of such easements. As compensation for these rights-of-way, WestGas agreed to pay to the tribe a throughput fee of \$.015 per MMBTU (million British thermal units) on “all gas compressed and processed on the premises of the Arkansas Loop Compressor Station or such other substitute or complimentary processing and compression facilities located within the boundaries of the Southern Ute Indian Reservation.” The agreement specified that all gas gathered from the west side of the reservation would be processed at the Arkansas Loop facility. The duration of the agreement would be “eleven (11) years from the date of approval by the Secretary of the Interior or his authorized delegate.” Any right-of-way subsequently approved by the tribe would expire at the same time as the overall agreement.<sup>212</sup>

According to tribal officials, there were several reasons why this deal benefited the tribe. For one thing, it gave both the tribe and WestGas “an important stake in successful development of the western lands for [coalbed methane] purposes.” For another, it ensured the rapid expansion of coalbed methane production, something that the tribe wanted. WestGas’s perspective on the transaction is not evident from the available records, but presumably it appreciated the access to rights-of-way that the agreement provided. In any case, the tribe considered it a “win-win” situation.<sup>213</sup>

In 1991, WestGas and the Southern Ute amended the right-of-way agreement. One amendment clarified that the blanket consent given to WestGas covered “all existing and future gathering systems and pipelines owned or operated by WestGas including right-of-way and pending renewals covering a period from March 1986 through December 1990 and any right-of-way applications for renewal of existing right-of-way that have expired or will expire during the term of this Agreement.” Another amendment dealt with what gas had to be processed at the Arkansas Loop Compressor Station. It stated that all gas in the gathering area would have to go to Arkansas Loop except for gas “delivered to the WestGas 8 [inch] transmission line at or

---

<sup>212</sup> Quotations in Right-of-Way Agreement and Amendment of Commercial Lease Between WestGas and the Southern Ute Indian Tribe, August 28, 1990, SUGF; see also Resolution No. 90-108, August 29, 1990, *ibid*.

<sup>213</sup> Quotation in Shipps to Sanchez, October 4, 2001; see also Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 12.

downstream of the Tiffany Compressor Station.” However, if the gas going to the WestGas 8-inch transmission line exceeded 22,000 MMBTU per day, the tribe would receive a throughput fee of \$.015 on all volumes over 22,000 MMBTU.<sup>214</sup>

The agreement as amended remained in place until 1994. That year, the Public Service Company of Colorado, wanting to eliminate its “non-core businesses,” decided to sell WestGas. Because WestGas operated mainly on the Southern Ute Reservation, the tribe was interested in purchasing the company, but did not have the resources to do so. It therefore established a relationship with Stephens Group, Inc., an investment company from Little Rock, Arkansas, and, after forming a partnership with Stephens (called WG Acquisition, Inc.), bid on WestGas. The Public Service Company of Colorado initially rejected the bid. According to Tribal Attorney Thomas Shipps, the tribe then sent a letter to Public Service “expressly confirming when [WestGas’s] rights-of-way would expire and requesting that all other potential buyers be properly notified of the fact.” The letter also explained that, by statute, the tribe would have to consent to a transfer of the easements. After receiving this letter, Public Service agreed to reconsider WG Acquisition’s bid.<sup>215</sup>

In the summer of 1994, the two sides agreed to terms, and WG Acquisition purchased WestGas for \$87 million. Stephens and the tribe then entered into a joint venture agreement creating the Red Cedar Gathering Company. Stephens contributed all of WestGas’s assets to the joint venture, while the tribe provided \$5 million and “an extension of [WestGas’s] existing rights-of-way.”<sup>216</sup> According to this arrangement, the rights-of-way would extend to December 31, 2036, but the throughput fee would increase to \$.0175 on January 1, 2001. In 2009, 2014, 2019, and every five years thereafter, other upward revisions would occur. The only caveat was that such increases would have to “be without economic consequence or detriment to Red Cedar.” If Red Cedar decided that the throughput fee was not in its best interests, “the amount of the throughput fee or the increases of the throughput fee shall be adjusted so as to eliminate such

---

<sup>214</sup> Amendment to Right-of-Way Agreement, July 23, 1991, SUGF.

<sup>215</sup> Quotation in Shipps to Sanchez, October 4, 2001; see also Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 12.

<sup>216</sup> Quotation in Shipps to Sanchez, October 4, 2001; see also Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 12. Although the Southern Ute has maintained its ownership of the corporation, its partner in the joint venture has changed twice. In December 1997, Stephens sold its interest to KN Energy, Inc., which was later acquired by Kinder Morgan, a large energy transportation company based out of Houston, Texas.

consequence.” Finally, the agreement increased the area to which tribal consent of rights-of-way was given to “all tribal lands within the exterior boundaries of the Southern Ute Indian Reservation.”<sup>217</sup>

Since the conclusion of the joint venture agreement, Red Cedar has invested considerable money into expanding pipeline systems on the reservation.<sup>218</sup> As it has done so, it has acquired rights-of-way in accordance with the agreements explained above. On April 4, 2000, for example, the Tribal Council granted rights-of-way to Red Cedar for a pipeline loop to Coyote Gulch Plant, noting that compensation would be provided according to the 1990 right-of-way agreement, as amended in 1991 and 1994.<sup>219</sup> Likewise, on January 9, 2006, the Tribal Council authorized easements for the expansion of Red Cedar’s West La Posta Compressor Station, stating that the rights-of-way were subject to the terms of the same agreements.<sup>220</sup>

Because of the tribe’s interest in Red Cedar, the right-of-way arrangement with the company was somewhat different from most arrangements on the reservation, although not entirely different from the original understanding with WestGas. The Southern Ute Indian Tribe did not have any holdings in WestGas, but the tribe wanted to see coalbed methane production expand dramatically on the reservation and was willing to provide concessions to achieve that goal. From the tribe’s perspective, the arrangements also showed that throughput fees could be successful. They provided an easy means of compensation, increased the revenue the tribe received from easements, and established partnerships between the tribe and industry.

## Summary

These four case studies show the different levels of involvement that the Southern Ute Indian Tribe has had in right-of-way negotiations from the 1960s to the present, indicating that from the 1970s on, the tribe was actively pursuing different methods of compensation. These included donations to the tribal scholarship fund, lump sum payments, throughput fees, and transferring

---

<sup>217</sup> Quotations in Amendment No. Two to Right-of-Way Agreement and Amendment of Commercial Lease, August 31, 1994, SUGF; see also Resolution No. 94-106, July 28, 1994, *ibid*.

<sup>218</sup> Southern Ute Indian Tribe, “Overview of Energy Rights-of-Way on Southern Ute Tribal Lands,” 12.

<sup>219</sup> Resolution No. 00-59, April 4, 2000, File Red Cedar Gathering Company Coyote Gulch Plant Pipeline, Realty Office, Southern Ute Agency.

<sup>220</sup> Resolution No. 2006-05, January 9, 2006, File West La Posta Compressor Expand, Realty Office, Southern Ute Agency.

non-cash assets. The tribe also tried to streamline compensation by passing resolutions setting blanket rates for pipeline easements. In making decisions about rights-of-way, the most important factors for the Southern Ute seemed to be whether the easements would facilitate development of its energy resources and whether payments provided adequate compensation according to the tribe's net benefit theory. These factors continue to be significant in the twenty-first century.

# Energy Rights-of-Way on the Morongo Indian Reservation

## Formation of the Reservation

The Morongo Band of Indians is one of several linguistically related tribal groups in south-central California collectively referred to as the Cahuilla. The area occupied and used by the Cahuilla traditionally extended from the summit of the San Bernardino Mountains in the north to the Chocolate Mountains in the south. The eastern edges of Cahuilla territory reached portions of the Colorado Desert, while the western boundaries included the San Jacinto River basin and the eastern slopes of the Palomar Mountains.<sup>221</sup>

Prior to contact with non-Indians, Cahuilla political and cultural organization was based upon clans that were composed of three to ten lineages, descended from a common ancestor. One of the lines functioned as a clan's founding lineage; its leader (*nét*) was an inherited position that usually passed from father to eldest son, continuing whenever possible within a direct line of descent. Each lineage owned a specific village site, such as the Morongo village, located in the San Bernardino Mountains and the San Jacintos north of San Gorgonio Pass. The dominant lineage of the Morongo village was the Wanikik, which, like other Cahuilla, relied primarily upon hunting and gathering for sustenance. Key plant foods included acorn, mesquite, piñon nuts, and fleshy bulbs from many types of cactus. The Wanikik also raised such produce as corn, beans, squash, and melons.<sup>222</sup>

The Wanikik and other Cahuilla groups intermarried and traded extensively with each other and with other Takic-speaking tribes of Uto-Aztecan stock, such as the Luiseño, Gabrielino, Serrano, and Cupeño.<sup>223</sup> Throughout the 1800s, persons from several different backgrounds became affiliated with the Wanikik, becoming known collectively as the Morongo Band of

---

<sup>221</sup> Lowell John Bean, "Cahuilla," in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 8, *California*, ed. Robert F. Heizer (Washington, D.C.: Smithsonian Institution, 1978), 575.

<sup>222</sup> Bean, "Cahuilla," 575, 578, 580, 584; Lowell John Bean, "Morongo Indian Reservation: A Century of Adaptive Strategies," in *World Anthropology: American Indian Economic Development*, ed. Sam Stanley (The Hague: Mouton Publishers, 1978), 165-66.

<sup>223</sup> Bean, "Cahuilla," 575; William Duncan Strong, "Aboriginal Society in Southern California," *University of California Publications in American Archaeology and Ethnology* 26 (1929): 98, 183, 275-76.

Mission Indians. They included other Cahuilla, Serrano, Cupeño, Diegueño, and Luiseño peoples, all of whom (except for the Diegueño) spoke a Shoshonean language.<sup>224</sup>

Although the Spanish had established a presence in present-day California relatively early, the first documented contact between the Cahuilla and non-Indians did not occur until 1809, when those natives residing at San Geronio Pass were pulled into Mission San Gabriel. This mission, like other Spanish missions, subjugated California Indians as part of Spain's colonial policy, instructing natives in the Catholic faith as well as in agriculture and European crafts. By 1820, missionaries had also established an *assistencia*, or a “helper” mission, at San Bernardino. In addition, Spanish ranchers established ranchos in Cahuilla territory, using Indians as their primary labor force.<sup>225</sup>

After the United States gained control of California under the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, the federal government signed treaties with the Cahuilla and other southern California bands. These agreements, negotiated in 1851, stipulated that the Indians would cede land to the United States in return for the establishment of reservations. The U.S. Senate, however, did not ratify any of these agreements. At the same time, Congress passed an act establishing a commission to determine who had valid Mexican titles to California land and to decide what lands Indians held, used, and occupied. Any tracts that did not have a valid Mexican title—including Indian lands—were opened to homestead filing, meaning that numerous non-Indians began moving onto Cahuilla land. By the 1870s, southern California Indians had lost so much land that some observers clamored for the federal government to put an end to non-Indian encroachment. Therefore, President Ulysses S. Grant issued an Executive Order in 1875 establishing reservations for several Indian groups in California, although the Morongo Band was not among them. On August 25, 1877, however, President Rutherford B. Hayes created the Morongo Reservation by Executive Order. Four years later, President James A. Garfield withdrew more land for the Morongo. The exact number of acres provided by the Executive Orders is unclear.<sup>226</sup>

---

<sup>224</sup> Bean, “Morongo Indian Reservation,” 166.

<sup>225</sup> Bean, “Morongo Indian Reservation,” 166-69.

<sup>226</sup> Bean, “Morongo Indian Reservation,” 169-70; Florence Connolly Shipek, *Pushed Into the Rocks: Southern California Indian Land Tenure, 1769-1986* (Lincoln: University of Nebraska Press, 1987), 34-36; Executive Orders of August 25, 1877, and March 9, 1881, in *Indian Affairs: Laws and Treaties*, 1:821-822; Office of Indian Affairs, ... continued on next page

Despite the establishment of the reservation, non-Indians continued to settle on Indian lands, leading Congress to pass an act in 1891 “for the relief of the Mission Indians in the State of California.” According to this law, a commission—known as the Smiley Commission—would determine what lands each band of Indians used and occupied and would then issue trust patents to the groups.<sup>227</sup> Between 1892 and 1910, BIA personnel surveyed the lands delineated by the Smiley Commission and provided trust patents to the bands. The Morongo Band received its trust patent in December 1908, although, upon the Commission’s recommendation, the patent did not cover all of the land withdrawn by the 1877 and 1881 Executive Orders. Instead, the patent included approximately 11,059 acres. Five years later, President Woodrow Wilson revoked the withdrawal of any Morongo land not patented in 1908, stating that these areas were “not used or occupied” by the Indians.<sup>228</sup> Yet additional acreage was added to the reservation in the 1920s. In 1925, President Calvin Coolidge withdrew acreage from the Angeles National Forest “for the use and benefit of the Morongo Indians until March 5, 1927,” and in 1926, Congress passed an act permanently integrating these lands into the reservation, making the total acreage of the reservation approximately 31,724 (see Figure 4).<sup>229</sup>

The 1891 Act also provided for the allotting of California Indians, recommending that each head of household receive between 160 and 640 acres of grazing land, as well as 20 acres of arable land, and that other persons over 21 years old receive between 80 and 640 acres of grazing land and 10 acres of arable land. Some bands, such as the Morongo, opposed allotment because they believed that it would result in the loss of even more land. By July 1919, however, BIA officials had compiled an allotment schedule for the Morongo Reservation, proposing tracts of only five or six acres each. Some Morongo accepted these allotments—one 1935 source listed

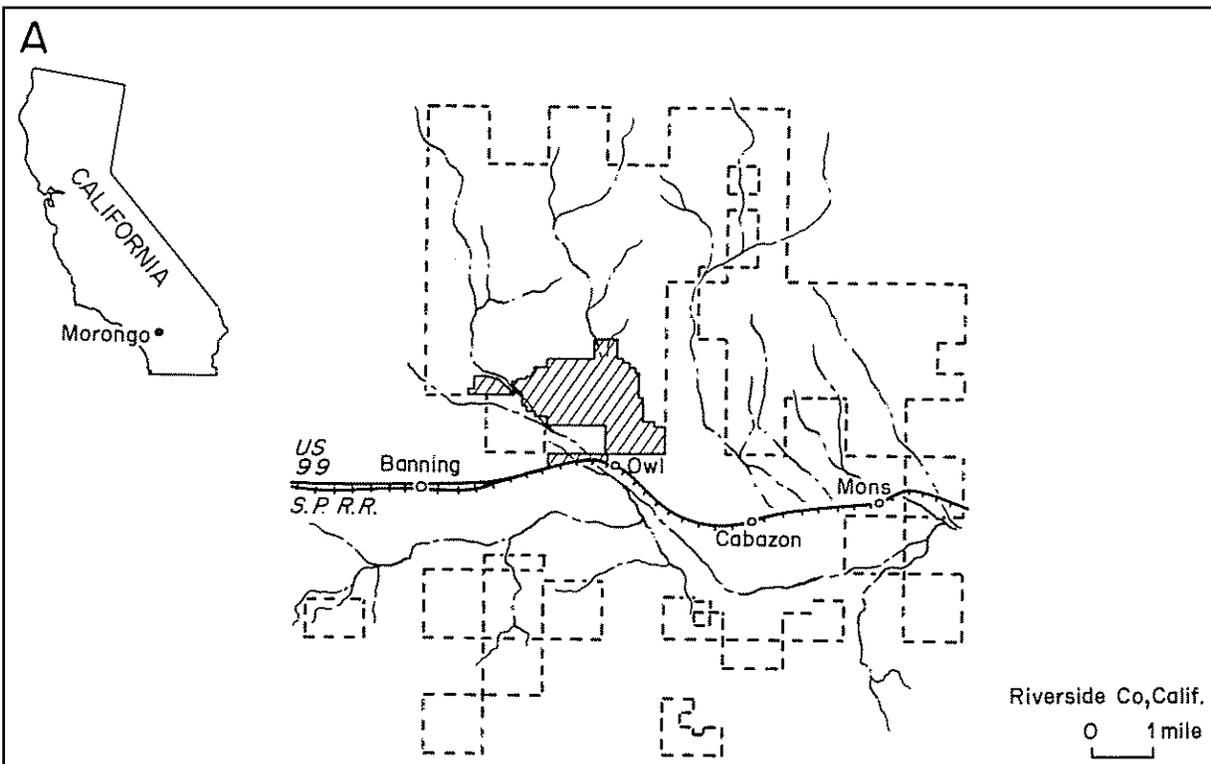
---

*Indian Land Tenure, Economic Status, and Population Trends* (Washington, D.C.: Government Printing Office, 1935), 28.

<sup>227</sup> Act of January 12, 1891 (26 Stat. 712).

<sup>228</sup> Quotation in Proclamation of November 12, 1913, in *Indian Affairs: Laws and Treaties*, 4:950; see also Shippek, *Pushed Into the Rocks*, 37-40; Office of Indian Affairs, *Indian Land Tenure*, 28.

<sup>229</sup> Quotation in Proclamation of September 30, 1925, in *Indian Affairs: Laws and Treaties*, 4:999; see also Act of June 1, 1926 (44 Stat. 679); Office of Indian Affairs, *Indian Land Tenure*, 28.



**Figure 4.** Morongo Indian Reservation. Source: Lowell John Bean, “Morongo Indian Reservation: A Century of Adaptive Strategies,” in *World Anthropology: American Indian Economic Development*, ed. Sam Stanley (The Hague: Mouton Publishers, 1978), 164.<sup>230</sup>

267 as the total number of allotments on the reservation—but others maintained their opposition.<sup>231</sup> Indeed, the Morongo made concerted efforts to hold most of their land in tribal ownership, and by 2003, the reservation comprised 32,402 acres, of which 31,115 acres were tribally owned.<sup>232</sup>

## Energy Resource Development

Little, if any, energy resource development has occurred on the Morongo Reservation. There are no oil and gas fields on the reservation, nor are there other minerals in any abundance. The

<sup>230</sup> The source is unclear as to what the shaded portion of the map represents.

<sup>231</sup> Office of Indian Affairs, *Indian Land Tenure*, 28; Shipek, *Pushed Into the Rocks*, 49-53, 165-169; Bean, “Morongo Indian Reservation,” 183.

<sup>232</sup> U.S. Bureau of Indian Affairs, Pacific Regional Office, “Acreages by Agency and Reservation, Calendar Year Ending December 2002, Southern California Agency,” copy provided by Office of Historical Trust Accounting, U.S. Department of the Interior.

one significant energy resource possessed by the Morongo Band is wind. Although large wind farms are located on lands in the vicinity of the reservation, the Band has chosen not to develop this resource because of potential bird mortality and degradation of the reservation landscape.<sup>233</sup>

## Energy Rights-of-Way

Even though the Morongo Reservation lacks energy resources of its own, it occupies a major east-west travel corridor in southern California. For over a half century, this corridor has served as an important route for natural gas, oil, and electric transmission lines. The first major electric line constructed on the reservation dates to 1914. Today, three natural gas and seven electric intrastate and interstate transmission lines, as well as multiple gas and electric distribution and service lines, traverse the reservation. Natural gas transmission lines range in size from 30 to 36 inches in diameter and electric transmission lines range from 115 kV to 500 kV, with plans in negotiation to build additional 500 kV lines. Distribution lines range from 12 kV to 33 kV—the 33 kV Banning-Palm Springs line constituting the main distribution line for the reservation. With the exception of some smaller service lines, all natural gas and electric transmission and distribution lines are currently under right-of-way or license agreements. There are no rights-of-way on the Morongo Reservation for substations or ancillary facilities.<sup>234</sup>

The Act of February 5, 1948, required the consent of “organized” tribes before a right-of-way could be granted, but even prior to 1948 the Morongo Band played a role in consenting to easements. For instance, in 1946, BIA Superintendent John W. Dady informed Field Aid J. K. Hall that “either the [right-of-way] stipulation must be signed by a majority of the members of the tribal committee, or it must be acted upon at a called tribal meeting.”<sup>235</sup> One complicating factor in post-1948 right-of-way negotiations is that the Morongo Band never organized under the Indian Reorganization Act of 1934 (IRA) or the other statutes mentioned in the 1948 Act.

---

<sup>233</sup> Karen Woodard, Realty Administrator, Morongo Band of Mission Indians, personal communication with David Strohmaier, Banning, California, May 5, 2006.

<sup>234</sup> Maurice Lyons, “Morongo Band of Mission Indians, Tribal Case Study: Section 1813 Report,” <[http://1813.anl.gov/documents/cocs/ScopingComments/MOR\\_5\\_14\\_1813\\_Case\\_Study\\_Final.pdf](http://1813.anl.gov/documents/cocs/ScopingComments/MOR_5_14_1813_Case_Study_Final.pdf)> (May 30, 2006); Karen Woodard, Realty Administrator, Morongo Band of Mission Indians, personal communication with David Strohmaier, Banning, California, May, 5, 2006. As opposed to distribution lines that supply gas and electricity to the reservation, transmission lines merely cross the reservation.

<sup>235</sup> John W. Dady, Superintendent, to J. K. Hall, Field Aid, June 17, 1946, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band of Mission Indians, Banning, California [hereafter referred to as Morongo Band].

Referred to as a “custom and tradition tribe,” the Morongo Band makes all major decisions (such as budgets, expenditures, and rights-of-way) collectively through general elections involving all voting-eligible band members, defined as enrolled tribal members over the age of 18. Election results are then forwarded to the Tribal Council for ratification. (Over the decades, the Tribal Council has been known variously as the Morongo Tribal Committee, the Morongo Business Committee, or the Morongo Tribal Council. Today the Council is composed of seven members, including the tribal chairperson.) Even though the 1948 Act referred only to IRA-organized tribes in its consent provision, regulations implementing the act did not distinguish between IRA-organized and other tribes, and all parties involved in Morongo right-of-way negotiations have assumed that tribal consent is essential when tribal lands are involved.<sup>236</sup>

In the decades between 1948 and the mid-1990s, the BIA, after receiving tribal consent, granted or renewed numerous rights-of-way across the Morongo Reservation. The typical process began with an applicant seeking permission from the BIA to survey the proposed right-of-way route. This was followed by an appraisal, formal application to the BIA, negotiations between the applicant and the Morongo Band for damages and compensation (which occurred in some but perhaps not all cases—the documents are not always clear on this point), a general membership vote approving the terms of the right-of-way and/or authorizing the Tribal Council to enter into negotiations, a Tribal Council resolution affirming the election results and consenting to the terms of the easement, and BIA approval of the right-of-way. In some cases, the process followed a different sequence, as evidenced in those instances where the BIA gave permission to companies to begin construction before the right-of-way was approved.<sup>237</sup>

The degree of Morongo participation in right-of-way negotiations is not always clear from Agency and tribal records. Neither is it clear how often energy companies modified their plans or offers of compensation based on tribal input. In some cases, Tribal Council members

---

<sup>236</sup> See, for instance, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3 and Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; File 378-Morongo-217, SCE San Bernardino-Zanja-Banning-Garnet Transmission Line SLA, TR-4616-P5, *ibid.*; Karen Woodard, Realty Administrator, Morongo Band of Mission Indians, personal communication with David Strohmaier, June 5, 2006; Veronica E. Velarde Tiller, *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* (Albuquerque, N.M.: BowArrow Publishing Company, 2005), 444.

<sup>237</sup> See Assistant Commissioner, to John W. Dady, Superintendent, April 22, 1946, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; “Order Issuing Minor-Part License (Transmission Line), April 2, 1954, 2, File 378-  
... continued on next page

requested compensation above and beyond what applicants offered, as was the case with the Third Boulder-Chino Transmission Line in the late 1940s and early 1950s (see discussion below).<sup>238</sup> In at least one case, however, the text of tribal resolutions appears nearly identical to text supplied to the Morongo Band by right-of-way applicants. For instance, in 1954, BIA Area Director Leonard Hill referenced a draft resolution “which was prepared for [the Morongo Band Spokeswoman’s] signature and that of the other members of the Morongo Tribal Committee” by the California Electric Power Company.<sup>239</sup> It is unclear whether this was a standard practice or an isolated case.

Between 1948 and the 1990s, tribal compensation for energy easements was usually determined by appraisals that assessed the fair market value of the land. On the Morongo Reservation, the applicant would typically initiate an appraisal, which BIA appraisers then reviewed. The appraisals themselves would generally attempt to characterize existing land uses (e.g., irrigable land versus rangeland) for the right-of-way and compare those tracts to land sales of parcels in the vicinity. Once the total fee market value of the right-of-way was ascertained, that amount was then reduced by some fixed percentage to arrive at the value of the right-of-way easement.

The appraisal method is illustrated by the Four Corners Pipeline Company’s right-of-way renewal for a 16-inch crude oil pipeline across the reservation. In 1977, an appraiser with the Western Cities Appraisal Company, hired by Four Corners, noted that “all pertinent data influencing the valuation was [*sic*] considered, including: location; physical characteristics; potential zoning; accessibility; highest and best use; district sale prices; and other physical and economic factors which may tend to influence property values.”<sup>240</sup> Moreover, “the highest and best use of the property, if available for sale on the open market, is for speculative land investment purposes.” Market data examined comparable tracts, price paid, and price per acre.

---

Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>238</sup> See File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3 and Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>239</sup> Leonard Hill, Area Director, to Viola M. Mathews, Morongo Band Spokeswoman, May 21, 1954, File 378-Morongo-139, SCG&EC 12 kV Electric Distribution Line ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Office, Southern California Agency, Riverside, California.

<sup>240</sup> Courtland J. Stewart to J. A. Baker, Right of Way Manager, August 17, 1977, File 372 Morongo 240, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

The appraisal report stated that, “considering the easement rights sought, it is our judgment that the underlying fee owner’s rights are reduced 75 percent within the subject right-of-way.” Put another way, since the tribe’s ability to use the land was reduced by an estimated 75 percent, the value of the easement was likewise 75 percent of the fair market fee value. However, the report did not elaborate on how the appraiser determined that percentage.<sup>241</sup> Besides paying compensation for the easement itself (whether in a lump sum or in annual payments), energy companies often paid the Morongo Band some set fee per pole or per mile, or an estimated amount for damages.<sup>242</sup>

During the 1970s, the Morongo Band and energy company officials continued to wrestle with the question of what constituted acceptable compensation. The Band sought some means to include provisions for rate increases over the life of the easement. In a 1978 memo, for example, Four Corners’ Right of Way Manager J. A. Baker summed up negotiations with the Morongo Band, noting that Tribal Chairman Tom Lyons had insisted on an “escalation clause” that would provide “for additional payments at 5 year intervals for the 20 year renewal term” using the U.S. Department of Labor’s Wholesale Price Index.<sup>243</sup>

Also during this decade, some BIA officials expressed the belief that traditional methods of compensation for rights-of-way (such as one-time damage payments) might not fully capture tribal values. In the context of a Southern California Gas Company proposal to utilize an existing natural gas pipeline for crude oil, BIA Area Director William E. Finale wrote:

The study fails to address itself to the unique situation which the Indian people find themselves in today’s society. The status of their land is unique, and as such, they are reluctant to permit its use for purposes which do not directly benefit the Tribe as a whole. They have a concept of land ownership that is foreign to the dominant society and do not feel that money, no matter how much, is adequate recompensation for losing the use of the land itself.<sup>244</sup>

---

<sup>241</sup> Western Cities Appraisal Company, Inc., Appraisal Report, August 12, 1977, File 372 Morongo 240, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>242</sup> Some ambiguity exists in right-of-way documents as to the use of the term “damages.” It is unclear whether “damages” means literal damages from facility construction and use, or the value assigned to the easement itself.

<sup>243</sup> J. A. Baker, Right of Way Manager, “Status of Renewal of Pipeline Right of Way Across the Morongo Band of Mission Indians Reservation,” April 18, 1978, File 372 Morongo 240, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>244</sup> William E. Finale, Area Director, to Project Manager, Bureau of Land Management, January 10, 1977, File 372 Morongo 61, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

Although monetary payment based on fair market value appraisals was the most common method of compensation for Morongo rights-of-way between 1948 and the 1990s, the Band also explored other forms of compensation. One approach was to secure either natural gas or electric distribution and service lines in exchange for rights-of-way across tribal lands. In the summer of 1968, Southern California Gas Company framed such an offer in terms of compensation for damages: “The total cost of the installation of the miles of gas service lines within the reservation is \$82,078.00 which we feel more than adequately reimburses the tribe for any damages which may result from the rights of way being sought.”<sup>245</sup> Likewise, Southern California Gas’s land and right-of-way agent explained that “in lieu of cash damages, the Southern California Gas Company will provide natural gas service to every home now constructed on the Morongo Reservation, as well as one home soon to be constructed.”<sup>246</sup> Such compensation served as a way for the Morongo Band to develop desired infrastructure on the reservation.

Starting in 1995, the 50-year terms of some electric transmission line rights-of-way began to expire. Negotiations are either currently underway or have yet to begin on some of these lines, a number of which are now under license agreements pending the start of right-of-way negotiations. Finally, in contrast to past negotiations that focused primarily on fair market value of rights-of-way and appraised damages, for future rights-of-way (or right-of-way renewals) the Morongo Band has been investigating the use of an “income approach methodology,” or rate of return, to determine adequate compensation, believing that the income approach recognizes tribal lands as income-producing assets.<sup>247</sup>

---

<sup>245</sup> Charles W. Elam, Chief R/W Representative, to U.S. Department of Interior, July 17, 1968, File 372 Morongo 101, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>246</sup> Allan L. Cleveland, Land and Right of Way Agent, to H. W. Gilmore, District Agent, March 14, 1950, 2, File 372 Morongo 61, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>247</sup> Karen Woodard, Realty Administrator, Morongo Band of Mission Indians, personal communication with David Strohmaier, May 18, 2006. As opposed to formal right-of-way grants that must comply with 25 CFR 169 and obtain BIA/Secretarial approval, tribes are allowed to issue license agreements without BIA approval for up to seven years. One current set of license agreements with Southern California Edison (which resulted in the band receiving approximately \$8,435,000 in compensation for the term of the license) requires that negotiations begin in 2008 and be completed by 2010. Authority to grant license agreements derives from 25 U.S.C. 81.

Table 3 delineates the compensation and duration of some of the energy rights-of-way that have been concluded on the Morongo Reservation. The listed easements include representative samples of natural gas, oil, and electric transmission and distribution lines (the focus of this study), selected with the help of Karen Woodard, Realty Administrator for Morongo Band of Mission Indians. Table 3 is organized by right-of-way purpose, then chronologically by right-of-way approval date. If the documents collected did not indicate the approval date, then the application date was used instead.

**Table 3.** Compensation for energy rights-of-way on the Morongo Indian Reservation.

ROW No.	Purpose	Acreage	Compensation	Original Offer	Appraised Value	Application Date	Date of Tribal Consent and BIA Approval	Duration	Comments
372- Morongo-15	30-inch welded steel natural gas pipeline	8.02			Original damages assessed at \$99.75 per acre: \$800.00 for right-of-way and \$400.00 for a temporary road (appears to cover damages from this pipeline on both the Morongo and Palm Springs Reservations)		9/26/1946, advanced permission; 3/29/1948; relinquished and new right-of-way approved on 5/5/1954	20 years beginning 3/29/1948	The 1954 renewal under the Act of February 5, 1948 retained the original approval date of 3/29/1948 as the start of the right-of-way duration. A short portion of line relocated to accommodate realignment of Interstate 10 (authorized by a 12/14/1963 tribal resolution).
372-Morongo-15-Renewal	30-inch welded steel natural gas pipeline		In exchange for renewing two pipeline rights-of-way and granting one new right-of-way, natural gas service to be provided to all existing and one proposed home on the reservation (estimated cost of service \$82,078.00)			11/6/1967	8/16/1968 (unnumbered tribal resolution); 8/30/1968, BIA approval.	50 years beginning 3/29/1968	On 4/11/1977, company requested amendment changing pipeline use from gas to any substances
372- Morongo-61	30-inch welded steel natural gas pipeline, right-of-way 16.5 feet wide	6.05		\$958.00	\$605.00 for right-of-way (\$100.00 per acre) and \$353 for "working strip" (\$100.00 per mile)	3/14/1950	3/22/1950; relinquished and new right-of-way approved on 5/5/1954	20 years beginning 3/22/1950	Original ROW granted pursuant to 25 U.S.C. 231; new rights-of-way granted pursuant to 25 U.S.C. 323 A short portion of line relocated to accommodate realignment of Interstate 10 (authorized by a 12/14/1963 tribal resolution).
372-Morongo-61-Renewal	30-inch welded steel natural gas pipeline, right-of-way 16.5 feet wide	6.05	Natural gas service provided to all existing and one proposed home on the reservation (estimated cost of service \$82,078.00)			11/6/1967 or 7/17/1968	8/16/1968 (unnumbered tribal resolution)	50 years beginning 8/21/1968 (although some sources say 50 years beginning 3/22/1970)	
378-Morongo-137	66 kV/88 kV electric transmission line, right-of-way 3.226 miles long	3.52	\$185.00 (37 poles at \$5.00 per pole) plus annual rental of \$10.00		\$5.00 per pole		3/30/1933 (unnumbered tribal petition/resolution)	50 years	Some references indicate annual rental of \$5.00 per mile. As of 1983 electrical facilities had been removed.
378-Morongo-143 (Devers-San Bernardino No. 1; also known as Third Boulder T/L FPC Project No. 2051)	220 kV electric transmission line, right-of-way 4.71 miles in length, 300 feet wide	87.65	Damages of \$6,229.25: \$4,616.75 for 184.67 acres at \$25 per acre; \$637.50 for 2.44 acres; and \$975.00 for 39 towers at \$25 per tower. In addition, annual fee of \$5.00 per mile.  \$31.80 annual fee paid to the United States as part of the FPC minor-part license	\$25.00 per acre	\$6,131.50 total; \$25.00 per acre for dry land areas and \$637.50 for 2.62 irrigated acres	4/17/1945 or 11/13/1945; 5/8/1950 (application for license pursuant to the Federal Power Act)	6/27/1947 (unnumbered tribal resolution confirming action taken at a 4/5/1945 tribal meeting); FPC minor-part license 3/31/1954.	50 years beginning 7/1/1945  Expired 7/1/1995  Currently under a license agreement until 2010.	Originally constructed in 1945, connecting Chino Substation to Hayfield, California. In 1992, company initiated process to renew license.  Original compensation reflected \$25/acre "on grounds of a 'war emergency'"; although the tribe requested \$100 per acre
378-Morongo-55	Three-phase 12 kV electric distribution line, right-of-way 0.51 miles long, 40 feet wide		Annual rental fee of \$5.00 per mile		\$50.00	8/15/1949	7/8/1949 (unnumbered tribal resolution); 5/26/1953	50 years beginning 8/16/1948	
378-Morongo-139	12 kV electric distribution line, right-of-way four miles long		Damages waived plus electric service provided to 28 homes and six tribal buildings	Waive damages in lieu of 29 electric service connections			6/15/1954 (unnumbered tribal resolution)		Tribal resolution gave exclusive right to company to construct all future electric lines and extensions that supply the reservation with power
378-Morongo-48	12 kV electric distribution lines, right-of-way 4.54 miles long, 10 feet wide		Damages waived plus electric service provided to 28 homes and six tribal buildings			10/7/1954	10/5/1954 (unnumbered tribal resolution)		Unclear how this right-of-way differs from right-of-way No. 378-Morongo-139

**Table 3.** Compensation for energy rights-of-way on the Morongo Indian Reservation.

ROW No.	Purpose	Acceage	Compensation	Original Offer	Appraised Value	Application Date	Date of Tribal Consent and BIA Approval	Duration	Comments
378-Morongo-49 (SCEC Poppet Flats ROW)	12 kV three-phase electric distribution line, right-of-way .52 miles long, 40 feet wide. Also an associated 20-foot -wide, .32-mile-long right-of-way, and a 20-foot-wide, .06-mile-long right-of-way for road access.	3.4	\$200 plus annual rental fee of \$5	\$200.00 plus annual rental fee of \$5.00	\$100.00 (BIA appraisal)	11/20/1958 (application stipulates right-of-way for both powerline and access road)	6/5/1959	50 years beginning 11/24/1958	No record of a tribal resolution authorizing this right-of-way
372-Morongo-18	16-inch crude oil pipeline, right-of-way 4.01 miles (1,284 rods) long, 60 feet wide	29.18					12/23/1959 (BIA permit)	20 years beginning 7/9/1957	
372-Morongo-240 (Renewal of 372-Morongo-18)	16-inch crude oil pipeline, right-of-way 4.01 miles long (1,284 rods) and 30 feet wide (originally 60 feet wide)	14.59	\$176,928.50	Original offer at time of application submittal: no damages since no physical changes to facilities. Renewal grant payment of \$3,210 (\$2.50 per rod)  Renewal offer: Option 1: \$26,500.00 for first 10 years; additional payment to be determined by appraisal at time of exercising option to renew. Option 2: \$87,600.00 (\$39,055 [including \$2,555 annual payment plus 19 additional annual payments of \$2,555)	\$21,885.00 total or \$1,000 per acre (applicant appraisal)  \$26,500.00 (BIA appraisal)  Appraisals reflected 60-foot rather than 30-foot right-of-way.	1/3/1977; supplemental application 7/5/1977; amended 7/18/1980	11/12/1980 (Tribal Resolution SCA-MO-1-81)	20 years from 7/9/1977  Expired 7/8/1997  Right-of-way not renewed	In its amended renewal application, the applicant requested that the renewal include 33 months from 7/9/1977 until 4/26/1980, then for an additional 20 years beginning on 4/26/1980.
378-Morongo-47 (San Bernardino Steam Plant-Garnet Substation 115 kV Electric Transmission Lines; also known as Devers-Banning-Garnet-Zanja 115 kV T/L and Devers-Vista No. 1 220 kV Electrical Transmission Line; SCEC Telecommunication System)	Single circuit 230 kV electric transmission line with associated fiber optic line (easement originally granted for two 115 kV lines). Records differ regarding length of right-of-way, ranging from 4.73 to 4.83 miles long (Devers-Vista No.1), 150 feet wide	Sources differ: early figures list as many as 85.83 or as little as 3.8 acres	\$21,000.00 for tribal land and \$735.00 for one allotment and electrical service to unserved homes (1960 easement)	\$21,000.00 cash and 12,000 kV distribution lines for unserved homes on allotted lands as of 6/26/1959 (1959); \$1,000.00 for one allotment	\$400.00 per acre, \$21,000.00 for tribal land and \$735.00 for one allotment (1959 applicant appraisal); \$13,250.00 for tribal land and \$540.00 for one allotment (1960 BIA appraisal; 50 percent of appraised fair market value of \$26,500.00).	6/22/1959; previous application 1/31/1940 (or 8/20/1941?)	10/7/1959 (conditional approval); 4/22/1960	50 years beginning 2/3/1960  Currently under a license agreement	This right-of-way may include lands part of an earlier right-of-way for an 88 kV transmission line.  Conditional approval predicated on completing application process for reservation distribution system and completed construction of the distribution system.
378-Morongo-47-Amendment	Amendment for third party use of telecommunications facilities occupying right-of-way	Sources differ: early figures list as many as 85.83 or as little as 3.8 acres	\$535,000.00 to Morongo Band and \$7,500.00 to one allottee		Allotted land valued at \$172.62		6/17/1997 (Tribal Resolution No. 97/06/01); 2/20/1998	50 years beginning 2/3/1960	

**Table 3.** Compensation for energy rights-of-way on the Morongo Indian Reservation.

ROW No.	Purpose	Acreage	Compensation	Original Offer	Appraised Value	Application Date	Date of Tribal Consent and BIA Approval	Duration	Comments
372-Morongo-101	Natural gas distribution mains/service lines		Natural gas service provided to all existing and one proposed home on the reservation (estimated cost of service \$82,078.00)				8/21/1968	50 years beginning 8/21/1968	Right-of-way for gas mains agreed to in exchange for right-of-way renewals for 372-15, 372-61 and one new right-of-way (presumably 372-110).
372-Morongo-110	36-inch natural gas pipeline, right-of-way 16,504.16 feet (3.12 miles) long, 50 feet wide	18.944	Natural gas service provided to all existing and one proposed home on the reservation (estimated cost of service \$82,078.00)				8/16/1968 (unnumbered tribal resolution); 8/21/1968	50 years beginning 8/21/1968	
378-Morongo-217 (San Bernardino-Zanja-Banning-Garnet Transmission Line)	115 kV electric transmission line (wood pole), right-of-way 3,057.57 feet long and 100 feet wide	7.02	\$6,643.00 (\$6,143.00 easement value plus \$500.00 severance). Previously under FPC license, \$5.00/pole; amended to \$5.29/pole in 1931.		\$6,643.00 (50 percent of \$1,750.00 per acre; applicant appraisal) \$2,225.00 (lump sum amount; BIA appraisal)	9/23/1966	9/25/1967 (Tribal Resolution No. 9-68) 10/19/1967 (BIA approval)	50 years beginning 10/19/1967	Right-of-way replaced FPC License No. 481 since powerline did not meet definition of a "primary" line or part of a "project." Original FPC license for 50 years beginning 8/8/1924.
378-Morongo-276 (Vista-Devers, Devers-Hayfield, and Hayfield-Eagle Mountain Electric Transmission Line; also called Devers-San Bernardino & Devers Vista #2)	220 kV electric transmission line, right-of-way 5.26 miles long, 200 feet wide	125.59	\$145,100.00 for tribal land plus \$4,775.00 for allotted lands (\$1,350.00 per acre for allotted lands in right-of-way)		\$141,097.00 for tribal lands	Multiple applications on file: 12/21/1967 and 7/14/1969	2/24/1969 (Tribal Resolution No. 49 FY 1969); 10/10/1969	50 years beginning 10/10/1969	Tribal resolution also applied to a 12 kV and a 33 kV distribution line. Tribal resolution stated that the length of the transmission line is 5.88 miles.
378-Morongo-277 (Banning-Palm Springs Electric Distribution Line)	33 kV electric distribution line, right-of-way 25 feet in width	4.02	\$8,660.00 for damages		\$8,655.00 (applicant appraisal)	7/17/1969	2/24/1969 (Tribal Resolution No. 49 FY 1969); 8/20/1969	50 years beginning 8/26/1969	At the time of appraisal in 1968, the line was already in existence. Originally built under a FPC license in 1929.
378-Morongo-277-Amendment	33 kV electric distribution line; relocating electrical line around Morongo Casino						7/15/2003 (Tribal resolution 071503-02)		
378-Morongo-1721 (SCE ILCA 2000)	Third party use of an existing fiber optic line in conjunction with a 500 kV transmission line, right-of-way 2.5 miles long, 200 feet wide	80.34 (unclear how much of this is Morongo land)	None			1/8/1997	Devers-Valley right-of-way originally approved by the California Public Utility Commission on 10/3/1984 and by the BLM on 11/2/1984 (BLM Right-of-Way Grant CA-9093)	Perpetual	Right-of-way grant amended 4/5/1985 to include additional lands. Land subsequently transferred to Morongo Band under the California Land Transfer Act, P.L. 106-568.
Banning-Garnet-Marachino 115 kV Transmission Line (also known as San Bernardino-Coachella 115 kV Transmission Line)	115 kV electric transmission line, right-of-way 3.2 miles long							50 years beginning 9/1/1955  Currently under license agreement	Documentation is unclear regarding this line. It may actually be identical to one of the above electric transmission lines, although the duration period does not correspond to any other line.

## Case Studies

In order to explain more fully the negotiation of compensation rates for energy rights-of-way on the Morongo Indian Reservation, four case studies have been selected. They were chosen to reflect different time periods, different degrees of tribal participation, and different types of compensation. In addition, case studies were selected that demonstrate the range of energy facility types and sizes present on the reservation. The examples include a right-of-way for a 30-inch natural gas transmission line, granted in 1948 to Southern California Gas Company and the Southern Counties Gas Company of California; a right-of-way for two 115 kV electric transmission lines with Southern California Edison Company, approved by a tribal resolution in 1947; a right-of-way for a 115 kV electric transmission line, granted to California Electric Power Company in 1959; and an easement for the 33 kV Banning-Palm Springs Electric Distribution Line to California Edison Company in 1969. Although originally granted in the 1940s, 1950s, and 1960s, these easements have undergone subsequent renewals and amendments, or are currently under temporary license agreements pending the start of renewal negotiations. Files from both the BIA Southern California Agency and the Morongo Band of Mission Indians were utilized for this study; no corporate records were consulted.

### ROW No. 372-Morongo-15

On September 26, 1946, BIA Southern California Agency Superintendent John W. Dady granted advance permission to the Southern California Gas Company and the Southern Counties Gas Company of California to construct a 30-inch gas pipeline across the Morongo Indian Reservation.<sup>248</sup> At that time, damages to Morongo Band lands were assessed at \$800 for the right-of-way and \$400 for access roads. According to BIA State Director Walter V. Woehlke, “twice that amount was deposited as required when advance permission to construct is given.” This extra amount would be held to cover excess damages from construction, with the balance refunded to the companies.<sup>249</sup> A 1948 BIA tribal land schedule reconfirmed the earlier

---

<sup>248</sup> James B. Ring, Acting State Director, to Harry Gilmore, Assistant to the Superintendent, Mission Sub-agency, March 19, 1948, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>249</sup> Walter V. Woehlke, State Director, to Harry W. Gilmore, Assistant to the Superintendent, Mission Sub-agency, April 2, 1948, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

assessment, valuing the 8.02-acre right-of-way at \$99.75 per acre, for a total of approximately \$800. The schedule went on to state that a tribal resolution affirmed the appraisal. It is not clear what, if any, negotiations occurred between the Morongo Band, Southern California Gas, and the BIA for the original right-of-way.<sup>250</sup>

The BIA officially granted the right-of-way on March 29, 1948, pursuant to the Act of March 11, 1904. For unspecified reasons, on April 28, 1954, the companies applied to the BIA to relinquish the right-of-way and establish a new right-of-way under the Act of February 5, 1948. BIA California Area Director Leonard M. Hill granted this request on May 5, 1954. Seeing “no reason why this matter should not be adjusted as requested,” Hill “ordered that the surrender of the right of way approved March 29, 1948, is accepted and a new right of way covering the same line of route is hereby granted under the Act of February 5, 1948 (62 Stat. 17[, ] 18) for a period of 20 years from March 29, 1948.”<sup>251</sup>

In 1966, according to Southern California Gas officials, the Morongo Band requested that the company install gas service to the reservation. The company’s Chief Right-of-Way Representative Charles W. Elam noted that, with service line installation costs estimated at \$82,078, “the Indians would be unable to pay for the gas lines necessary to provide service.” Consequently, Southern California Gas offered to provide gas service to the reservation in exchange for the renewal of two existing rights-of-way (including 372-Morongo-15) and the grant of one new right-of-way for a proposed 36-inch natural gas pipeline.<sup>252</sup>

Accordingly, on December 18, 1967, Morongo Band members approved a resolution delegating to the Business Committee authority to “negotiate and execute a right of way agreement with the Southern California Gas Company for a term of 50 years,” and, in lieu of cash, accepting as compensation “natural gas service to every home now constructed on the

---

<sup>250</sup> Walter V. Woehlke, State Director, “Tribal Land Schedule,” April 16, 1948, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. HRA was unable to locate a copy of the resolution referenced in this correspondence.

<sup>251</sup> Leonard M. Hill, Area Director for California, memo, May 5, 1954, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. Documents did not specify the original duration of the easement; although, presumably, it, too, was for a twenty-year period.

<sup>252</sup> Charles W. Elam, Chief R/W Representative, Southern California Gas Company, to U.S. Department of the Interior, BIA, July 17, 1968, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

Reservation as well as one home soon to be under construction.”<sup>253</sup> On August 16, 1968, the Morongo Tribal Business Committee approved a resolution requesting the BIA “to take whatever steps are necessary to get this project underway.”<sup>254</sup> On August 30, 1968, BIA Acting Area Field Representative William H. Gianelli granted the right-of-way per the conditions spelled out in the tribal resolution. The renewed lease would last for 50 years, retroactive from March 29, 1968—the date on which the original right-of-way lease expired.<sup>255</sup>

In 1977, Southern California Gas proposed that it be allowed to convert the use of its original 30-inch pipeline from natural gas to oil.<sup>256</sup> The company would partner with SOHIO Transportation Company to complete the conversion.<sup>257</sup> Although the Agency Superintendent at the time described the amendment as “a simple matter,” it quickly became complicated.<sup>258</sup> In a March 14, 1979, letter to the Department of the Interior Solicitor, Associate Solicitor Thomas W. Fredericks stated that both Southern California Gas and SOHIO Transportation Company were “upset because they had apparently been informed that you [the solicitor] had decided that no tribal consent was necessary and a letter was being sent to the Band to that effect.” Moreover, according to the Band’s attorneys, the Morongo were “told that we [the Solicitor’s Office] are prepared to waive the regulation requirement of tribal consent if the Band did not negotiate its own deal.” Fredericks noted that the Band was investigating the possibility of entering into a pipeline franchise agreement similar to one adopted by the Town of Banning. In that agreement, the municipality had the option of either “receiving 2% of the companies’ gross annual receipts ‘. . . arising from the use, operations or possession of the franchise . . . .’ or the formula of one-half

---

<sup>253</sup> Morongo Band of Mission Indians, election results and ballot, December 18, 1967, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>254</sup> Morongo Tribal Business Committee, August 16, 1968, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>255</sup> William H. Gianelli, Acting Area Field Representative, Southern California Gas Company and Southern Counties Gas Company of California Affidavit and attached BIA approval memo, August 30, 1968, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>256</sup> Sidney K. Gally, Staff Supervisor, Rights of Way Procedures, Southern California Gas Company, to William H. Gianelli, Agency Realty Officer, April 11, 1977, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. This letter notes that on July 31, 1970, Southern Counties Gas Company of California merged into Southern California Gas Company.

<sup>257</sup> Barbara E. Karshmer to William Finale, Area Director, September 15, 1977, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>258</sup> Jerome F. Tomhave, Superintendent, to Emmet St. Marie, Spokesman, Morongo Tribal Business Committee, April 18, 1977, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

cent multiplied by the number of inches of diameter of the pipeline times the number of lineal feet of the pipeline underlying public ways within the municipality.”<sup>259</sup> A subsequent letter from Fredericks to the Morongo Band’s Legal Counsel emphasized the solicitor’s position as not merely requiring that the Band negotiate with the two companies, but also that it negotiate in “good faith.” “The Secretary of the Interior supports the project,” wrote Fredericks, “and the Solicitor’s view is that arbitrary and unreasonable obstacles to the project should not be countenanced.”<sup>260</sup> The records do not reveal how the controversy was eventually resolved or whether the Morongo adopted the Town of Banning model of compensation. Presumably, though, the pipeline was never used to convey oil since it remains in use as a natural gas line.

This case study demonstrates the Morongo Band’s increasing participation in rights-of-way negotiations throughout the second half of the twentieth century. Although the Band apparently consented to the original pipeline easement in 1948, it did not have much of a role in determining compensation at that time. During the right-of-way renewal process in the 1960s, Band members explicitly charged the Business Committee with the authority to “negotiate and execute” the renewal, and the Committee obliged by approving Southern California Gas’s proposal to exchange right-of-way renewals for natural gas service to the Morongo Reservation. Finally, as of the late 1970s, the Morongo Band was actively exploring alternative methods of compensation for the pipeline, whereby it would receive a percentage of corporate profits derived from the pipeline’s use or capacity.

### **ROW No. 378-Morongo-143**

On April 5, 1945, representatives from the BIA and Southern California Edison (SCE) attended a general membership meeting of the Morongo Band to discuss SCE’s proposed Third Boulder-Chino transmission line (later known as Devers-San Bernardino No. 1 Transmission Line) connecting Boulder Dam to Los Angeles.<sup>261</sup> Two months later, and prior to the SCE filing

---

<sup>259</sup> Thomas W. Fredericks, Associate Solicitor, Indian Affairs, to Solicitor, March 14, 1979, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. As of 1979, correspondence refers to the pipeline as the SoCal/Sohio gas pipeline.

<sup>260</sup> Thomas W. Fredericks, Associate Solicitor, to Steven V. Quesenberry, Esquire, April 12, 1979, File 372 Morongo 15, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>261</sup> H. W. Gilmore, District Agent, to James B. Ring, Assistant State Director, May 31, 1949, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; William Zimmerman, Jr., Assistant Commissioner, to Josephine Morongo Norte, Secretary, Morongo Tribal Committee, September 25, 1945, *ibid.*

a formal application, Interior granted SCE advanced authority to construct the line. Construction began in August 1945 and was completed at the end of October 1945.<sup>262</sup> While construction was underway, the Morongo Band, BIA, and SCE officials debated what constituted adequate compensation for the easement.

In August 1945, the Morongo Band Chairman wrote to the Commissioner of Indian Affairs, asking the BIA to reconsider its appraisal of the easement: “We here and now make another protest against the arbitrary and unfair decision of the so called ‘farmer’ Mr. Hall on the staff of the local Superintendent Mr. Dady.” According to the Chairman, Hall appraised Morongo lands at \$25 per acre, an amount, the Chairman said, that the band as a whole did not approve. The Chairman went on to state that, of the nine tribal members who purportedly approved the \$25 amount at the April 5, 1945, meeting, three were unqualified to vote. The balance of the “members knew they were being rushed and asked for time to consider the matter thoroughly.”<sup>263</sup>

On November 13, 1945, after construction was completed, SCE applied to the BIA for a revocable right-of-way permit to construct and operate “two parallel electric transmission lines and a road” across the Morongo Reservation. Although SCE agreed to pay damages for an easement over tribal lands (which initially were assessed at \$6,421.50), it rejected a BIA requirement to pay \$5.00 per mile of right-of-way annually, claiming that existing regulations only required annual rental fees for lands across “unreserved public lands where no other charge is made.”<sup>264</sup> Some Morongo Band members continued their protests against the arrangement,

---

<sup>262</sup> Assistant Commissioner, to John W. Dady, Superintendent, April 22, 1946, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; “Order Issuing Minor-Part License (Transmission Line),” April 2, 1954, 2, 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>263</sup> Chairman to John W. Brophy, Commissioner of Indian Affairs, August 30, 1945, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>264</sup> Quotation from “Department of the Interior Stipulation,” November 13, 1945, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. Also see E. R. Davis, Vice President, Southern California Edison, to John W. Dady, November 13, 1945, *ibid*; and William Zimmerman, Jr., Assistant Commissioner, to Josephine Morongo Norte, Secretary, Morongo Tribal Committee, September 25, 1945, *ibid*. Apparently the confusion over whether rental fees could be charged stemmed from an interpretation of General Land Office Circular 1461a, Section 245.14, and whether or not this regulation was applicable to the Third Boulder-Chino Transmission Line. John W. Dady, Superintendent, to Commissioner of Indian Affairs, October 5, 1945, *ibid*. For damages, see “Schedule of Damages and Compensation Assessed,” December 12, 1945, *ibid*.

reiterating that the appraisal was inadequate and that the tribe should receive an annual \$5.00 per mile rental fee. BIA Superintendent John W. Dady agreed, explaining to SCE, “this charge is an administrative requirement of the Indian Office in conformity with the wishes of the [Morongo] Indians.” In addition, wrote Dady, “we are sure it would be good policy on the part of your Company to accede to their wishes that the \$5 per mile, per year, charge be allowed and included in the revocable permit for the use of the tribal lands.”<sup>265</sup>

In addition to pushing for a rental fee, the Morongo Band also continued to contest the findings of the BIA appraisal. On October 11, 1945, the Tribal Committee wrote Secretary of the Interior Harold L. Ickes, requesting that SCE pay \$100 per acre rather than \$25 per acre.<sup>266</sup> According to Field Aid Joseph K. Hall, Tribal Committee Secretary Josephine Morongo Norte protested that “the company (Edison) is making millions of dollars with their line, and only want to pay us \$25 per acre.”<sup>267</sup> Although the line had already been constructed, the BIA had yet to formally approve the right-of-way. On December 12, 1945, Superintendent Dady wrote the Commissioner of Indian Affairs, recommending that Interior grant SCE’s request for a permit for a 4.71-mile-long, 300-foot-wide right-of-way. The attached schedule of damages called for compensating the Morongo Band \$6,421.50. This included \$975.00 for 39 towers (at \$25 per tower) and \$5,446.50 for damages to 194.85 acres of land (at \$25 per acre for dryland and \$637.50 for 2.49 acres of irrigated land). In addition, compensation would include an annual rental of \$5 per mile of right-of-way for an unspecified period of time.<sup>268</sup> A reassessment of total acreage in 1946 yielded a modified compensation amount of \$6,131.<sup>269</sup>

---

<sup>265</sup> John W. Dady, Superintendent, to George E. Trowbridge, Assistant Counsel, Southern California Edison, November 8, 1945, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>266</sup> Dolores Norte, Spokesman, Josephine Morongo Norte, Secretary, Charles M. Largo, Amroe T. Abill, and Katherine Howard, to Harold L. Ickes, Secretary of the Interior, October, 11, 1945, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. The tribal committee wrote that “all the land is valuable [since] it is near the highway and the Rail-Road. . . . The water springs can be developed with our own money when we take full control of it, in the future.”

<sup>267</sup> Joseph K. Hall, Field Aid, to John W. Dady, Superintendent, December 6, 1945, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>268</sup> “Schedule of Damages and Compensation Assessed,” December 12, 1945, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>269</sup> “Corrected Schedule of Damages,” December 3, 1946, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

Even though the initial right-of-way negotiations for this easement preceded passage of the Act of February 5, 1948, the BIA sought tribal consent before SCE was allowed to begin construction. As Superintendent Dady explained, “the Tribe has first right to give their [*sic*] consent.” The question was whether that consent was actually granted; some Tribal Committee members said no, while some BIA officials said yes. In Dady’s opinion, it was clear that the project was vital to fuel oil conservation related to the World War II effort, that the BIA had acted prudently in “submitting the matter to the Tribal Committee for action,” and that the tribe had agreed to \$25 per acre for damages.<sup>270</sup> On June 27, 1947, two years after the April 1945 tribal meeting, the Morongo Tribal Committee passed a resolution ratifying the Band’s acceptance of \$25 per acre for damages.<sup>271</sup> Nevertheless, some hard feelings persisted, and, on October 7, 1949, the Tribal Committee wrote BIA District Agent Harry W. Gilmore, stating that other rights-of-way on the Morongo Reservation garnered \$100 per acre, but that “the Edison Company on grounds of ‘war emergency’ received a permit and installed their lines [for] only \$25.00 per acre.”<sup>272</sup>

On May 8, 1950, nearly five years after SCE and BIA officials had first met with the Band regarding the right-of-way, SCE submitted a license application to the Federal Power Commission (FPC) for this transmission line. It is unclear why the FPC had not been involved earlier. The FPC adopted the license request on March 31, 1954, and on April 2, 1954, it issued a license to SCE for 50 years, beginning July 1, 1945, “for the construction, operation and maintenance of such parts of the Third Boulder transmission line” on both the Agua Caliente and Morongo Reservations (known as FPC Project No. 2051).<sup>273</sup> Following the issuance of the FPC license, Acting Assistant Commissioner of Indian Affairs Evan L. Flory stated that “there is apparently no other action remaining uncompleted in connection therewith except the acceptance

---

<sup>270</sup> John W. Dady, Superintendent, to Oscar L. Chapman, Assistant Secretary, January 15, 1946, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>271</sup> Tribal Resolution, June 27, 1947, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>272</sup> Walter A. Linton, Spokesman, to Harry W. Gilmore, October 7, 1949, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 3 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>273</sup> “Order Issuing Minor-Part License (Transmission Line),” April 2, 1954, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; W. L. Miller, Chief, to Leonard M. Hill, Area Director, April 27, 1954, *ibid*.

of the license by the applicant.” He returned any unapplied portions of SCE’s original deposit.<sup>274</sup> The FPC license required SCE to pay \$31.80 per year, ostensibly reflecting the \$5 per mile annual rental fee previously approved by the BIA.<sup>275</sup> The right-of-way file does not indicate the final disposition of SCE’s earlier right-of-way application to the BIA.

In 1992, three years prior to the scheduled expiration of the right-of-way for SCE’s power line, SCE contacted the Morongo Chairperson in order to initiate the license renewal process for what is now called the Devers-San Bernardino No. 1 220 kV Transmission Line.<sup>276</sup> A recent report by the Morongo Band noted that “when the original FPC license expired in 1995, it could not be relicensed by FERC” (the Federal Energy Regulatory Commission, successor to FPC) because the line was no longer classified as “primary” and thus was “no longer . . . within FERC’s licensing jurisdiction.” “Only after Morongo threatened to initiate litigation seeking to eject the line from the Reservation,” the report went on, “did Edison agree to negotiate” a license agreement. Under the terms of the current license agreement, formal negotiations must commence by 2008 and conclude by 2010.<sup>277</sup>

This case study demonstrates the complexities of multiple federal agencies—the BIA and the FPC—involved in the permitting and authorization of an energy right-of-way. Far from being passive observers of the right-of-way approval process, Morongo leaders played an active role in negotiations with SCE over the requested easement. The Band lobbied successfully to retain a \$5.00 per mile rental fee, even though it failed to secure an acceptable lump sum payment for damages.

### **ROW No. 378-Morongo-47**

In June 1959, the California Electric Power Company (CEPC) applied for a 150-foot-wide right-of-way to construct two 115 kV electric transmission lines across 4.73 miles of tribal land

---

<sup>274</sup> Evan L. Flory, Acting Assistant Commissioner, to Harry W. Sturges, Jr., Assistant Counsel, Southern California Edison Company, May 25, 1954, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>275</sup> “Order Issuing Minor-Part License (Transmission Line),” April 2, 1954.

<sup>276</sup> Ann Kulikoff, Real Properties Agent, to Adalaide Presley, Tribal Chairperson, June 2, 1992, File 378-Morongo-143, SCEC 220 kV Transmission Line ROW, Part 2 of 3, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>277</sup> Karen Woodard, Realty Administrator, Morongo Band of Mission Indians, personal communication with David Strohmaier, May 18, 2006; Lyons, “Morongo Band of Mission Indians, Tribal Case Study: Section 1813 Report.”

and 0.1 mile of allotted land on the Morongo Indian Reservation. The transmission lines would connect the San Bernardino Steam Plant with the Garnet Substation, located north of Palm Springs.<sup>278</sup>

As early as 1958, CEPC offered the Morongo Band \$21,000 for the right-of-way. During a meeting in July 1958, however, a Morongo Band member suggested that CEPC also provide electrical service to most, if not all, homes on the reservation.<sup>279</sup> By 1959, CEPC had adopted this proposal as part of their offer to the Morongo Band, and in June 1959, the company provided the BIA with explanatory text for two propositions to present to the Morongo Band. The first included the cash offer for compensation. The second, assuming that the first proposal passed, included a provision that CEPC provide to the Morongo Band “all required 12,0000-volt electric distribution lines necessary to make electric service available to allotted lands not now being served, but having homes located on them as of June 26, 1959.” This offer was conditioned on the Morongo Band granting rights-of-way for distribution lines and assuming responsibility for purchasing electricity.<sup>280</sup>

As part of its right-of-way application to the BIA, CEPC included an appraisal in which tribal lands were valued at \$400 per acre, making the total appraised value of the right-of-way \$34,500. The appraisal stated that the land was “unused or being used for livestock grazing” and that it “does not appear to have any potential for subdivision or commercial development.” Because of these conditions, the appraiser reduced the \$34,500 value by approximately 40 percent, resulting in an offer of \$21,000 for the right-of-way. The report concluded that “the right of way and the

---

<sup>278</sup> “Application for Right of Way,” June 22, 1959, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; Hugh McCulloch, Right of Way Engineer, California Electric Company, to Orlando Garcia, Field Representative, May 29, 1959, *ibid.*

<sup>279</sup> Hugh McCulloch, Right of Way Engineer, California Electric Company, to Orlando Garcia, Field Representative, May 29, 1959, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. According to McCulloch, “by reason of the internal and factional dissension that has existed among the Morongo Indians during the past year or so, and the question as to whether there is a council authorized to act for the Tribal Members, the Company has not since last August actively attempted to secure action by the Council or Members” regarding granting of the right-of-way.

<sup>280</sup> William M. Burton, Right of Way Agent, California Electric Power Company, June 22, 1959, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

proposed electric transmission lines should have no effect on the current use or anticipated potential use of the land, except for actual pole locations.”<sup>281</sup>

To evaluate this appraisal, the BIA Sacramento Area Office conducted its own investigation in October 1959. In contrast to CEPC’s appraisal, BIA Appraiser Walter J. Wood estimated the fair market value of the right-of-way easement across tribal lands at \$13,250, which was 50 percent of the appraised “fair market value of the fee title.” Wood arrived at this figure after deciding that “the owners will relinquish not less than 50% of their bundle of rights.”<sup>282</sup>

In October 1959, the BIA granted permission to construct the transmission lines, conditional upon CEPC applying for right-of-way easements for the proposed reservation electric distribution system and completing construction of the distribution system. It is not clear how tribal members voted on the two propositions described above (or if an election on the issues was ever held), but CEPC’s right-of-way agent informed BIA officials that 79 percent of those Band members contacted to complete a “consent form” responded favorably to CEPC’s proposal, while the remaining 21 percent opposed the right-of-way request.<sup>283</sup> In addition, a 1960 schedule of damages for tribal land stated that, pursuant to 25 CFR 161.3, the Morongo Band authorized the right-of-way through “a petition signed by a majority of adult members.”<sup>284</sup> The duration of the grant, according to one BIA official, was for 50 years, beginning February 3, 1960.<sup>285</sup>

In 1963, SCE acquired the CEPC powerlines, and the following year SCE informed the BIA of its intention to increase the voltage of one of the lines from 115 kV to 230 kV. No alterations

---

<sup>281</sup> William M. Burton, Right of Way Agent, California Electric Power Company, “Appraisal of Electric Transmission Line Right of Way for Two 115,000-volt Lines, San Bernardino Area to Garnet Substation,” June 22, 1959, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>282</sup> Orlando Garcia, Field Representative, to Area Realty Officer, Sacramento Area Office, October 7, 1959, File 378-Morongo-47, SCEC Telecommunications System ROW, Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; “Appraisal Report,” February 12, 1960, *ibid*.

<sup>283</sup> Wm. M. Burton, Right of Way Agent, to Bureau of Indian Affairs, December 16, 1959, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>284</sup> “Schedule of Damages, Tribal Land,” April 22, 1960, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>285</sup> Orlando Garcia, Field Representative, to California Electric Power Company, May 5, 1960, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

to the facilities would be required by this change, projected to occur in March 1967.<sup>286</sup> The BIA saw no problem with this proposal since “no changes in the physical aspects of the right-of-way are contemplated,” and tribal members presumably consented as well.<sup>287</sup> It is unclear, however, precisely when the voltage was increased to 230 kV in one of the lines and whether any additional compensation was paid for this change.

In the late 1990s, SCE requested that its easement be amended to allow third-party use of existing telecommunications facilities. At some point, SCE had installed telecommunication lines on the right-of-way “to facilitate and enable the maintenance, operation, use, inspection, repair and replacement and safety of its electric transmission facilities.” Now, according to the Morongo Band’s Legal Counsel, SCE wanted to sell “some or all of the excess capacity” of its fiber-optic system. As with the increase in voltage, no modifications to infrastructure would be required for this third-party use. On May 3, 1997, the Morongo General Council voted to “delegate to the Tribal Council the authority to negotiate and execute an amendment” to the easement. Within a month, the Tribal Council had passed a resolution that allowed third party use, agreeing to a lump sum payment of \$535,000 as compensation.<sup>288</sup>

This case study demonstrates the diversity of right-of-way compensation paid to the Morongo Band. The Band secured both a lump sum cash payment and electric service for its members. It also shows the differences that sometimes arose in land valuations. CEPC appraised the value of the right-of-way at 60 percent of full fee value (\$21,000), while the BIA believed the value was significantly lower (\$13,250). Finally, this case highlights how proposed changes to the use of existing facilities in a right-of-way have served as a bargaining point for additional compensation, as indicated by SCE’s request for a third-party use of a fiber optic line built within the transmission line right-of-way.

---

<sup>286</sup> P. B. Peacock to BIA, September 9, 1964, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. The Morongo Band’s comments on the Section 1813 Study state that “when Edison acquired the California Electric Power Company, the facilities were modified to operate as a single circuit 230 kV line (Devers-Vista No. 1),” suggesting that one of the 115 kV lines was decommissioned. Lyons, “Morongo Band of Mission Indians, Tribal Case Study: Section 1813 Report”

<sup>287</sup> Arthur W. Arntson, Area Field Representative, to P. B. Peacock, Manager, Southern California Edison, September 9, 1964, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>288</sup> George Forman, Forman & Prochaska, to Virgil Townsend, Superintendent, July 28, 1997, File 378-Morongo-47, SCEC Telecommunications System ROW, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; Tribal Resolution No. 97/06/01, June 17, 1997, *ibid*.

**ROW No. 378-Moronggo-277**

In July 1969, SCE applied for a 25-foot-wide, 4.02-mile-long right-of-way for a 33 kV electric distribution line.<sup>289</sup> This line, which was known as the Banning-Palm Springs Electric Distribution Line, had already been in operation since 1929 under a Federal Power Commission License (FPC Project 1008). By 1969, the FPC no longer considered the power line a primary line or part of a “project” pursuant to the Federal Power Act, presumably since it was only being used for distribution. Therefore, the FPC requested that the license be revoked once it was transferred from California Electric Power Company to SCE and after the BIA granted SCE a right-of-way easement.<sup>290</sup>

Two years earlier, in 1967, SCE had conducted an appraisal of the portion of the power line right-of-way across the Moronggo Reservation. The appraisal utilized a market value approach, defining market value as “the highest price estimated in terms of money which a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used.” Appraiser R. E. Davis noted that because “it has been the Company’s [SCE’s] practice, and has also been approved by the Bureau of Indian Affairs, to allow an easement value of 50% of appraised market value (fee value) of the land to be encumbered for rights of way covering electric lines of lesser voltage than 220 kV,” the easement value of Moronggo lands required for the Banning-Palm Springs line would likewise be calculated at 50 percent of the appraised fee value. This amounted to \$7,155 for an estimated 12.19 acres. Davis assessed severance damages at \$1,500, which he saw as “an arbitrary token amount for streets, sewer and water lines that may cross the proposed right of way at some protracted future time.”<sup>291</sup> Nearly a year elapsed before the BIA’s Sacramento Area Office completed its review of SCE’s appraisal.

---

<sup>289</sup> “Application for an Easement and Right of Way,” July 17, 1969, File 378-Moronggo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Moronggo Band

<sup>290</sup> P.B. Peacock to Jess T. Town, Area Field Representative, September 2, 1969, File 378-Moronggo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Moronggo Band; “Affidavit of Completion,” November 18, 1969, *ibid.*; Federal Power Commission, “Order Approving Transfer of Licenses or Interest Therein and Dismissing Application for Approval in Other Respects,” October, 1, 1963, *ibid.* Presumably, the FPC must have originally considered this powerline part of a “project”; however, records revealed little about the original licensing.

<sup>291</sup> R. E. Davis, Property Appraiser, “Appraisal Report: Banning-Palm Springs 33 kV Distribution Line Right of Way Proposed Purchase of a Right of Way Easement Over Lands of the Moronggo Indian Reservation,” August 25, 1967, File 378-Moronggo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Moronggo Band.

According to Acting Area Chief Appraiser Walter J. Wood, the appraisal was deemed “adequate compensation for the subject right of way grant,” although he continued that “nothing contained in this memorandum is to be construed as limiting or binding upon the free bargaining position of the land owners, their agents or representatives.”<sup>292</sup>

The Morongo Band became involved in June 1968, when Area Field Representative Jess T. Town requested that the Morongo Tribal Business Committee take steps “to place this matter on a ballot for a vote by the general membership by [*sic*] the Morongo Band.”<sup>293</sup> In January 1969, BIA Acting Area Field Representative Frank L. Haggerty, Jr., reminded the Business Committee that revised regulations allowed rights-of-way to “be granted without limitation as to years.” Haggerty was not certain, however, whether granting the right-of-way in perpetuity would change the damage appraisal. Regardless, on February 15, 1969, the Morongo Band held a special election, the ballot for which contained a proposition to grant SCE rights-of-way for a 220 kV transmission line, and 12 kV and 33 kV distribution lines. The proposition, which passed by a vote of 86 to 20, listed damages for all three lines as a lump sum totaling \$153,660.<sup>294</sup> A tribal resolution passed nine days later approved the damages set forth in the ballot proposition and set the term of the easement at 50 years.<sup>295</sup>

Although the Morongo Band had already agreed to the right-of-way, SCE filed a formal application for the 33 kV distribution line with the BIA on July 17, 1969. On August 20, 1969, BIA Area Field Representative William H. Gianelli approved the easement, noting that SCE would pay \$8,660 for it.<sup>296</sup> In 2003, the Morongo Tribal Council authorized an amendment to

---

<sup>292</sup> Walter J. Wood, Acting Area Chief Appraiser, to Area Field Representative, Riverside Area Field Office, June 17, 1968, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>293</sup> Jess T. Town, Area Field Representative, to Emmett St. Marie, Spokesman, Morongo Tribal Business Committee, June 24, 1968, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>294</sup> Special election ballot, February 15, 1969, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band. The ballot states that “the proposed right-of-way for the [220 kV] transmission line will be included in the now existing 300 feet right of way presently covered by a Federal Power Commission license which was acquired in 1946 for the Boulder Canyon Project.” Although not stated explicitly, it is assumed that the existing right-of-way corresponded to 378-Morongo-143.

<sup>295</sup> Resolution No. 49 FY 1969, February 24, 1969, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>296</sup> “Application for an Easement and Right of Way,” July 17, 1969, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band; “Grant of Easement,” August 20, 1969, *ibid*.

the right-of-way grant, requesting that the powerline be relocated to avoid the new Morongo Casino. In contrast with most other tribal resolutions in the above case studies, this one stated that “the Morongo Tribal Council has the authority to authorize this amendment,” presumably without a general membership vote.<sup>297</sup> Subsequently, on May 11, 2004, SCE Right of Way Agent Laura L. Solorio informed the BIA that SCE would “be removing facilities from 3,328’ (1.91 acres) of the right of way.” Whether the amended right of way included any additional compensation is not clear.<sup>298</sup>

Unlike the other rights-of-way discussed above, this case study highlights a distribution line that provides power to the reservation rather than transmission lines that just cross over it. Similar to transmission line easements granted across the Morongo Reservation, compensation for this right-of-way was largely based on an appraisal using a market value approach. However, the records do not indicate whether the Morongo Band participated in the negotiation of compensation for the right-of-way.

## Summary

These four case studies indicate how rights-of-way for electric and natural gas transmission and distribution lines have been negotiated on the Morongo Reservation both before and after 1948. In many cases, tribal involvement consisted of passing resolutions consenting to a proposed grant of easement, usually for the amount of compensation determined by the appraisal process. In other cases, the Morongo Band has succeeded in retaining annual rental fees and in leveraging essential infrastructure—such as electrical and natural gas distribution and service facilities—as part of right-of-way negotiations. Several easements are presently under tribal license agreements pending the start of formal right-of-way renewal negotiations, which are set to begin in 2008. As the new round of negotiations begin, some of the significant issues for Morongo Band members include health concerns related to high voltage lines passing near residential areas; the relationship of appraised land values to tribal goals for the reservation; volume of energy resource passing through rights-of-way; and alternate forms of compensation,

---

<sup>297</sup> Resolution No. 071503-02, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

<sup>298</sup> Laura L. Solorio, Right of Way Agent, Southern California Edison, to James J. Fletcher, Southern California Agency, May 11, 2004, File 378-Morongo-277, SCE Electric Distribution Line SLA, TR-4616-P5 Indian Land Right-of-Ways & Easements, Realty Department, Morongo Band.

such as rate of return. In 2004, the Morongo Band increased its management of its own business affairs by taking over the BIA's responsibility for realty functions on the reservation. Nevertheless, at the present time, the authority to grant final approval of rights-of-way still rests with the Agency Superintendent.<sup>299</sup>

---

<sup>299</sup> Karen Woodard, Realty Administrator, Morongo Band of Mission Indians, personal communication with David Strohmaier, Banning, California, May 5, 2006.

# Energy Rights-of-Way on the Navajo Indian Reservation

## Formation of the Reservation

Today's Navajo Nation embraces over 16 million acres on the Colorado Plateau of northeast Arizona, southeast Utah, and northwest New Mexico.<sup>300</sup> The Little Colorado and San Juan River Basins drain the majority of Navajo country, which ranges from high elevation, forested mountains to semiarid steppe, mesas, high plains, and warm deserts. Besides the main reservation and off-reservation allotments, the Navajo also occupy three satellite reservations in northwest New Mexico: Ramah, To'Hajiilee (Cañoncito), and Alamo.<sup>301</sup>

Anthropologists trace the ancestry of the Navajo, or Diné as they refer to themselves, to Athapaskan groups in Alaska and Canada. Sometime between 1000 A.D. and the early 1500s the Navajo arrived in the desert Southwest, most likely having traveled south along the Rocky Mountains or High Plains. They ultimately occupied lands once held by the ancestors of the Pueblo Indians. Navajo territory was situated between the Hopi to the west, the Northern Pueblos to the east, the Zuni and Western Keresans to the south, and the *Apaches de Quinía* on the north and northeast. The pre-contact Navajo subsistence economy combined nomadic dependence on hunting and gathering with more sedentary, Pueblo-influenced agrarian strategies.<sup>302</sup>

The sixteenth through the early nineteenth centuries marked a time of great social change for the Navajo. First contact with Europeans may have come as early as 1540 with Francisco Coronado's expedition to the region.<sup>303</sup> The first recorded reference to the term "Navajo" appeared in 1626, when Fray de Zárate Salmerón observed the "Apache Indians of Nabajú"

---

<sup>300</sup> Bureau of Indian Affairs, "Acreages by Agency and Reservation—Fiscal Year Ending: July 31, 2005," Bureau of Indian Affairs, Navajo Regional Office.

<sup>301</sup> Peter Iverson, *The Navajo Nation* (Albuquerque: University of New Mexico Press, 1981), 3-4, 6.

<sup>302</sup> Iverson, *The Navajo Nation*, 3-4, 6; David M. Brugge, "Navajo Prehistory and History to 1850," in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 10, *Southwest*, ed. Alfonso Ortiz (Washington, D.C.: Smithsonian Institution, 1983), 490.

<sup>303</sup> James M. Goodman, *The Navajo Atlas: Environments, Resources, People, and History of the Diné Bikeyah* (Norman: University of Oklahoma Press, 1982), 53.

residing in the Chama Valley of northwestern New Mexico.<sup>304</sup> In the years that followed, the Navajo incorporated European livestock and firearms into their culture. According to archaeologist David M. Brugge, the Navajo probably suffered the same epidemic diseases experienced by other tribes in the region following European contact. Over time, tensions grew between the Navajo and the Spanish, played out in cycles of conflict and peace. Spanish control lasted until 1821, followed by the era of Mexican administration between 1821 and 1846. Ineffectual treaties and strife marked this period, as New Mexicans pressed into Navajo territory and as drought intensified competition for land. Matters did not improve when the United States gained control of the area following the Mexican War. In 1849, U.S. troops killed Navajo leader Narbona, and the federal government asserted a more prominent military presence in the area by establishing Fort Defiance and Fort Fauntleroy (Wingate) in the heart of Navajo country. Tensions reached a boiling point in 1860 when an estimated 1,000 Navajo attacked Fort Defiance but failed to take the fort. Relations deteriorated even further with the so-called Fauntleroy Massacre of 1861 (in which U.S. Army troops killed many Navajo), ongoing pressures for Navajo land, and the continued capture of Navajo by slave traders.<sup>305</sup>

A defining moment in Navajo history was the forced “Long Walk” from Navajo territory to Fort Sumner. In 1862, after defeating the Mescalero Apache, General James H. Carleton established Fort Sumner along the Pecos River in New Mexico’s Bosque Redondo region. He planned to confine the Navajo and Apache Indians there, hoping to control and acculturate the region’s nomadic groups by collecting them in one place. The next year, Carleton gave the Navajo an ultimatum: relocate to Fort Sumner or face war. Following a U.S. Army scorched-earth policy that laid waste to Navajo crops, livestock, and property, many Navajo acquiesced and traveled 300 miles by foot from Fort Defiance to Fort Sumner during the winter of 1864. By 1865, over 9,000 Navajo were confined at Fort Sumner; others never surrendered. Widespread sickness, lack of food and clean water, and continual raids by other Indians created dire conditions for the Navajo at Fort Sumner, and tribal members continued to resist their captivity

---

<sup>304</sup> Quotation in Garrick Bailey and Roberta Glenn Bailey, *A History of the Navajos: The Reservation Years*, second paperback printing with a new preface by Garrick Bailey (Santa Fe, N.M.: School of American Research Press, 1986), 12.

<sup>305</sup> Iverson, *The Navajo Nation*, 5-8; Brugge, “Navajo Prehistory and History to 1850,” 489-97; Robert A. Roessel, Jr., “Navajo History, 1850-1923,” in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 10, *Southwest*, ed. Alfonso Ortiz (Washington, D.C.: Smithsonian Institution, 1983), 506-10.

and to lobby for their return to their original homeland. In 1866, General Carlton was relieved of his duties in New Mexico, and the following year a government investigation urged abandonment of the Bosque Redondo project. Finally, in 1868, President Ulysses Grant sent a peace commission to negotiate a new treaty with the Navajo. The commissioners proposed relocating the tribe to Indian Territory (present-day Oklahoma), but they ultimately responded to the tribe's goal of returning to the Colorado Plateau. The Treaty of June 1, 1868, established a 3,414,528-acre reservation for the Navajo in northeast Arizona and northwest New Mexico—about 10 percent of the area constituting traditional Navajo territory.<sup>306</sup>

Throughout the late nineteenth and early twentieth centuries, numerous Executive Orders alternately expanded and contracted the boundaries of the Navajo Reservation (See Figure 5). Expansion generally reflected a recognition that the original boundaries of the reservation neither acknowledged lands actually occupied by the Navajo nor were adequate for the livestock-based Navajo economy. By contrast, efforts to limit expansion—or even to decrease the size of the reservation—reflected an opposite viewpoint, one that emphasized more intensive utilization and development of resources on the reservation in order to confine the Navajo and accommodate settlement of non-Indians on adjoining public domain lands.<sup>307</sup> With the exceptions of a land exchange in the 1950s near Lake Powell and changes within the Hopi Reservation that affected Navajo use of the area, the boundaries of the Navajo Reservation were largely set by the 1930s.<sup>308</sup>

Among the Executive Orders that affected the Navajo land base was the Executive Order of December 16, 1882, which created the Hopi Reservation. The 1882 Order, issued by President Chester A. Arthur, set aside 2.4 million acres “for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon.”<sup>309</sup> During the first half of the twentieth century, the Hopi and Navajo continually challenged each other's

---

<sup>306</sup> Roessel, “Navajo History, 1850-1923,” 510-17; Treaty of June 1, 1868 (15 Stat. 667), in J. Lee Correll and Alfred Dehiya, *Anatomy of the Navajo Indian Reservation: How it Grew*, rev. ed. (Window Rock, Ariz.: The Navajo Times Publishing Company, 1978), 3-7; Katherine Marie Birmingham Osburn, “The Navajo at the Bosque Redondo: Cooperation, Resistance, and Initiative, 1864—1868,” *New Mexico Historical Review* 60 (October 1985): 399-409; Bailey and Bailey, *A History of the Navajos*, 25.

<sup>307</sup> Roessel, “Navajo History, 1850-1923,” 519-20.

<sup>308</sup> Goodman, *The Navajo Atlas*, 57.

<sup>309</sup> Quotation from Executive Order of December 16, 1882, in *Indian Affairs: Laws and Treaties*, 1:805; Iverson, *The Navajo Nation*, 195.

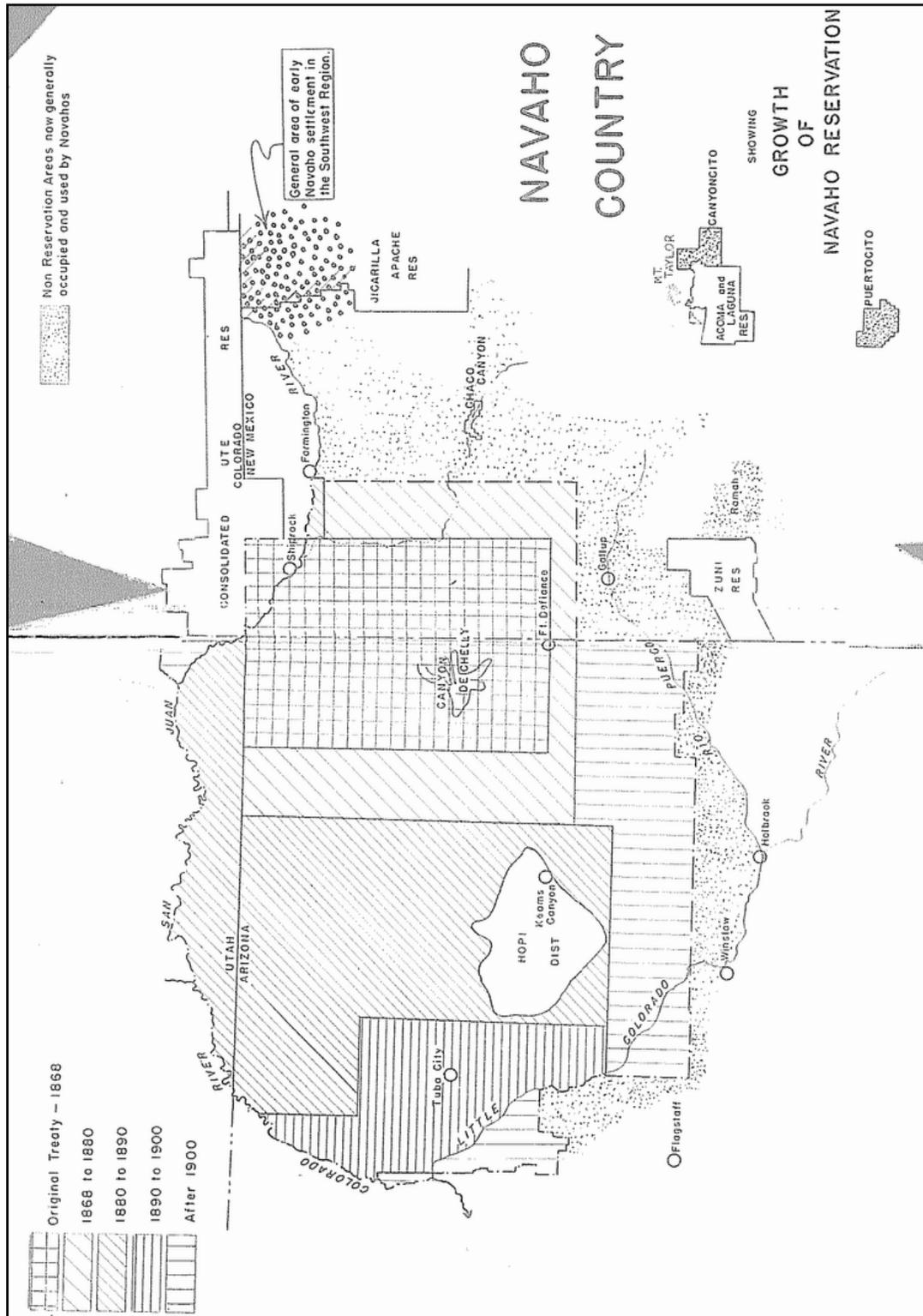


Figure 5. Navajo Indian Reservation with satellite reservations, in Arizona, Utah, and New Mexico. Source: Clyde Kluckhohn and Dorothea Leighton, *The Navaho* (Cambridge, Mass.: Harvard University Press, 1948), inside cover.

title to lands within the 1882 reservation. In the early 1960s, court rulings partitioned the 1882 reservation into an exclusive Hopi area and a Navajo-Hopi Joint Use Area, a move precipitated by a 1962 U.S. district court ruling in *Healing v. Jones*. Following passage of the Navajo-Hopi Land Settlement Act of 1974 (88 Stat. 1712), the two tribes entered into mediated discussions to determine the final disposition of the Joint Use Area. In February 1977, on the recommendation of the federal mediator, a U.S. district court ordered the dissolution of the 1963 Joint Use Area, dividing it between the Hopi and Navajo, with the Navajo portion becoming part of the Navajo Reservation. Among other provisions, the terms of the settlement required the relocation of 40 Hopi and 3,495 Navajo. The Navajo appealed to the Ninth Circuit Court of Appeals, which in 1978 affirmed most of the earlier court ruling. However, the appeals court overruled the lower court's decision to include in the new partition a 50,000-acre parcel that, as a result of a flawed 1914 survey, had incorrectly been included in the 1.8-million-acre joint use area.<sup>310</sup>

The allotment process also transformed Navajo geography. The General Allotment Act of 1887, also known as the Dawes Act, authorized the President of the United States to allot parcels of reservation land to individual Indians.<sup>311</sup> Policy makers believed that individual ownership of property—along with instruction in Euroamerican-style agriculture and conversion to Christianity—would enable Indians to assimilate into the American mainstream. The Dawes Act also allowed the government to purchase unallotted “surplus land,” which could then be opened to non-Indian settlement. Unlike other reservations, allotment of the Navajo occurred almost entirely outside reservation boundaries on the public domain, as provided for under Section 4 of the Dawes Act. In some cases, agents assigned allotments that would enable the Navajo to secure off-reservation parcels (falling within Navajo territory) that contained water sources, a key to grazing. Agents inadvertently allotted some Navajo on railroad lands, and in other cases non-Indian settlers competed with Navajo for rangeland on the public domain. Despite these conflicts, by the end of the allotment era in 1934, over a half million acres had been allotted to the Navajo in Arizona and New Mexico.<sup>312</sup>

---

<sup>310</sup> Quotation in Iverson, *The Navajo Nation*, 195-98; Goodman, *The Navajo Atlas*, 57, 93-97.

<sup>311</sup> Act of February 8, 1887 (24 Stat. 388), in *Indian Affairs: Laws and Treaties*, 1:33-36.

<sup>312</sup> Lawrence C. Kelly, *The Navajo Indians and Federal Indian Policy* (Tucson: The University of Arizona Press, 1968), 25; Rosalie A. Fanale, “Navajo Land and Land Management: A Century of Change” (Ph.D. diss., Catholic University of America, 1982), 154-56.

Traditional Navajo culture was characterized by only loosely defined political structures. According to historian Lawrence C. Kelly, “the calling of a Navajo council in these early years of the twentieth century was a routine and even casual event. The initiative came not from the Indians themselves, but from the prospectors who were interested in securing leases.” Following the completion of required business, Kelly continued, “the Indians disbanded and did not reassemble unless another request for a council was approved.”<sup>313</sup> However, once oil was discovered on the reservation in the early 1920s, the federal government worked to establish a more organized tribal governing body to deal with leasing and resource development matters. To that end, the Secretary formed a three-person business council in 1922 to facilitate leasing. This body, which failed to adequately represent all Navajo, was replaced the following year by a Tribal Council composed of representatives from each agency, under the direction of a commissioner. Although the tribe voted against organizing under the IRA, the Navajo Tribal Council remained in existence and even grew in size, expanding from 12 to 24 members in 1934. In 1938, the Commissioner of Indian Affairs issued bylaws for a new Council that included a chairman, vice chairman, and 74 delegates. Beginning in the 1950s, the Tribal Council assumed increasingly more authority in managing its own affairs.<sup>314</sup> Since 1969, the tribe has officially referred to itself as the Navajo Nation.<sup>315</sup> Today, the Tribal Council constitutes the legislative branch of the Navajo Nation, and is composed of 88 popularly elected members.<sup>316</sup>

## Energy Resource Development

Throughout the twentieth century, the bulk of Navajo tribal income has derived from energy-related mineral leases, including natural gas, oil, coal, and uranium. As opposed to many tribes who lost mineral interests on their lands over time, the mineral rights of the Navajo have largely remained intact, although not without controversy. The Indian Appropriation Act of June 30, 1919 (also known as the Metalliferous Minerals Leasing Act), allowed mining leases on

---

<sup>313</sup> Kelly, *The Navajo Indians and Federal Indian Policy*, 49-50.

<sup>314</sup> Bailey and Bailey, *A History of the Navajos*, 196-97, 237-40; Goodman, *The Navajo Atlas*, 17; Kelly, *The Navajo Indians and Federal Indian Policy*, 167-70; Iverson, *The Navajo Nation*, 20-22, 68.

<sup>315</sup> Peter Iverson, “The Emerging Navajo Nation,” in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 10, *Southwest*, ed. Alfonso Ortiz (Washington, D.C.: Smithsonian Institution, 1983), 636.

<sup>316</sup> Navajo Nation Council, “Profile of the Navajo Nation,” <<http://www.navajonationcouncil.org/profile.htm>> (June 13, 2006).

unallotted Indian lands, with Indians receiving a minimum 5 percent royalty. In the early 1920s, legal disputes occurred between Secretary of the Interior Albert B. Fall and the Navajo Tribe over ownership of mineral rights on Executive Order reservations—an issue eventually resolved in favor of the Navajo in 1924.<sup>317</sup>

The BIA Agency Superintendents' annual reports for the Navajo agencies began including information about mineral leasing on Navajo lands in the 1920s. The 1920 annual statistical report from the Pueblo Bonito Agency noted that an unspecified number of oil and gas leases were “pending.”<sup>318</sup> The first Navajo oil lease began in 1921 in the San Juan jurisdiction, and two years later, as noted above, the BIA established the Navajo Tribal Council to facilitate the process of oil leasing. Oil and gas income averaged \$70,000 per year between 1921 and 1937, increasing dramatically to nearly \$1 million per year for oil and gas bonuses, royalties, and rentals between 1938 and 1956. In 1952, for instance, aggregate individual Indian rental income amounted to \$49,448, with an additional \$166,819 in bonuses; tribal income amounted to \$221,224 in rentals, \$1,173,116 in bonuses, and \$44,208 in royalties. Annual averages for oil and gas income climbed to \$18 million per year over the next decade.<sup>319</sup> BIA annual lease reports from the 1960s through the 1980s suggest that mineral lease income derived primarily from reservation (tribal) lands as opposed to off reservation allotments.<sup>320</sup>

Efforts to strip mine Navajo coal began in the early 1950s when Utah Mining and Construction (now Utah International Inc) received a permit for coal exploration in the Fruitland, New Mexico, area. Mining commenced in the 1960s and within a decade coal generated significant royalty income for the Navajo. However, as fossil fuel prices rose worldwide, fixed royalties for Navajo coal and oil significantly limited tribal income. To address this situation,

---

<sup>317</sup> Ambler, *Breaking the Iron Bonds*, 40-41, 46-47; Indian Appropriation Act of June 30, 1919 (41 Stat. 3), in *Indian Affairs: Laws and Treaties*, 4:223-25; Iverson, *The Navajo Nation*, 19.

<sup>318</sup> Pueblo Bonito Indian School Annual Statistical Report, 1920, M-1011, Roll 110 (Pueblo Bonito School), 28.

<sup>319</sup> David F. Aberle, “Navajo Economic Development,” in *Handbook of North American Indians*, ed. William C. Sturtevant, vol. 10, *Southwest*, ed. Alfonso Ortiz (Washington, D.C.: Smithsonian Institution, 1983), 647-49; House, *Report With Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs*, 82d Cong., 2d sess., 1952, H. Rpt. 2503, 87. Also, in 1921, the Pueblo Bonito superintendent reported 24 oil and gas leases covering 24 allotments, totaling 3,840 acres. Pueblo Bonito Indian School Annual Statistical Report, 1921, M-1011, Roll 110 (Pueblo Bonito School), 28.

<sup>320</sup> Bureau of Indian Affairs, *Annual Report[s] on Indian Lands and Income from Surface and Mineral Leases, 1966-1971, 1973-1974*; Bureau of Indian Affairs, *Annual Report of Indian Lands and Income from Surface and Subsurface Leases, 1975-1977, 1980-1981*.

the Tribe attempted during the 1970s to avoid fixed rates and to craft more lucrative royalty agreements with energy corporations. As of the early 1980s, the Mohave, Page, and Four Corners power generation plants consumed the majority of Navajo coal, and Navajo coal reserves were estimated at approximately four billion tons (of which 2.6 billion tons had already been leased). Major mines included the Navajo, McKinley, Kayenta, and Black Mesa mines.<sup>321</sup> Until recently, Black Mesa coal was pumped through a 273-mile-long slurry pipeline to the Mojave Generating Station in Laughlin, Nevada. The plant closed on December 31, 2005, due to environmental concerns, although it may reopen at some point in the future.<sup>322</sup>

The Navajo have also garnered income from other energy resource minerals—chief among which is uranium, which was discovered in the late 1940s on Navajo lands. Indeed, Navajo (both reservation and off-reservation) lands and Laguna Pueblo Indian lands hold a large percentage of U.S. uranium deposits. Uranium mills were once located at Shiprock, Mexican Hat, and Tuba City, but closed in the 1960s during a downturn in the market.<sup>323</sup> In 1952, uranium bonus, royalty, and rental income on both tribal and individual Indian lands garnered \$304,154.<sup>324</sup> Eventually, Navajo deposits of high-grade ore played out and the mines and mills closed.<sup>325</sup>

Over the course of the twentieth century, the Navajo have assumed an increasingly active role in managing its energy estate. The Tribe was a charter member of the Council of Energy Resource Tribes (CERT), created in 1975 to provide technical and political support to tribes possessing energy resources. In the 1980s, the Navajo collaborated with the New Mexico Public Service Company, Combustion Engineering, and Bechtel Power Corporation in the development of the Dineh power plant. In this undertaking, “the Navajo Nation was considered a full equity

---

<sup>321</sup> Aberle, “Navajo Economic Development,” 649-51; Reno, *Navajo Resources and Economic Development*, 106-11. Ambler, *Breaking the Iron Bonds*, 174.

<sup>322</sup> Goodman, *The Navajo Atlas*, 79; Black Mesa Pipeline, “Major Long-Distance Slurry Pipeline Projects,” <[http://www.blackmesapipeline.com/slurry\\_lines.htm](http://www.blackmesapipeline.com/slurry_lines.htm)> (June 9, 2006); Daniel Kraker, “The End of an Era: Mohave Generating Station’s Closure Saves Navajo and Hopi Water, but Leaves their Economies in Doubt,” *American Indian Report*, January 2006, <<http://web.lexis-nexis.com.weblib.lib.umt.edu:2048/universe/document?m=04550f7a63cfd>> (June 13, 2006).

<sup>323</sup> Reno, *Navajo Resources and Economic Development*, 133-34; Bailey and Bailey, *A History of the Navajos*, 236; Aberle, “Navajo Economic Development,” 173.

<sup>324</sup> House, *Report with Respect to the House Resolution*, 89.

<sup>325</sup> Bureau of Indian Affairs, *Annual Report of Indian Lands and Income from Surface and Mineral Leases*, June 30, 1975, 106.

partner, contributing its resources (coal, water, and transmission line rights of way) rather than money.”<sup>326</sup> In 1998, the Navajo Nation Council ratified a federal charter for the Navajo Nation Oil and Gas Company (NOG), which is wholly-owned by the Navajo Nation.<sup>327</sup> As of 2002, the Navajo Tribal Utility Authority was investigating the feasibility of developing wind farms on the reservation.<sup>328</sup> In 2003, after a 25-year hiatus in granting new oil and gas leases, the Tribal Council voted to allow NOG to develop energy reserves on tribal lands. From 1978 until 2003, the Tribe had “refused all offers, with tribal officials saying that they were waiting for the best time to start exploiting their vast mineral reserves.”<sup>329</sup>

## Energy Rights-of-Way

The Navajo Nation (or Navajo Tribe, as it is referred to in older records) has actively participated in right-of-way negotiations at least since the 1950s.<sup>330</sup> By a resolution of the Navajo Tribal Council dated November 5, 1947, the Council Chairman was empowered to grant consent to rights-of-way. Sometime in the 1960s, that authority fell to the Advisory Committee and today the consent authority rests with the Resources Committee of the Navajo Nation Council.<sup>331</sup> Energy rights-of-way on the Navajo reservation include natural gas pipelines, gathering lines, and distribution lines; crude oil pipelines; and electric transmission and service lines.

Many of the major rights-of-way were initially approved in the 1950s and 1960s. Pipeline easements generally lasted 20 years, while most electric transmission easements lasted 50 years. As the original pipeline easements came up for renewal in the 1970s and 1980s, the Navajo Nation and energy companies negotiated consolidated easements, incorporating a number of

---

<sup>326</sup> Ambler, *Breaking the Iron Bonds*, 91-93, 259.

<sup>327</sup> Resolution of the Navajo Nation Council, CF-22-98, 2/5/1998, provided by Paul Frye, Frye Law Firm, P.C., Albuquerque, New Mexico.

<sup>328</sup> U.S. Department of Energy, Tribal Energy Program, “Navajo Tribal Utility Authority: Project Summary,” <[http://www.eere.energy.gov/tribalenergy/projects/fy05\\_ntua.html](http://www.eere.energy.gov/tribalenergy/projects/fy05_ntua.html)> (June 13, 2006).

<sup>329</sup> Bill Donovan, “Council OKs Oil and Gas Development Agreement,” *Navajo Times*, January 2, 2003.

<sup>330</sup> The records collected for this section of the report span the years 1950-2004. Those for the Four Corners Pipe Line Company provide the most detail about the Navajo Nation’s involvement in earlier negotiations.

<sup>331</sup> Paul Jones to Glenn Landbloom, 4/27/1959, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Folder #1, Box SURFACE 13, Room 124, Real Estate Services, Navajo Regional Office, BIA, Window Rock, Arizona [hereafter referred to as BIA-WR.] Jones indicated that the resolution vesting authority in the chairman was in “Resolutions, Volumes I and II, page 177.”

rights-of-way into one package. The Navajo Nation was assertive in these negotiations, proposing higher compensation than the companies offered and trying (but largely failing) to obtain compensation based on pipeline throughput.<sup>332</sup>

It has been the Navajo Nation's practice since at least the 1980s to negotiate directly with right-of-way applicants. Before entering into a right-of-way agreement, the terms are submitted to the appropriate Council Committee for approval. For the purposes of 25 CFR Part 169, the committee resolutions and the signed agreement appear to serve as the Navajo Nation's consent.

It is not clear from the records collected whether appraisals of rights-of-way were conducted in the 1950s. In 1960, BIA General Superintendent Glenn Landbloom informed El Paso Products Pipeline Company that all real estate transactions on the Navajo Reservation, including rights-of-way, would require submission of "an acceptable appraisal report in support of such transactions."<sup>333</sup> From that point forward, applicants submitted appraisals (completed by outside appraisers) in conjunction with their applications for easements. The BIA then reviewed the appraisals, sometimes agreeing with them and sometimes rejecting them as too low.

Compensation was initially in the form of damages, at dollar-per-acre or dollar-per-rod rates. The consolidated renewals in the 1970s and 1980s generally provided for an initial lump payment followed by annually adjusted payments during the tenure of easement. In at least one case (see the 1981 Four Corners pipeline renewal below), the Navajo Nation succeeded in obtaining consideration based on throughput, but many companies, such as El Paso and Transwestern Pipeline, have resisted throughput agreements.

BIA administration on the Navajo Reservation is divided into a number of Agencies, each with its own Superintendent. For a period of time, the reservation had a General Superintendent, who held the authority to approve easements. At some point, this responsibility was transferred to the Navajo Area Director, who in 1979 was also delegated certain authorities that earlier fell to the Agency Superintendents. A redelegation of authority occurred within the Navajo Area Office in 1988, by which the Agency Superintendents were authorized to approve all rights-of-

---

<sup>332</sup> Glenn Orr to Wayne Stephens, 1/16/1979, File Navajo Indians—Correspondence, File 1 of 6, Room 517, Land Department, El Paso Western Pipelines, Colorado Springs, Colorado [hereafter referred to as Room 517, EPWP].

<sup>333</sup> Glenn Landbloom to El Paso Products Pipeline Company, 12/7/1960, File 1942-1994 1 of 2, Room 123 [floor], BIA-WR.

way under 25 CFR Part 169, with some exceptions. The exceptions included easements with a consideration of \$100,000 or greater, those that involved oil or gas lines of 24 inches or greater in diameter, and those for electric transmission lines of 66 kV or higher or that involve the Four Corners Power Plant or the Page Power Plant.<sup>334</sup> Authority over the excepted rights-of-way remained with the Area Director.

Table 4 provides compensation and tenure data for certain energy rights-of-way on the Navajo Reservation since 1948. The sheer number of pipelines and transmission lines on the Navajo Reservation required HRA to focus its collecting efforts more narrowly than on other reservations in this study. HRA historians decided to restrict document collection to electric transmission lines of 69 kV or higher and to gas and oil pipelines crossing more than 10 miles of tribal land. HRA did not look at service lines for either electricity or gas, nor did it examine gas gathering lines. Even with those limitations, HRA collected information about many more easements than can conveniently be tabulated here. Therefore, Table 4 represents easements fitting the search parameters for which fairly complete information was available. The table includes a variety of easement types (electric lines, gas lines, oil lines), and it includes original easements and renewals. It is organized by easement type, then by company and date of easement.

Tribal consent initially occurred through action of the Tribal Council Chairman, not by numbered resolution. In some cases, information about tribal consent came from a source other than a memorandum or resolution. Where available, resolution numbers have been included in the “Date of Tribal Consent” column.

The “Appraised Value” column indicates, where information is available, whether the figure came from the company or the BIA. In most cases, the company submitted an appraisal with its right-of-way application, and then the BIA reviewed that appraisal.

Consideration for most Navajo Reservation easements was paid on a per-rod or per-mile basis, but occasionally it was paid according to acreage. The “Length/Acreage” column in Table 4 includes both measures, if available. Easements often included both tribal and allotted land. In some cases where the documentation distinguished between tribal and allotted land, the “Length/Acreage” and “Consideration” columns include only tribal figures. In cases where the

---

<sup>334</sup> Addendum to 10 BIAM 3.3E, Section 1.4.B, Release No. 1, May 26, 1988, provided by BIA-WR.

documentation did not distinguish between tribal and allotted land, those columns include figures for the entire easement.

**Table 4.** Compensation for energy rights-of-way on the Navajo Indian Reservation.

ROW No./ Company Name	Purpose	Length/Acreage	Compensation	Original Offer	Appraised Value	Application Date	Date of Tribal Consent	Date of BIA Approval	Duration	Comments
R/W 59056 El Paso Products Pipeline Co.	6-5/8" crude oil pipeline	2,531.50 rods	\$1 per rod in damages.	\$2,789.23 in damages		5/20/1959	consent to commence construction 5/27/1959	11/1/1960	20 years from 5/29/1959	Line was ultimately constructed partly at 6-5/8" and partly at 4-1/2". Original application made by El Paso Products Pipeline Co. At some point, it was assigned to Shell Oil Co. Assigned by Shell Oil Co. to Shell Pipeline Corporation 12/31/1969.
renewal of 56103 Shell Pipeline Company	4" crude oil pipeline, Ciniza to Wingate	2054.7151 rods 6.4209 miles	\$3 per rod		BIA: \$3 per rod		7/12/1978			BIA Assistant Area Director said that \$2 per rod was inadequate and asked for \$5 per rod plus 10% interest 4/13/1982. Shell assigned easement to Ciniza Pipe Line Inc. 3/30/1982
CIN-RW-992 Ciniza Pipe Line Inc.	renewal of existing crude oil pipeline	9,041.389 rods 28.253 miles	Consideration per agreement dated 4/30/1990	\$13.13 per rod plus 10% interest per annum since 1982 appraisal; total \$175,030	BIA: \$33.56 per rod	revised application: 4/30/1987	4/26/1990 RCAP-55-90	4/30/1990	renewed to 7/31/1990	Ciniza and Giant merged. Pipeline was then operated by Giant's Ciniza Pipe Line Division. Agreement reached between Ciniza and Navajo Nation stating terms and conditions for renewal 4/30/1990. CIN-RW-992 included 59056.
Public Service Co. of New Mexico	230 kV line, Ambrosia Lake to Arizona Public Power Plant	56.6 miles	\$7,910 in damages (\$140 per mile)		PSCNM: \$12 per acre	10/3/1961		4/5/1962	50 years	
Public Service Co. of New Mexico	1st 345 kV line, West Mesa Switching Station to Four Corners	43.392 miles 525.975 acres	\$520 per mile	\$200 per mile (projected pending appraisal) \$8,678.40	PSCNM: \$12.50 per acre BIA: Calls this amount adequate.	2/10/1966	consent to commence construction 4/13/1966	6/10/1968	50 years, expires 6/10/2018	
Public Service Co. of New Mexico	2nd 345 kV electric transmission line	31.915 miles 386.949 acres	\$16,000.92 (\$520 per mile)			10/16/1967	consent to commence construction 7/15/1969	8/1/1968	50 years, expires 6/26/2018	
Tucson Gas and Electric Company	two 345 kV electric transmission lines		\$223,130.16	TGE: \$30 per acre for tribal lands			8/1/1973 ACAU-308-73		50 years; with extension under same terms for up to an additional 49 years (consideration subject to negotiation)	Agreement reached between Navajo Nation and TGE dated 8/1/1973
IN-79 Arizona Public Service Company	500 kV line through Navajo-Hopi Joint Use Area	57.4524 miles	\$755 per mile		APS: \$28,400 BIA: Calls this amount, roughly \$20.40 per acre, fair and equitable.	10/10/1966	6/16/1966 ACJN-109-66	3/22/1967	25 years, "subject to renewal for a like term upon compliance with applicable regulations".	
IN-78 Arizona Public Service Company	500 kV line east of 1882 Executive Order boundary	96.2609 miles	\$755 per mile				6/16/1966 ACJN-109-66	3/22/1967	25 years, "subject to renewal for a like term upon compliance with applicable regulations".	
IN-80 Arizona Public Service Company	500 kV line west of 1882 Executive Order boundary	40.0796 miles	\$755 per mile				6/16/1966 ACJN-109-66	3/22/1967	25 years, "subject to renewal for a like term upon compliance with applicable regulations".	
Four Corners Pipe Line Company	12"-16" crude oil pipeline	230.28 miles	\$119,292.20 (for damages for pipelines, pump stations, microwave sites, and other installations and facilities) \$1 per rod, \$320 per mile			3/31/1959	4/27/1959	5/11/1959	20 years from 5/23/1957	
Four Corners Pipe Line Company	16" pipeline across 1882 Executive Order area	26 miles	\$10,000 to Navajo (also \$10,000 to Hopi)			3/12/1959	3/31/1959	3/31/1959		

**Table 4.** Compensation for energy rights-of-way on the Navajo Indian Reservation.

ROW No./ Company Name	Purpose	Length/Acreage	Compensation	Original Offer	Appraised Value	Application Date	Date of Tribal Consent	Date of BIA Approval	Duration	Comments
UT/AZ/NM-82-02 Four Corners Pipe Line Company	consolidated R/W for all existing lines and facilities	373.794 miles 2,896.104 acres	Annual payment of \$.03 per barrel for hydrocarbons transported through mainline, adjusted annually based on consumer price index; not less than \$250,000 for 1981 and adjusted annually based on CPI.			2/5/1980 (subsequently amended)	Agreement btw Navajo Nation and Four Corners 1/29/1981	10/23/1981	20 years	In addition to the compensation for the new 20-year term, Four Corners agreed to a \$900,000 lump sum for compensation from 5/23/1977 (expiration of original mainline R/W) to 12/31/1980; plus \$.03 per barrel on hydrocarbons transported through mainline from 1/1/1981 to date of issue of R/W.
UT/AZ/NM-02-01 Questar Southern Trails Pipeline Company	12", 16", 20", and 22" natural gas pipelines	259.14 miles 1,592.19 acres	Amount is confidential. 20 annual payments with all but first payment adjusted according to CPI.		Questar: \$1,450,000 for "leasehold" estate		11/15/2001 RCNN-198-01	1/14/2002	20 years	Agreement between Navajo Nation and Questar signed 10/3/01
T-13872 AZ-85-21 NM-85-131 Transwestern Pipeline Company	renewal of 30" pipeline and loop lines; right to install other necessary appurtenances		Consideration per Memorandum of Understanding 10/31/1984; amount is confidential.				4/15/1985	4/26/1985	20 years, 1/1/1984-12/31/2003	Extension Agreement of May 2001 extended expiration to 11/18/2009.
F-AZ-91-16 E-NM-91-24 Transwestern Pipeline Company	30" pipeline known as Loop E	27.94 miles tribal 169.33 acres tribal	Consideration per Memorandum of Understanding 10/31/1984; amount is confidential.			5/30/1991	8/21/1991	10/23/1991	until 12/31/2003	Extension Agreement of May 2001 extended expiration to 11/18/2009.
E-NM-91-022 Transwestern Pipeline Company	30" pipeline known as San Juan Laterals	79.82 miles tribal 483.78 acres tribal	Consideration per Memorandum of Understanding 3/4/1991; amount is confidential.			6/19/1991	approval of MOU 2/28/1991 RCF-021-91	9/6/1991	until 12/31/2003	An amended easement approved 4/29/1999 added an omitted tract. Extension Agreement of May 2001 extended expiration to 11/18/2009.
E-NM-05-06 Transwestern Pipeline Company	36" San Juan Lateral Loop Lines (Loops A and B)	66.33 miles 402.80 acres	In accordance with terms and conditions set forth in resolutions of the Resources Committee; amount is confidential.			7/6/2004	10/14/2004 RCO-55-04	11/8/2004	5 years	Resources Committee approved an amendment to the May 2001 Extension agreement on 10/14/2004 to provide Transwestern approximately 21,415 rods of additional R/W for 36" loop line (Loops A and B).
50086 El Paso Natural Gas Company	24" natural gas pipeline	218 miles		\$1 per rod (\$320 per mile) plus additional actual damages caused by construction across agricultural or forested lands		7/20/1950				
53197 El Paso Natural Gas Company	Plains Station to San Juan Line		\$1 per rod in damages			7/31/1953	9/11/1953			Date of tribal consent is the date of the Chairman's signature on the grant of easement.
58273 El Paso Natural Gas Company	El Paso Natural Gas 20" and 16" natural gas pipeline	64.020 miles	\$20,568.72 in damages (\$1 per rod)	\$1 per rod in damages		5/9/1958	11/23/1959	11/24/1959	20 years from 6/16/1958	Permission to construct initially granted 6/16/1958.
601298 El Paso Natural Gas Company	8-5/8" natural gas pipeline		\$1 per rod in damages (\$320 per mile)				1/30/1962	1/31/1962	20 years from 7/7/1961	
65916 El Paso Natural Gas Company	24" loop line from San Juan Plant to M.P. 20.7	19.106 miles 138.956 acres	\$6113.77 (damages at \$1 per rod)		EPNG: \$6,115 (\$1 per rod)		5/11/1966 (permission to construct) 5/31/1966 (additional 30' of right of way between certain stations)	6/23/1966 (for additional 30')		
72531 (renewal 50086 et al.) El Paso Natural Gas Company	renewal of various lines, loops, and stations	264.966 miles 2,944.614 acres	\$260,000		EPNG: \$50,769 BIA: \$133,189	12/21/1971		3/30/1973	1/11/1972-3/9/1986	

**Table 4.** Compensation for energy rights-of-way on the Navajo Indian Reservation.

ROW No./ Company Name	Purpose	Length/Acreage	Compensation	Original Offer	Appraised Value	Application Date	Date of Tribal Consent	Date of BIA Approval	Duration	Comments
73632 et al. Supplement No. 1 El Paso Natural Gas Company	16" pipelines with necessary appurtenances	64.27 miles 468.499 acres	\$10 [Consideration included in 72531 renewal]					9/28/1979	until 3/9/1986	
73632 et al. Supplement No. 8 El Paso Natural Gas Company	renewal of 2", 6-5/8", and 8-5/8" lines with necessary appurtenances	61.18 miles 442.39 acres	\$10 [Consideration included in 72531 renewal]					9/28/1979	until 3/9/1986	
73632 et al. El Paso Natural Gas Company	30" pipelines with necessary appurtenances	19.717 miles 143.393 acres	\$10 [Consideration included in 72531 renewal]					9/28/1979	until 3/9/1986	
850328 El Paso Natural Gas Company	renewal of natural gas pipelines and appurtenant facilities, component parts of gas gathering and transmission system	258.273 miles 1,841.808 acres	Consideration per Memorandum of Agreement 1/29/1985.		EPNG: \$15 per rod BIA: \$78.37 per rod	4/29/1985		10/18/1985	20 years (until 10/17/2005)	The Advisory Committee of the Navajo Tribal Council approved the agreement with El Paso by resolution ACJA-11-85 on 1/17/1985.
850329 El Paso Natural Gas Company	existing 24" San Juan Line and 24", 30", and 34" loop lines and necessary appurtenances	205.93 miles 2,648.709 acres	Consideration per Memorandum of Agreement 1/29/1985.		EPNG: \$15 per rod BIA: \$78.37 per rod	4/26/1985	1/15/1985	10/18/1985	20 years (until 10/17/2005)	Date of tribal consent is the date of an unnumbered joint resolution of the Economic and Community Development Committee and the Resources Committee of the Navajo Tribal Council.
850331 El Paso Natural Gas Company	renewal of existing 34" main and loop lines (Blanco Plant to Gallup Station Line and Partial Loop)	49.33 miles 459.26 acres	Consideration per Memorandum of Agreement 1/29/1985.		EPNG: \$15 per rod BIA: \$78.37 per rod			10/18/1985	20 years (until 10/17/2005)	
850333 El Paso Natural Gas Company	renewal of Winslow Line and necessary appurtenances	13.367 miles 97.211 acres	Consideration per Memorandum of Agreement 1/29/1985		EPNG: \$15 per rod BIA: \$78.37 per rod	4/26/1985		10/18/1985	20 years (until 10/17/2005)	
890609 E-NM-91-005 El Paso Natural Gas Company	34" pipeline loop, Blanco Plant to Gallup, with necessary appurtenances	6.629 miles 48.207 acres	Consideration per Amendment No. 2 to Memorandum of Agreement 1/29/1985.			7/26/1990		3/18/1991 (amended approval 5/10/1991)	20 years, amended to expiration 10/17/2005	
890610 E-NM-91-006a El Paso Natural Gas Company	34" pipeline loop, Whiterock Compressor Station to Gallup Plant, with necessary appurtenances	5.593 miles 40.676 acres	Consideration per Amendment No. 2 to Memorandum of Agreement 1/29/1985.			7/26/1990		3/18/1991 (amended approval 5/14/1991)	20 years, amended to expiration 10/17/2005.	
900900, 900901, 900902, 900903, 900904, 900905 E-NM-91-023 F-AZ-91-15 El Paso Natural Gas Company	34", 36", and 42" natural gas pipelines	87 miles 632.738 acres	\$5,404,123.91, as per Amendment No. 3 to the Memorandum of Agreement 1/3/1985.					10/9/1991	until 10/17/2005	
940373 E-NM-95-18 El Paso Natural Gas Company	34" Loop Line from Blanco Plant to Gallup Station (San Juan Triangle)	28.225 miles tribal 171.060 acres tribal	\$3,173,420.40 tribal, as per Amendment No. 4 to the Memorandum of Agreement 1/29/1985.		EPNG: \$225,838 (\$25 per rod) BIA: \$25 per rod	5/31/1994	approval of Amendment No. 4, 9/14/1995 RCS-214-95	10/13/1995	until 10/17/2005	

## Case Studies

The case studies that follow represent activity in right-of-way negotiations from the 1950s to the 1990s. They include an oil pipeline (belonging to Four Corners Pipe Line Company), an electric transmission line (Arizona Public Service), and two natural gas lines (Transwestern Pipeline Company and El Paso Natural Gas Company). Most of the records cited below were collected from the branch of Real Estate Services in the BIA's Navajo Regional Office, Window Rock, Arizona. In addition, the Navajo Nation Department of Justice (NNDOJ) at Window Rock provided narratives of certain rights-of-way, along with underlying documents. Two of the case studies below—Transwestern and El Paso—cover the same easements addressed in the NNDOJ narratives. Because of the confidential nature of certain agreements, NNDOJ asked us not to reveal the dollar figures for agreements with Transwestern starting in 1983 and with Questar in 2002. Finally, El Paso Natural Gas provided access to its Indian easement records, which are held by the Land Department of El Paso Western Pipelines in Colorado Springs, Colorado.

### Four Corners Pipeline

Four Corners Pipe Line Company (Four Corners) received its initial easement for a 16-inch crude oil pipeline on the Navajo Reservation on May 11, 1959. Shell Pipe Line Corporation built and operated the pipeline on behalf of its six owners: Continental Pipe Line Company, Gulf Oil Corporation, Richfield Oil Corporation, Shell Oil Company, Standard Oil Company of California, and the Superior Oil Company.<sup>335</sup> The pipeline transported oil from southeastern Utah and northwestern New Mexico to southern California. Atlantic Richfield became sole owner of the pipeline in 1977, and in 1998, Questar Southern Trails Pipeline Company purchased the line and converted it to natural gas.<sup>336</sup>

Four Corners applied to construct the line on April 5, 1957. Four Corners addressed its application both to the BIA General Superintendent of the Navajo Agency and to Navajo Tribal

---

<sup>335</sup> Press release, Four Corners Pipe Line Company, November 22, 1957, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>336</sup> R. Allan Bradley to Darryl Francois, May 15, 2006, <[http://1813.anl.gov/documents/docs/ScopingComments/Questar\\_Southern\\_Trails\\_Pipeline.pdf](http://1813.anl.gov/documents/docs/ScopingComments/Questar_Southern_Trails_Pipeline.pdf)> (June 16, 2006).

Council Chairman Paul Jones.<sup>337</sup> Jones consented to the construction on behalf of the Tribe, and the BIA General Superintendent granted authority to commence construction on May 23, 1957, respectively.<sup>338</sup> At the time, federal regulations allowed companies to build lines before obtaining an actual grant of easement, provided the companies complied with federal regulations. Four Corners completed construction of the line and then applied for rights-of-way for the trunk pipeline (230.28 miles), the Aneth gathering system (15 lines totaling 41.37 miles), and various station sites (150.50 acres).<sup>339</sup>

Records related to the Four Corners Pipe Line right-of-way indicate that the Navajo Tribe participated actively in the process of approving the application.<sup>340</sup> Tribal Council Chairman Jones wrote to Four Corners in October 1958 to remind Four Corners that it had not formally applied for the right-of-way, as required by 25 CFR Part 161. Jones referred Four Corners to specific sections of the regulations, demonstrating his knowledge of the requirements. He also expressed concern that the company had not yet signed and returned stipulations that Four Corners and the tribe had agreed to include in the grant of easement.<sup>341</sup> On February 9, 1959, Jones explained to Navajo General Superintendent Glenn Landbloom that he had previously withdrawn the tribe's consent for the Four Corners right-of-way because Four Corners had not executed "a satisfactory stipulation for the benefit of the Navajo Tribe."<sup>342</sup> The Chairman

---

<sup>337</sup> Application for Permission to Commence Construction of Pipe Line, April 5, 1957, File Pipeline Four Corners 16"—Hopi Reservation, Box SURFACE 32, Room 124, BIA-WR.

<sup>338</sup> Acting Chief, Branch of Realty, to General Superintendent, Navajo Agency, November 27, 1957, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>339</sup> R.G. McIntyre, Four Corners Pipe Line Company, to General Superintendent, Navajo Agency, March 31, 1959, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>340</sup> For example, the tribe was involved in issues surrounding construction of the pipeline. Representatives of the tribe, Four Corners, and the Navajo Agency met on October 16, 1957, to discuss construction of the pipeline over a coal lease on the reservation. The tribe and the company reached agreement that stipulations in the coal lease would apply to Four Corners. In return, the tribe agreed to a change in location for the pipeline crossing of the coal lease. Maurice McCabe, Acting Chairman, and Clarence Ashby, Acting General Superintendent, to Norman Littell, October 18, 1957, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>341</sup> Paul Jones to Four Corners Pipe Line Company, October 15, 1958, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>342</sup> Because Four Corners' applications for survey and construction did not include agreements about employment of Navajos, the tribe was unable to compel the company to hire tribal members. This may be why Chairman Jones was so insistent on obtaining executed stipulations before consenting to the right-of-way. Acting Chief, Branch of Realty, to General Superintendent, Navajo Agency, November 27, 1957, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

instructed Landbloom, “Until you hear further from me, please do not take any action toward finalizing a right-of-way grant for the Four Corners Pipe Line Company across Navajo Tribal land.”<sup>343</sup> Jones wrote to Four Corners the same day, again calling upon Four Corners to submit an executed stipulation. Jones noted,

This form of stipulation was prepared at a meeting held in Window Rock on September 11, 1958, between representatives of your company and our legal staff, and your representatives stated that it was satisfactory and would be executed on behalf of your company.<sup>344</sup>

He made it clear that he would not give consent until he received the executed stipulation.<sup>345</sup>

Four Corners submitted its formal application, with the required stipulations, on March 31, 1959.<sup>346</sup> In the stipulations, Four Corners agreed, among other things, to pay damages of \$1 per lineal rod and to give preference in employment to Navajo Indians.<sup>347</sup> On April 27, 1959, Paul Jones informed Superintendent Landbloom that Four Corners “has met all requirements for Tribal consent to grant the right of way under application,” and thus he was giving consent for a 20-year right-of-way, effective May 23, 1957.<sup>348</sup>

The Acting Superintendent of the Navajo Agency approved the easement for 230 miles of pipeline and other facilities on May 11, 1959. By that time, Four Corners had deposited a total of \$199,796 to cover estimated damages.<sup>349</sup>

Because the pipeline crossed 26 miles of the 1882 Executive Order area, Four Corners had to deal with the Navajo-Hopi land dispute. In April 1957, the President of Four Corners explained

---

<sup>343</sup> Paul Jones, Chairman, to Glenn Landbloom, General Superintendent, February 9, 1959, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>344</sup> Paul Jones, Chairman, to Four Corners Pipe Line Company, February 9, 1959.

<sup>345</sup> Paul Jones, Chairman, to Four Corners Pipe Line Company, February 9, 1959.

<sup>346</sup> R.G. McIntyre to General Superintendent, Navajo Agency, March 31, 1959, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>347</sup> Stipulation, December 1, 1958, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

<sup>348</sup> Paul Jones to Glenn Landbloom, April 27, 1959, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR. The effective start date was the date on which Four Corners had been granted permission to begin construction. See R.G. McIntyre to General Superintendent, March 31, 1959, *ibid.*

<sup>349</sup> Agency Realty Officer to Navajo Tribal Council and General Superintendent, Navajo Agency, May 11, 1959, File Four Corners Pipeline Company—16" & 12" pipe line R/W—Station Sites, and other facilities, Box SURFACE 13, Room 124, BIA-WR.

the problem and Four Corner's solution in a letter to BIA Agency Superintendent Warren Spaulding and Tribal Chairman Paul Jones: Four Corners would apply to both the Hopi and the Navajo for a right-of-way across the tract.<sup>350</sup> Four Corners applied for permission to survey and construct the right-of-way over Hopi lands on March 25, 1957. The Hopi Tribal Council consented to construction on March 29, 1957, and Hopi Agency Superintendent Herman O'Harra approved survey and construction the same day. O'Harra estimated damages at \$1 per rod (it is unclear whether this amount was based on an appraisal). Despite that estimate, Four Corners agreed to pay the Hopi and Navajo tribes \$10,000 each for the disputed segment. The total consideration of \$20,000 for the 26-mile stretch exceeded the typical rate for Navajo easements in the period, which was \$1 per rod (\$320 per mile, or \$8,320 for a 26-mile easement).<sup>351</sup>

In a letter to the Commissioner of Indian Affairs, the Acting Assistant Director for the Gallup Area mentioned that the Navajo Tribe did not oppose the easement, "however, they have expressed a desire to examine the application and supporting documents before making a final commitment."<sup>352</sup> Paul Jones gave the Navajo Tribe's consent to the easement on March 31, 1959.<sup>353</sup> Because the right-of-way involved the disputed area, Superintendent Landbloom forwarded the application to the BIA Central Office for approval.<sup>354</sup> The easement was granted on June 20, 1959, for a period of 20 years.<sup>355</sup>

Because the initial easement for the Navajo sections of the Four Corners pipeline was due to expire on May 23, 1977, Four Corners applied to renew the right-of-way on April 9, 1976. Four Corners submitted an appraisal of \$2 per rod, which the BIA found too low. Instead, the Area Appraiser determined that \$3 per rod was "current market value," and Four Corners subsequently

---

<sup>350</sup> President, Four Corners Pipe Line Company, to Warren Spaulding and Paul Jones, April 5, 1957, File Pipeline Four Corners 16"—Hopi Reservation, Box SURFACE 32, Room 124, BIA-WR.

<sup>351</sup> President, Four Corners Pipe Line Company, to Warren Spaulding and Paul Jones, April 5, 1957; President, Four Corners Pipe Line Company, to Herman O'Harra and Karl Johnson, March 25, 1957; and John G. Cable, Acting Assistant Area Director, to Commissioner, Bureau of Indian Affairs, October 23, 1958; all in File Pipeline Four Corners 16"—Hopi Reservation, Box SURFACE 32, Room 124, BIA-WR.

<sup>352</sup> Acting Assistant Area Director to Commissioner, Bureau of Indian Affairs, March 12, 1959, File Pipeline Four Corners 16"—Hopi Reservation, Box SURFACE 32, Room 124, BIA-WR.

<sup>353</sup> Paul Jones to General Superintendent, Navajo Agency, March 31, 1959, File Pipeline Four Corners 16"—Hopi Reservation, Box SURFACE 32, Room 124, BIA-WR.

<sup>354</sup> Glenn Landbloom to Chairman, Navajo Tribal Council, March 23, 1959, File Pipeline Four Corners 16"—Hopi Reservation, Box SURFACE 32, Room 124, BIA-WR.

<sup>355</sup> R.E. Frazier to U.S. Department of Interior, February 5, 1980, File envelope addressed to U.S. Department of the Interior, Box SURFACE 32, Room 124, BIA-WR.

submitted a new offer at the higher rate.<sup>356</sup> The records collected do not indicate what, if any, negotiations occurred following the \$3 per rod offer, but no renewal resulted, apparently leading to the expiration of the 1957 easement.

On February 5, 1980, Four Corners applied for a new grant of easement that would consolidate all of its rights-of-way on the Navajo Reservation. Four Corners asked for an easement “without limitation as to term of years, or for a maximum period of time permissible under applicable laws and regulations.”<sup>357</sup> The records collected do not reveal what negotiations took place, but Four Corners and the Tribe reached an agreement on February 2, 1981. The agreement renewed all of Four Corner’s rights-of-way for pipelines and facilities, both expired and unexpired. Consideration was based primarily on throughput of hydrocarbons in the main line at 3 cents per barrel, adjusted annually based on the Consumer Price Index (CPI). The annual payment was to be not less than \$250,000 for 1981 and thereafter adjusted annually based on the CPI. Four Corners also paid \$900,000 in compensation for May 23, 1977, to December 31, 1980, the period during which the easement for its main line was expired but still in use. In return, the Navajo Nation released Four Corners from liability for using the right-of-way after it expired. Finally, Four Corners agreed to pay any actual damages caused by construction or operation of the pipeline.<sup>358</sup>

As with the 1959 easement, the 1882 Executive Order area complicated the approval process. Four Corners arranged for one easement to cover the whole pipeline including the disputed Navajo-Hopi area, and the BIA required both tribes to consent before it would grant the easement.<sup>359</sup> The Hopi Tribe initially rejected the deal, causing the BIA to refuse Four Corners’ first payment for its rights-of-way.<sup>360</sup> In late September 1981, the Acting Assistant Area

---

<sup>356</sup> Area Director, Navajo Area, to Commissioner of Indian Affairs, March 24, 1981; Acting Assistant Area Director to J.A. Baker, October 17, 1977; and Realty Specialist to The Files, February 25, 1981; all in File 4616-P3, Land Rights-of-Way Files, CY: 1981, ARCO Pipeline Company, unlabeled box, Room 128, BIA-WR.

<sup>357</sup> R.E. Frazier to U.S. Department of the Interior, February 5, 1980, File envelope addressed to U.S. Department of the Interior, Box SURFACE 32, Room 124, BIA-WR.

<sup>358</sup> The signatures on the agreement are dated January 29, 1981, but the language of the agreement indicates that it was entered into February 2, 1981. Agreement, February 2, 1981, File envelope addressed to U.S. Department of the Interior, Box SURFACE 32, Room 124, BIA-WR.

<sup>359</sup> Albert Keller to George Vlassis, date unclear [September 30, 1981?], File 4616-P3, Land Rights-of-Way Files, CY: 1981, ARCO Pipeline Company, unlabeled box, Room 128, BIA-WR.

<sup>360</sup> George Vlassis to Donald Dodge and Curtis Geigamah, July 22, 1981, File 4616-P3, Land Rights-of-Way Files, CY: 1981, ARCO Pipeline Company, unlabeled box, Room 128, BIA-WR.

Director for the Navajo Area Office indicated that the Hopi Tribe had consented to the renewal.<sup>361</sup> As a result, the Area Director approved the easement on October 23, 1981, to last 20 years from that date.<sup>362</sup>

Four Corners, which at some point became a wholly owned subsidiary of Atlantic Richfield Company, changed its name to ARCO Pipe Line Company on January 1, 1995.<sup>363</sup> In 1998, Questar Southern Trails Pipeline Company (Questar) purchased the Four Corners pipeline from ARCO.<sup>364</sup> Questar intended to convert the crude oil pipeline to natural gas, which would result in some new construction over Navajo Agricultural Products Industry (NAPI) lands.<sup>365</sup> Negotiations for the 2001 easement renewal addressed the conversion to natural gas and the new construction. Although the details of the negotiations are not evident from the records collected, the Navajo Nation once again used its authority to consent to achieve tribal goals. Questar and the Navajo Nation reached an agreement for renewal in 2001, to which the Tribal Resources Committee consented in September 2001. A month later, however, the committee rescinded its consent because of “Questar’s initial failure to pay surface damages to the Navajo Agricultural Products Industry” and the company’s failure to include NAPI in the negotiations.<sup>366</sup>

The Navajo Nation and Questar worked out their differences and entered into an agreement for the right-of-way on October 3, 2001, not long before the existing easement was due to expire. In addition to renewing the easement for the existing pipeline, the agreement included Navajo consent to additional rights-of-way “for purposes of installing new sections of natural gas pipeline to be incorporated into Questar’s existing pipeline system.” Unlike the 1981 renewal, consideration in this agreement was not based on pipeline throughput. Instead, the total amount of compensation would be paid in 20 annual installments with all but the first payment adjusted annually according to the CPI. Questar also agreed to make an annual payment to the Navajo

---

<sup>361</sup> Keller to Vlassis, date unclear [September 30, 1981?].

<sup>362</sup> Grant of Easement for Right-of-Way, UT/AZ/NM-82-02, October 23, 1981, File envelope addressed to U.S. Department of the Interior, Box SURFACE 32, Room 124, BIA-WR.

<sup>363</sup> Claudette E. Saunders to Bureau of Indian Affairs, December 28, 1994, File 4616-P3, Land Rights-of-Way Files, CY: 1981, ARCO Pipeline Company, unlabeled box, Room 128, BIA-WR.

<sup>364</sup> Robert O’Shields to Navajo Agricultural Products Industry, October 16, 2001, File 4616-P3, Land Rights-of-Way Files, CY: 1981, ARCO Pipeline Company, unlabeled box, Room 128, BIA-WR.

<sup>365</sup> O’Shields to Navajo Agricultural Products Industry, October 16, 2001.

<sup>366</sup> Kelsey A. Begay, President, to Ned Greenwood and D.N. Rose, October 31, 2001, File TR-4616-P5 Indian Right-of-Way Easements, Questar Southern Trails Pipeline Company, unlabeled box, Room 128, BIA-WR.

Nation Scholarship Program and to install up to six taps for delivery of gas on the reservation.<sup>367</sup> The Tribal Resources Committee gave its consent to the agreement on November 15, 2001, and the BIA Deputy Regional Director approved it on January 14, 2002, for a term of 20 years.<sup>368</sup>

This example reveals that the Navajo Nation kept a careful watch [or was actively involved in] over the right-of-way approval process from an early date. Although it is not clear how rates of compensation were set, it appears that they were not closely tied to appraisals in the 1981 and 2001 renewals. The 1981 agreement, by which Four Corners renewed all its easements at once, was one of several consolidated rights-of-way approved in the period. The 1981 throughput arrangement was unusual, however. Although the Navajo Nation subsequently tried to obtain compensation based on throughput from Transwestern Pipeline Company and El Paso Natural Gas Company in the 1980s, it was not successful (see below), and the 2001 Questar renewal did not include consideration based on throughput. The 1981 agreement was also unusual in that it was an early attempt for a throughput fee, especially in comparison to the other tribes in this study.

### Arizona Public Service 500 KV Line

Arizona Public Service Company (APS) operates various electric transmission lines over the Navajo Reservation. One of them is a 500 kV line that stretches from the Four Corners steam generating plant in New Mexico to El Dorado Substation near Boulder City, Nevada.<sup>369</sup> The line runs across the Navajo Reservation in a westerly direction, passing through the Hopi Reservation before exiting the Navajo Reservation west of Cameron, Arizona. APS initially proposed two 500 kV lines, with a right-of-way 330 feet wide.<sup>370</sup> Ultimately, the company obtained a 25-year

---

<sup>367</sup> Agreement for Navajo Nation Consent to Rights-of-Way Grant to Questar Southern Trails Pipeline Company, October 3, 2001, File TR-4616-P5 Indian Right-of-Way Easements, Questar Southern Trails Pipeline Company, unlabeled box, Room 128, BIA-WR.

<sup>368</sup> Resolution of the Resources Committee of the Navajo Nation Council, RCN-198-01, November 15, 2001 and Grant of Easement for Right-of-Way, UT/AZ/NM-02-01, January 14, 2002, both in File TR-4616-P5 Indian Right-of-Way Easements, Questar Southern Trails Pipeline Company, unlabeled box, Room 128, BIA-WR.

<sup>369</sup> William A. Simson to Glenn Landbloom and Raymond Nakai, May 17, 1965, File Ariz. Public Service IN-79, (Hopi Ex. Ord. Area), 2 500 kV Lines, unlabeled box, Room 128, BIA-WR.

<sup>370</sup> Simson to Landbloom and Nakai, May 17, 1965.

easement for a single line in 1967, with the option to renew “for a like term upon compliance with applicable regulations.”<sup>371</sup>

As with the 1959 Four Corners negotiations, the Tribe appears to have been active in all stages of the approval process. APS requested permission to conduct feasibility studies for two 500 kV lines on May 17, 1965. Replying on behalf of Tribal Council Chairman Raymond Nakai, Vice Chairman Nelson Damon granted the tribe’s consent for the feasibility studies, but instructed the Navajo Agency Superintendent that consent was for the studies only. The tribe would require “separate requests for permission to survey and permission to construct the said transmission line.” Damon also noted that APS would need to obtain Hopi permission “for entry on the Joint Reservation.”<sup>372</sup>

The feasibility studies apparently convinced APS that it should proceed, and APS continued the process for acquiring a right-of-way for one 500 kV line. APS hired Robert Hugh to appraise the land within the 1882 Executive Order area.<sup>373</sup> In a cover letter to the report dated August 8, 1966, Hugh explained that the appraisal team had

considered pertinent data affecting the valuation, including (1) location, (2) size, (3) highest and best use, (4) development within the area, and (5) sales of comparable properties.

The length of the right-of-way in this section was 57.4524 miles and the width was 200 feet, for a total of 1,392.78 acres, and Hugh deemed the fair market value to be \$28,400 (approximately \$494 per mile or \$20.39 per acre).<sup>374</sup> The BIA reviewed Hugh’s appraisal and called this valuation “fair and equitable.” The reviewer noted, however, that such concurrence did not “limit the negotiating rights of the Indian Tribe or of individual Indians.”<sup>375</sup>

---

<sup>371</sup> See approval for IN-78 stamped on map, March 22, 1967, File Ariz. Public Service IN-79, (Hopi Ex. Ord. Area), 2 500 kV Lines, unlabeled box, Room 128, BIA-WR.

<sup>372</sup> Chairman, Navajo Tribal Council, to General Superintendent, Navajo Agency, May 19, 1965, File Ariz. Public Service IN-79, (Hopi Ex. Ord. Area), 2 500 KV Lines, unlabeled box, Room 128, BIA-WR. Because the transmission line crossed both Navajo and Hopi lands, the right-of-way was ultimately broken into three sections: east of the 1882 Executive Order reservation, through the 1882 reservation, and west of the 1882 reservation.

<sup>373</sup> Hugh probably appraised the entire right-of-way, but the records collected include the appraisal for the 1882 area only.

<sup>374</sup> Appraisal Report of 500 KV Transmission Line Right of Way for Arizona Public Service Company (Hopi Executive Order Area), August 10, 1966, File Ariz. Public Service IN-79 (File #2), unlabeled box, Room 128, BIA-WR.

<sup>375</sup> Appraisal Report (NAV) 40-67, November 10, 1966, File Ariz. Public Service IN-79 (File #2), unlabeled box, Room 128, BIA-WR.

The Advisory Committee of the Navajo Tribal Council consented to the right-of-way in a resolution dated June 16, 1966.<sup>376</sup> On July 6, 1966, the Hopi Tribal Council consented to construction of the line and to the grant of easement. The Hopi Tribal Council also consented to a payment of \$755 per mile for damages. According to the Hopi resolution, it was “understood that the above payment is to be for the first 25 years of the term of the permit, with a second payment to be made at the commencement of the second 25 year term in an amount equal to the above payment.”<sup>377</sup>

Despite tribal consent, the BIA did not approve the grant of easement for several months, in part because of discussions of an alternate route for the line.<sup>378</sup> In any case, Hopi Agency Acting Superintendent Joseph Lucero granted permission to construct the 1882 Executive Order section on October 12, 1966, and R.C. Bergeson, the Acting Assistant Area Director for the Navajo Area, gave permission to construct on all three sections of the line on October 18, 1966. Bergeson referred to “terms and conditions as discussed in our meetings of September 22 and September 29,” but the records collected do not reveal what these terms were.<sup>379</sup> Final approvals for the Navajo sections of the easement were granted March 22, 1967, and the approval for the Hopi section was granted April 20, 1967.<sup>380</sup>

On March 9, 1992, shortly before the end of the first 25-year period on the easement, APS applied to renew the 500 kV right-of-way across the Navajo Reservation. APS asked the Tribe to “waive all claims for compensation . . . since lines will be of distinct benefit to the members of

---

<sup>376</sup> Resolution of the Advisory Committee of the Navajo Tribal Council, ACJN-109-66, June 16, 1966, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file cabinets, Room 123, BIA-WR.

<sup>377</sup> Resolution, Hopi Tribe, No. H-18-66, July 6, 1966, File Ariz. Public Service IN-79, unlabeled box, Room 128, BIA-WR.

<sup>378</sup> 9/23 Meeting, Ariz Pub Service, 500 KV Line, Sept. 23, Window Rock and APS Mtg 9/29/ - re alternate route, no date, both in File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>379</sup> Joseph Lucero to Arizona Public Service Company, October 12, 1966, File Ariz. Public Service IN-79, (Hopi Ex. Ord. Area), 2 500 KV Lines, unlabeled box, Room 128, BIA-WR. R.C. Bergeson, Acting Assistant Area Director, to Arizona Public Service Company, October 18, 1966, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>380</sup> Map showing approval date, File Ariz. Public Service IN-79, (Hopi Ex. Ord. Area), 2 500 KV Lines, unlabeled box, Room 128, BIA-WR. James Dugan to Walter Mills, March 9, 1992, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

the Tribe.”<sup>381</sup> After filing the applications, APS submitted checks to the BIA Area Director in almost the same amounts it had paid for the initial easement. APS’ lead land agent stated that the payments “were calculated on the basis of the original payments made in 1967,” but APS was “prepared to discuss the consideration to be paid” for the renewals.<sup>382</sup>

By this time, the Navajo Nation had extensive experience in negotiating major rights-of-way agreements (see discussions of 1980s negotiations above and below) and in using its consent authority to control the approval process. The Navajo Nation disagreed with APS’ position that the original easement specified compensation for a second 25-year period at the same level as the first 25 years. Navajo Nation Council President Peterson Zah wrote to the BIA Area Director advising him that the Navajo Nation “does not accept Arizona Public Service Company’s offers.” Zah said that he would appoint a team to negotiate “what we deem to be a proper consideration for this R.O.W. which lies with the Navajo Nation.” He continued, “Once this is completed, the appropriate documents will be processed through the Navajo Nation governmental system and forwarded on to you for action.”<sup>383</sup>

Meanwhile, in April 1992, BIA officials reviewed an appraisal submitted by APS. Anson Baker, Chief Appraiser for the Navajo Area Office, found that the appraised amount—\$125 per acre—was not consistent with the “going rate” for Navajo easements. “While this figure may be accurate for market value with a willing seller,” Baker wrote, “it assumes that the Navajo Tribe is willing to sell the land at issue.” In addition, Baker deemed the APS appraisal of \$4.73 to \$4.76 to be significantly below the “going rate,” which he considered to be \$45 per rod or greater.<sup>384</sup>

At some point, someone involved in the negotiations—probably a representative of either the Navajo or the Hopi—prepared a briefing document for the DOI. The copy of this document

---

<sup>381</sup> HRA collected applications for the Navajo sections of the right-of-way, but not for the Hopi section. A letter from James Dugan, Lead Land Agent for APS, indicates that APS also applied to renew the Hopi section on March 9. See Application for Easement, APS #IN-78, March 9, 1982; Application for Easement, APS #INH-80, March 9, 1982; and James Dugan to Walter Mills, March 9, 1992, all in File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>382</sup> James W. Dugan to Walter Mills, March 16, 1992, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>383</sup> Peterson Zah to Walter Mills, May 28, 1992, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>384</sup> Appraisal Review Statement, SPEC.NAV-11-92, April 6, 1992, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

found in BIA files bears the handwritten date “1/14/94,” suggesting that it may have been distributed at a rights-of-way meeting held that day.<sup>385</sup> The author of the document stated that 1.1 percent of the construction costs for the APS Four Corners to Moenkopi line were spent on securing the right-of-way on Indian lands. The author commented,

The companies are likely to point out that any increase in compensation to the Tribes will ultimately be reflected in an increase in rates to customers. However, the Tribes should not be required to subsidize the electrical rate to consumers by granting a right-of-way across the reservations for minimal compensation. We have learned that the effect on utility rates from even a dramatic increase in right-of-way compensation would be almost indiscernible.<sup>386</sup>

This document also noted that the tribes had hired consultants to help them assess the value of the right-of-way.<sup>387</sup>

In late December 1993, Navajo Nation Vice President Marshall Plummer asked the BIA Navajo Area Director to attend a meeting with the Navajo and Hopi right-of-way committees. Plummer explained that the Navajo and Hopi Nations had “entered into a confidentiality agreement to cooperate in negotiations with Southern California Edison” (SCE) on the right-of-way.<sup>388</sup> Although APS held the easement, SCE had the right “to use 100% of the capacity of the line.”<sup>389</sup> In August 1994, President Zah informed BIA Area Director Wilson Barber that he had established a task force to negotiate electrical transmission rights-of-way with APS, SCE, the City of Los Angeles’s Department of Water and Power, and Public Service Company of New Mexico. Zah asked Barber to return any payments that these companies had made for rights-of-way, “unless authorized by the Navajo Nation.” He concluded, “We will notify the BIA on the

---

<sup>385</sup> The meeting on January 14, 1994, is mentioned in a memorandum from Donna Christensen to the Navajo Nation Right of Way Committee, December 28, 1993, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>386</sup> The Hopi and Navajo Nations, A Briefing Report for Department of the Interior Representatives, no date, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>387</sup> The Hopi and Navajo Nations, A Briefing Report for Department of the Interior Representatives, no date, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>388</sup> Marshall Plummer to Wilson Barber, December 29, 1993, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>389</sup> The Hopi and Navajo Nations, A Briefing Report for Department of the Interior Representatives, no date, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

outcome of the negotiations.”<sup>390</sup> In February 1996, APS and the Nation were still at an impasse, leading Melvin Bautista, chair of the Navajo Nation’s Right-of-way Task Force, to ask the BIA to return to APS a recent payment of \$120,374.49 for the right-of-way. Bautista explained that the payment was “not acceptable to the Navajo Nation.”<sup>391</sup> The easement still has not been renewed.

The 1967 APS easement is somewhat unusual in that it lasted only for 25 years instead of 50 years, the more typical tenure for power line easements on Indian lands. Because the easement came up for renewal in the 1990s, it provides a window on the Navajo Nation’s approach to rights-of-way during in that period. APS and the Navajo Nation have had difficulty renewing at least one other easement (a 69 kV line that also had a 25-year tenure), which NNDOJ describes in a narrative submitted for the Section 1813 study.<sup>392</sup> With other electric transmission easements on the reservation due to expire in the next 10 to 15 years, these stalemates could be an indicator of challenges ahead.

### Transwestern Pipeline Company, San Juan Line

In 1959, Transwestern Pipeline Company (TWPC) began construction of a 30-inch natural gas line from the San Juan Basin to Southern California, cutting across the Navajo Reservation. TWPC put its mainline in service in 1960, added compression facilities in 1967, and began building loop lines in 1969. By 1980, the system’s capacity across Navajo lands was 750,000 mcf per day.<sup>393</sup> The records collected do not provide information about how the original easement, which expired on October 26, 1979, was negotiated.<sup>394</sup> TWPC submitted an application for renewal to the BIA on November 26, 1979, but the company received “no

---

<sup>390</sup> Peterson Zah to Wilson Barber, August 23, 1994, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>391</sup> Melvin Bautista to Genni Denetsone, February 23, 1996, File Arizona Public Service Company, Operation, Construction and Maintenance of 500 KV Electric Power Line, file drawers, Room 123, BIA-WR.

<sup>392</sup> Case Study: APS 69 kV “Southern NN Border to Tuba City” electric power line, May 10, 2006, <[http://1813.anl.gov/documents/docs/NavCom/D-5-NN\\_Case\\_Study-APS.pdf](http://1813.anl.gov/documents/docs/NavCom/D-5-NN_Case_Study-APS.pdf)> (June 16, 2006).

<sup>393</sup> Application for Pipeline Right of Way, August 24, 1981, File 4616-P3, Land Right-of-Way, CY-85, Transwestern Pipeline Company, Renewal of 30” Natural Gas Pipeline across Navajo Tribal and Trust Allotted lands, unlabeled box, Room 128, BIA-WR.

<sup>394</sup> Thomas L. Marek to Donald Dodge, October 11, 1979, File 4616-P3, Land Right-of-Way, CY-85, Transwestern Pipeline Company, Renewal of 30” Natural Gas Pipeline across Navajo Tribal and Trust Allotted lands, unlabeled box, Room 128, BIA-WR.

definitive response.” TWPC then submitted a second application in 1981, but it is unclear what occurred thereafter.<sup>395</sup>

In any case, the Navajo Nation and TWPC reached an agreement regarding renewals in 1984, which was recorded in a memorandum of understanding (MOU). The 1984 MOU indicated that the easement for the main pipeline had expired, but the rights-of-way for its loop line were not scheduled to expire “until approximately April 14, 1989.” The MOU allowed TWPC to renew its easements (both expired and unexpired) and specified that the renewals would expire on December 31, 2003. Among its other provisions, the MOU disposed of lawsuits TWPC and the Navajo Nation had filed in Federal District Court involving Transwestern’s rights-of-way. The parties agreed to a settlement amount, which also constituted consideration for TWPC’s easements. The amount consisted of three payments to be made by certain dates, plus a deposit that TWPC had made previously. The MOU also included provisions allowing TWPC to extend its loop line for an additional sum.<sup>396</sup> The Navajo Tribal Council approved the MOU on October 30, 1984.<sup>397</sup> Subsequently, the Acting Navajo Area Director approved TWPC’s renewal of its easement for the main pipeline and loop lines.<sup>398</sup> TWPC applied for and obtained an easement for approximately 65 miles of new loop line in 1991, under the terms of the 1984 MOU.<sup>399</sup>

During the time between the signing of the MOU and the BIA’s approval of the actual easement, FERC became involved in the discussions, apparently because TWPC sought to use the MOU as a basis for adjusting its rates. FERC met with Texas Eastern (TWPC’s parent company at the time) and tribal representatives in December 1984. Wayne Stephens of El Paso Natural Gas, who was not present at the meeting, observed that “FERC staff blasted the Indians

---

<sup>395</sup> Application for Renewal of Right of Way, November 26, 1979, File 4616-P3, Land Right-of-Way, CY-85, Transwestern Pipeline Company, Renewal of 30” Natural Gas Pipeline across Navajo Tribal and Trust Allotted lands, unlabeled box, Room 128, BIA-WR. Application for Pipeline Right of Way, August 24, 1981, *ibid*.

<sup>396</sup> Memorandum of Understanding, October 31, 1984, File 4616-P3, Land Right-of-Way Files, CY-1991, Transwestern Pipeline Company, 30” OD Steel-Welded Natural Gas Pipeline [Loop E Extension], unlabeled box, Room 128, BIA-WR.

<sup>397</sup> Resolution of the Navajo Tribal Council, CO-56-84, October 30, 1984, provided by the Navajo Nation Department of Justice.

<sup>398</sup> The approved easement also carries Chairman Zah’s signature, dated April 15, 1985, indicating the Navajo Nation’s consent to the easement. Renewal of Easement for Right-of-Way, T-13872, AZ-85-21, NM-85-131, April 26, 1985, File 4616-P3, Land Right-of-Way, CY-85, Transwestern Pipeline Company, Renewal of 30” Natural Gas Pipeline across Navajo Tribal and Trust Allotted lands, unlabeled box, Room 128, BIA-WR.

<sup>399</sup> Peterson Zah, President, to Walter Mills, Area Director, August 21, 1991, File 4616-P3, Land Right-of-Way Files, CY-1991, Transwestern Pipeline Company, 30” OD Steel-Welded Natural Gas Pipeline [Loop E Extension], unlabeled box, Room 128, BIA-WR.

for demanding an excessive payment and creating higher rates for the consumers” in the TWPC deal. Stephens continued, “The Tribe responded in kind saying they were a sovereign nation and that the payment was just and proper.”<sup>400</sup> Soon thereafter, Kenneth Williams of FERC notified TWPC that the compensation agreed to “is reasonable and properly includable in [TWPC’s] rate base in the same matter as payments for the expired permits have been treated.” Williams said that FERC agreed not to oppose inclusion in TWPC’s rate base of actual amounts paid to the Navajo Nation, up to the total sum in the 1984 MOU. But Williams cautioned that this decision did not necessarily represent the views of the commission, nor did FERC intend “to establish a precedent that will be followed in the future.” Instead, the decision was a response “to unique circumstances . . . and is for the sole purpose of facilitating a final agreement between [TWPC] and the Navajo Nation.”<sup>401</sup>

The 1984 MOU set a pattern for subsequent negotiations between TWPC and the Navajo Nation: the parties were able to cooperate and to reach agreement about compensation for additional easements. They successfully negotiated another MOU in 1991 and then agreed to extensions of the 1984 easements in 2001 and 2004. The 1991 MOU allowed TWPC the option to acquire 79.507 miles of additional rights-of-way by March 4, 1992. It provided for 25 percent of the consideration to be delivered as a non-refundable payment. The remainder would be paid when TWPC exercised the option to acquire the rights-of-way, with adjustments made according to the CPI and the actual length of the rights-of-way. Although consideration for the rights-of-way was set in dollar amounts, the MOU committed TWPC to sell and deliver up to 3,000 mcf of natural gas per day to the Navajo Nation, upon execution of a service agreement. TWPC also agreed, subject to FERC approval, to transport gas owned by the Nation at a rate not to exceed that charged “to other similarly-situated shippers for such transportation services.”<sup>402</sup> The Resources Committee of the Navajo Nation Council approved the MOU on February 28,

---

<sup>400</sup> Wayne Stephens to M.E. Engler et al., December 17, 1984, File Navajo Negotiations 1985, Joe Martinez working files, Room 517, EPWP.

<sup>401</sup> Kenneth Williams to Transwestern Pipeline Company, January 11, 1985, File Navajo Negotiations 1985, Joe Martinez working files, Room 517, EPWP.

<sup>402</sup> Memorandum of Understanding, March 4, 1991, File 4616-P3, Land Right-of-Way, CY-1991, Transwestern Pipeline Company, 30” OD Steel-Welded Natural Gas Pipeline [Loop E Extension], unlabeled box, Room 128, BIA-WR. The MOU was amended in 1999 to include an additional 92.545 rods, with additional compensation provided. Resolution of the Resources Committee of the Navajo Nation Council, RCF-24-99, February 25, 1999, File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion across NTTL, McKinley County, NM, file drawer, Room 123, BIA-WR.

1991.<sup>403</sup> TWPC later applied for and was granted an easement for 30-inch pipelines known as the San Juan Laterals, to expire December 31, 2003.<sup>404</sup>

Although its easements were not scheduled to expire until the end of 2003, TWPC began the renewal process in 1998. TWPC applied for one grant to cover all of its easements over Navajo Nation trust lands, indicating that it would file a separate application for allotted lands.<sup>405</sup> In 1998, TWPC hired Winius Realty Analysts to conduct an appraisal, and the BIA reviewed this document in March 1999. Leonard Jones, BIA Staff Appraiser, explained that Winius Realty had made its estimates of market value—ranging from \$10.69 to \$14.40 per rod—as of April 22, 1998. “This Review Appraiser does not agree with the estimates of market values,” Jones wrote. He found them to be “below market rent” and recommended \$25 per rod as “an acceptable range of fair market value based upon the current going rate of \$25 per lineal rod being paid for similar easements across Navajo Nation lands for 20 year terms.”<sup>406</sup> It is not clear what effect, if any, Jones’ review had on negotiations.

Because of “the numerous complex and difficult issues that currently exist respecting the development of new terms and conditions pertaining to rights-of-way,” TWPC and the Navajo Nation decided in 2001 to extend the existing easements, thereby “defer[ring] these issues.” Signed in May 2001, the Extension Agreement extended the tenure of TWPC’s easements, including existing pipeline rights-of-way and all associated facilities (except for compressor stations covered by other agreements), to November 18, 2009. Consideration took the form of an initial payment, followed by six annual payments for calendar years 2004-2009. The annual

---

<sup>403</sup> Resolution of the Resources Committee of the Navajo Nation Council, RCF-021-91, February 28, 1991; and Peterson Zah to Walter Mills, March 4, 1991, both in File 4616-P3, Land Right-of-Way, CY-1991, Transwestern Pipeline Company, 30” OD Steel-Welded Natural Gas Pipeline [Loop E Extension], unlabeled box, Room 128, BIA-WR.

<sup>404</sup> Peterson Zah, President, to Walter Mills, Area Director, July 9, 1991, File 4616-P3, Land Right-of-Way Files, CY-1991, Transwestern Pipeline Company, 30” OD Steel-Welded Natural Gas Pipeline [Loop E Extension], unlabeled box, Room 128, BIA-WR. Grant of Easement for Right-of-Way, E-NM-91-022, September 6, 1991, provided by Navajo Nation Department of Justice. This easement was amended in 1999 to add 1,527 feet required for construction of the pipeline. Amendment No. One (1), Grant of Easement for Right-of-Way, E-NM-91-022a, April 29, 1999; and Resolution of the Resources Committee of the Navajo Nation Council, RCF-24-99, February 25, 1999, both in File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion Across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR.

<sup>405</sup> David W. Sinclair to Elouise Chicharello, Acting Area Director, October 6, 1998, File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion Across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR.

<sup>406</sup> Appraisal Review, NAV-29-99, AO-16-99, March 5, 1999, File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion Across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR.

payments, according to the agreement, “shall be adjusted upwards, but shall not be decreased” using the CPI.<sup>407</sup> The Tribal Resources Committee approved the extension agreement on May 10, 2001.<sup>408</sup> Two months after the parties signed the agreement, the BIA Acting Regional Director approved the extension and amended TWPC’s easements to reflect the 2009 expiration date.<sup>409</sup>

In October 2004, the parties amended the 2001 agreement to allow TWPC an easement to construct, operate, and maintain a new 36-inch pipeline known as the San Juan Lateral Loop Line, 21,415 rods in length. Consideration was monetary, to be delivered in two payments.<sup>410</sup> The easement would expire on November 18, 2009, along with TWPC’s other rights-of-way. In communicating this information to the BIA Regional Director, Navajo President Joe Shirley, Jr., wrote, “The Navajo Nation is of the opinion that the total consideration to be paid by TWPC for this right-of-way will significantly exceed any value to be appraised by the Bureau of Indian Affairs.”<sup>411</sup> The Resources Committee approved the amendment on October 14, 2004.<sup>412</sup> The BIA approved the resulting easement on November 8, 2004, at a length of 66.33 miles.<sup>413</sup> The 2009 expiration date remains in effect for TWPC’s easements.

The failure to renew the original easement before it expired in 1979 appears to have affected negotiations between the Navajo Nation and TWPC since the 1980s. TWPC applied for a renewal of its 1984 easements well before they were due to expire, and although the parties did

---

<sup>407</sup> Extension Agreement, May 1, 2001, File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR. Note that the Nation requested BIA approval of the Extension Agreement. Akhtar Zaman, Minerals Department, to Genni Denetsone, Regional Realty Officer, May 16, 2001, *ibid*.

<sup>408</sup> Resolution of the Resources Committee of the Navajo Nation Council, RCMY-76-01, May 10, 2001, provided by Navajo Nation Department of Justice.

<sup>409</sup> Genni Denetsone, Acting Regional Director, to David W. Sinclair, July 12, 2001, File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR.

<sup>410</sup> Amendment No. 1 to the Extension Agreement of May 11, 2001, October 15, 2004, provided by Navajo Nation Department of Justice.

<sup>411</sup> Joe Shirley, Jr., to Elouise Chicharello, Regional Director, October 15, 2004, File Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR. Transwestern’s application to the BIA for this easement is dated July 6, 2004. Application for Pipeline Rights-of-Way, July 6, 2004, *ibid*.

<sup>412</sup> Resolution of the Resources Committee of the Navajo Nation Council, RCO-55-04, October 14, 2004, provided by Navajo Nation Department of Justice.

<sup>413</sup> Grant of Easement for Right-of-Way, E-NM-05-06, November 8, 2004, Transwestern Pipeline Company, 30” O.D. Steel Welded Natural Gas Company Expansion across NTTL, McKinley County, NM, file drawers, Room 123, BIA-WR.

not achieve a 20-year renewal, they agreed to extend the easements to 2009, thereby avoiding expiration. In a narrative submitted for the Section 1813 study, NNDOJ expresses satisfaction with how negotiations have unfolded with TWPC.<sup>414</sup> Records connected with El Paso Natural Gas Company (El Paso) pipelines on the Navajo Reservation suggest that the Nation has used the TWPC deals as a benchmark for its negotiations with El Paso.

### El Paso Natural Gas Company San Juan Line

El Paso's pipeline system on the Navajo Reservation is probably the largest network of energy rights-of-way on Indian land. El Paso's pipelines also cross a number of other reservations in the Southwest, including Southern Ute (see above), Laguna Pueblo, Acoma Pueblo, Gila River, Tohono O'odham, and San Carlos Apache. El Paso's presence on the Navajo reservation dates to the 1950s. While records collected are thin for the 1950s and 1970s, they provide a good window on Navajo right-of-way negotiations in the 1980s. This case study focuses on El Paso's principal pipeline corridor across the reservation, which encompasses the San Juan main line and a number of loop lines.

El Paso first applied for a 218-mile right-of-way on July 20, 1950. The purpose was to construct a 24-inch natural gas pipeline

from a point in San Juan County, New Mexico, to a point near the California State Line for delivery to Pacific Gas and Electric Company for further transmission to the San Francisco Bay Area.

The application offered \$1.00 per rod (\$320 per mile) in damages, plus additional actual damages caused by construction over agricultural or forested lands.<sup>415</sup> The collected records do not reveal any details about how the approval process proceeded.

Over time, El Paso expanded its pipeline system on the reservation, making "major additions" in 1953, 1955, and 1965. The additions included loop lines, gathering lines, branches, compressor stations, and other facilities. The San Juan corridor eventually included the 24-inch main line and sections of loop line at 24, 30, and 34 inches in diameter.

---

<sup>414</sup> Narrative History of Transwestern Right-of-Ways, <[http://1813.anl.gov/documents/docs/NavCom/D-2-NN\\_Case\\_Study-Transwestern.pdf](http://1813.anl.gov/documents/docs/NavCom/D-2-NN_Case_Study-Transwestern.pdf)> (June 16, 2006).

<sup>415</sup> [Right-of-Way application], July 20, 1950, File 50086 Navajo, Room 517, EPWP. Better copy at File 1942-1994 1 of 2, Room 123 [floor], BIA-WR.

On December 21, 1971, El Paso applied for a renewal of rights-of-way for the main line, its loop lines, other segments of large-diameter line, and various related facilities (such as radio stations and microwave stations). The application indicates that the main line and loop lines were due to expire on January 10, 1972, while other lines and facilities had later expiration dates. Although the expiration dates ranged from 1972 to 1986, El Paso submitted them as a group in order to synchronize their tenures. One source attributed this to the Navajo Tribal Council Chairman's desire to establish a single expiration date for all El Paso easements.<sup>416</sup>

On behalf of El Paso, J. N. Weems conducted an appraisal "of the economic or fair rental of various rights of way within or near the Navajo Indian Reservation," submitted to the BIA on December 10, 1971. His appraisal covered the San Juan, Blanco-Gallup, Gallup, and Winslow pipelines, along with stations for radios, generators, cathodic protection, and meters. Weems deemed the "highest and best use" of most of the land to be livestock grazing, although irrigated farmland and land with recreational potential were also present.

Weems' method for determining the value of the easements was complex, and its logic is not entirely clear from the appraisal report. He first calculated the fee simple market value, which he described as "the price at which a willing buyer and seller would agree without abnormal pressure for the absolute ownership of the property with both parties being well informed." To come up with this value, Weems used sale prices of properties comparable to the subject lands. He then broke the right-of-way into segments based on the type of land traversed, arriving at estimates of \$25 to \$670 per acre for the different land types.

After establishing the fee value, Weems discounted it by 50 percent because, in his opinion, "about 50% of the fee value is taken" by the right of way. Weems also concluded that 8 percent of the value of rights taken constituted a fair rent on the land. Using those two percentage factors, Weems calculated an appropriate payment for each segment of the right-of-way.<sup>417</sup> The available version of the appraisal report does not include a total estimate of the easement's value,

---

<sup>416</sup> Application for Renewal of Right of Way, December 21, 1971, File TR-4616-P5 Indian Right-of-Way and Easements, El Paso Natural Gas Company, Project No. 850333, Cabinet A, Room 128, BIA-WR. Thomas Wright to File, February 29, 1984, File Navajo Indians—Correspondence, File 4 of 6, Room 517, EPWP. Whether or not he did so in early 1970s, the Tribal Chairman did request in 1981 that pending easement applications be set to expire on the same date as the major renewal granted in 1973. Peter MacDonald to David Larson, March 11, 1981, File Navajo Indian Status, File 11b of 12, General, Room 517, EPWP.

<sup>417</sup> Appraisal Report, J.N. Weems, December 10, 1971, File R/W 72531 Navajo Indian Reservation Renewal, San Juan Lines + Appurtenances, Drawings Only, Box 747229, EPWP.

but the El Paso official who transmitted Weems' report said that Weems put the total value of the rights-of-way at \$50,769.<sup>418</sup> A BIA appraiser reviewed Weems' appraisal and recommended a higher figure of \$125,272 for the tribal lands involved.<sup>419</sup>

After "lengthy" negotiations (in the words of an El Paso official), the renewals were divided into two easements.<sup>420</sup> The San Juan main line and its first and second loops, along with other sections of line and associated facilities, were renewed as R/W 72531 for a term lasting from January 11, 1972, to March 9, 1986, with an option to renew for an additional 20-year period.<sup>421</sup> This easement covered a total of 264.966 miles of tribal land and 17.695 miles of allotted land in exchange for consideration of \$260,000, and it was "subject to the terms and conditions of consent of the Navajo Tribe, signed August 17, 1972," which were appended to the easement. The terms and conditions provided that consideration for the renewal term would be \$276,000, to be "adjusted upward in the event of an increase in the CPI . . ." with readjustments every five years. The BIA Assistant Area Director approved the easement on March 30, 1973.<sup>422</sup> Other pieces of El Paso's pipeline system were renewed as R/W 73632 and its supplements, which were approved in 1979 and 1980.<sup>423</sup> Consideration for R/W 73632 was apparently included in the \$260,000 offered for R/W 72531. R/W 73632 did not include the same renewal provisions as R/W 72351, which ultimately complicated renewal negotiations in the 1980s.

---

<sup>418</sup> Roland Tayler to Graham Holmes, January 3, 1972, File TR-4616-P5 Indian Right-of-Way and Easements, El Paso Natural Gas Company, Project No. 850333, Cabinet A, Room 128, BIA-WR.

<sup>419</sup> Edward Raymond to Area Real Property Management Officer, February 18, 1972, File TR-4616-P5 Indian Right-of-Way and Easements, EL Paso Natural Gas Company, Project No. 850333, Cabinet A, Room 128, BIA-WR.

<sup>420</sup> Wayne Stephens to File, June 23, 1982, File R/W 73632 Renewal—Navajo Indian Reservation San Juan Lines, et al (R/W 53197) Application File, Working Files of Joe Martinez, Room 517, EPWP. Thomas Wright to File, February 29, 1984, File Navajo Indians—Correspondence, File 4 of 6, Room 517, EPWP.

<sup>421</sup> It is not clear why the term of the renewal was less than 20 years. El Paso's application requested a term of 20 years to expire on January 10, 1992. Among the renewals on this application, the latest expiration date is March 9, 1986, which may be the source of the ultimate expiration date for the easement that was ultimately granted. Application for Renewal of Right of Way, December 21, 1971, File TR-4616-P5 Indian Right-of-Way and Easements, El Paso Natural Gas Company, Project No. 850333, Cabinet A, Room 128, BIA-WR.

<sup>422</sup> Grant of Easement for Right of Way, No. 50086, et al., March 30, 1973, File Misc—1973 Renewals, Room 517, EPWP.

<sup>423</sup> 1986 Navajo Indian Land Renewal, November 1, 1983, File R/W 83057 Navajo Renewal Negotiations (3/9/86) 1983 Correspondence, Room 517, EPWP.

The parties began planning for the 1986 renewal as early as 1981, agreeing to begin negotiations in January 1982.<sup>424</sup> Because the Navajo Nation had succeeded in reaching a throughput agreement with Four Corners and had made a similar demand of TWPC, C. S. Laman of El Paso's Right of Way Department anticipated that the Navajo Nation would follow the same strategy for El Paso's 1986 renewal. Laman doubted that the Navajo Nation would accept an offer based on a formal appraisal of the land's value.<sup>425</sup> An undated document indicates that El Paso staff contemplated alternatives to consideration based solely on land value, such as assisting the tribe in developing its energy resources and making contributions to Navajo schools.<sup>426</sup> During the 1980s renewal negotiations, the Navajo Nation lobbied hard for a throughput agreement, while El Paso worked just as hard to avoid one.<sup>427</sup> This difference in goals may have prolonged the negotiations.

The Navajo Nation had been advocating a throughput agreement with El Paso at least since September 1983.<sup>428</sup> The Navajo Nation submitted its first formal proposal to El Paso on April 9, 1984, which included an annual payment to the scholarship fund and annual payments based on throughput.<sup>429</sup> El Paso apparently submitted appraisals at this stage, and they may have later become the basis for appraisals submitted in 1985. The value submitted, therefore, may have been \$15 per rod. Whatever the appraised value, the BIA deemed it too low and called for a payment of \$20 per rod. In advocating that figure, the Acting Assistant Area Director explained, "We have set a minimum based on the highest settlements and independent value estimates." He continued,

---

<sup>424</sup> C.S. Laman to File, February 18, 1982, File R/W 83057 Navajo Renewal Negotiations (3/9/86) 1983 Correspondence, Room 517, EPWP. See also Peter MacDonald to David Larson, March 11, 1981, File Navajo Indian Status, File 11b of 12, General, Room 517, EPWP.

<sup>425</sup> C.S. Laman to File, February 18, 1982, File R/W 83057 Navajo Renewal Negotiations (3/9/86) 1983 Correspondence, Room 517, EPWP.

<sup>426</sup> Undated document, no title, File R/W 83057 Navajo Renewal Negotiations (3/9/86) 1983 Correspondence, Room 517, EPWP.

<sup>427</sup> See, for example, Wayne Stephens to Harold Tso, July 2, 1984, and Harold Tso to Wayne Stephens, July 5, 1984, both in File Abstracter's Certificates dated June 11, 1965, Room 517, EPWP.

<sup>428</sup> Wayne Stephens to Richard Morris, September 19, 1983, File Navajo Indians—Correspondence, File 3 of 6, Room 517, EPWP. As early as March 1982, El Paso thought that the Nation would demand compensation based on throughput. C. S. Laman to Distribution, March 26, 1982, *ibid*.

<sup>429</sup> Navajo Nation's Proposal to El Paso Natural Gas Company (EPNG) for the Renewal of Natural Gas Pipeline Rights-of-Way, ca. April 9, 1984, File Abstracter's Certificates dated June 11, 1965, Room 517, EPWP.

The theory of “market value” requires the payment of the highest price based on similar transactions. Our trust responsibility to the Indian landowners also mandates we obtain the highest price being paid for similar right-of-way takings.<sup>430</sup>

El Paso’s internal memoranda indicate that the parties met a number of times and offers went back and forth. At one point in the negotiations, a member of the of the Navajo negotiating team asked how much it would cost El Paso to reroute the pipeline around the reservation. An internal El Paso memorandum notes,

This has been pushed by the Council of Energy Resource Tribes as a proper figure on which to base such negotiations. [El Paso attorney Thomas] Wright replied that EPNG believes that this position is outrageous and is one that cannot ultimately stand under the law.<sup>431</sup>

On December 19, 1984, El Paso Attorney Thomas Wright announced internally that the El Paso and the Tribe had reached agreement and they would meet in January “to reduce the agreement to writing.”<sup>432</sup> Harold Tso, who chaired the Navajo negotiating team, noted that the final agreement put to rest conflicting claims between the Navajo Nation and El Paso involving the renewal clause in R/W 72531. As adjusted, that clause would have required a payment of about \$600,000 to renew the easement. El Paso, according to Tso, took the position that the \$600,000 payment would also renew R/W 73632, but the Navajo Nation had objected. In addition, the Nation believed that El Paso had agreed to renegotiate consideration for all its rights-of-way.<sup>433</sup> El Paso argued that parties had intended for R/W 73632 to be renewable under the terms in R/W 72531, but the BIA had erred in putting a different renewal provision in R/W 73632.<sup>434</sup>

The agreement, which disposed of this dispute, provided for an initial payment of \$2 million to the Nation when the document was signed, followed by 20 annual payments of \$1.35 million, adjusted every three years according to the CPI. The deal also allowed El Paso to acquire an additional 15 miles of rights-of-way for gathering lines. “No aspect of Navajo sovereignty has

---

<sup>430</sup> Robert Archuleta to Wayne Stephens, June 22, 1984, File Abstracter’s Certificates dated June 11, 1965, Room 517, EPWP.

<sup>431</sup> Thomas Wright to W.A. Wise, July 9, 1984, File Abstracter’s Certificates dated June 11, 1965, Room 517, EPWP.

<sup>432</sup> Thomas L. Wright to Distribution, December 20, 1984, File Misc-1985 Renewal, Room 517, EPWP.

<sup>433</sup> Harold Tso to Members of the Navajo Tribal Council, no date, File Navajo Negotiations 1985, Room 517, EPWP.

<sup>434</sup> Thomas Wright to BIA Area Director, July 31, 1984, provided by the Navajo Nation Department of Justice.

been waived or compromised,” Harold Tso claimed. He also commented that the agreement “compares favorably” with the 1984 TWPC deal. Finally, Tso stated, “We believe that this agreement is a good agreement and recommend that it be approved by the Navajo Nation.”<sup>435</sup> The Economic and Community Development Committee and the Resources Committee of the Tribal Council issued a joint resolution on January 15, 1985, recommending approval of the deal with El Paso, and the Advisory Committee did the same on January 17, also authorizing the Tribal Council Chairman to sign the document.<sup>436</sup> On January 29, 1985, Chairman Peterson Zah representing the Navajo Nation and attorney Wayne Stephens representing El Paso signed the agreement.<sup>437</sup>

Although compensation terms had already been determined, El Paso did not submit its official renewal applications until May 8, 1985.<sup>438</sup> El Paso also provided appraisals, although it is unclear what date El Paso submitted them. The appraisals, conducted by Leonard Lord, estimated the value of the easements at \$15 per rod and referred to schedules and sales transaction data submitted with easement applications in 1983.<sup>439</sup> In August 1985, Robert Pencall of the BIA reviewed Lord’s appraisals. Pencall noted that other pipelines had garnered \$20 to \$40 per rod, significantly more than Lord’s estimate of \$15 per rod. Pencall also calculated that the terms of compensation under the renewal agreement signed by El Paso and

---

<sup>435</sup> Harold Tso to Members of the Navajo Tribal Council, no date, File Navajo Negotiations 1985, Room 517, EPWP.

<sup>436</sup> Joint Resolution of the Economic and Community Development Committee and the Resources Committee of the Navajo Tribal Council Recommending the Approval of the Proposed Right-of-Way Agreement with the El Paso Natural Gas Company, January 15, 1985, File Navajo Negotiations 1985, Room 517, EPWP. Resolution of the Advisory Committee of the Navajo Tribal Council, ACJA-11-85, January 17, 1985, File 4616-P3, Land Right-of-Way Files, FY-85, El Paso Natural Gas Company R/W 850329, Room 128, BIA-WR. The Advisory Committee’s resolution suggests that approval of the agreement ultimately rested with the Tribal Council, but there was no resolution of the full council among the records collected.

<sup>437</sup> Terms and Conditions for the Renewal of El Paso Natural Gas Company Pipeline Rights-of-Way, January 29, 1985, File 4616-P3, Land Right-of-Way Files, FY-85, El Paso Natural Gas Company R/W 850329, Room 128, BIA-WR.

<sup>438</sup> Kenneth Steelhammer to Wayne Stephens, May 15, 1985, and K.L. Steelhammer to File, May 5, 1985, both in File R/W 850328 Navajo Indian Renewal: Tribal Lands—Plains—San Juan Lines et al, unlabeled box, Room 517, EPWP.

<sup>439</sup> See, for example, Appraisal of Right of Way (Navajo Indian Lands), Renewal, April 15, 1985, File R/W 850329 1986 Navajo Ind. Res. Renewal; Tribal, San Juan Main Line System, unlabeled box, Room 517, EPWP.

the Navajo Nation worked out to about \$78 a rod. He thus characterized the settlement as “higher than the highest off-reservation settlements” and recommended its approval.<sup>440</sup>

The BIA approved the renewals on October 18, 1985, under the terms of the agreement between El Paso and the Navajo Nation. The renewals all bore 20-year terms. Instead of combining everything into one easement, the 1985 renewals were divided into a number of different easements, separating tribal lands from allotments, transmission from gathering lines, and major trunk/loop systems from one another. (El Paso later sold its interest in the gathering lines.) For example, Right-of-Way No. 850239 encompassed the 24-inch San Juan Line and its several loop lines, plus “necessary appurtenances,” crossing 205.93 miles of tribal trust lands.<sup>441</sup>

In the years that followed, the Navajo Nation and El Paso negotiated various amendments to the 1985 agreement, allowing El Paso to acquire additional rights-of-way. For example, Amendment No. 2, dated August 7, 1989, gave El Paso the option to acquire up to 12 miles of rights-of-way for loop lines. El Paso expressed its intent to exercise the option in July 1990, obtaining 12.221 miles of right-of-way for \$560,429.90.<sup>442</sup> Although the easements granted under Amendment No. 2 originally bore an expiration date of March 17, 2011, they were amended to expire on October 17, 2005, to coincide with the grants made under the 1985 agreement.<sup>443</sup> El Paso and the Navajo Nation are currently negotiating renewals of El Paso’s easements. Although the October 17, 2005, expiration date has now passed, the parties have agreed to continue the easements through December 31, 2006.<sup>444</sup>

The negotiations between the Navajo Nation and El Paso in the 1980s indicate that one company’s renewals cannot be completely understood without looking at the Tribe’s experiences with other companies. The Four Corners and TWPC agreements appear to have influenced the

---

<sup>440</sup> Review Statement, SPEC. NAV.-47-85, AO-92-85, August 21, 1985, File 4616-P3, FY-85, Land Right -of-Way Files, El Paso Natural Gas Company, R/W 850329, file cabinets, Room 128, BIA-WR.

<sup>441</sup> Renewal, Grant of Easement for Right-of-Way, No. 850329, October 18, 1985, File R/W 850329 1986 Navajo Ind. Res. Renewal; Tribal, San Juan Main Line System, unlabeled box, Room 517, EPWP.

<sup>442</sup> Alan Zinter to Area Real Property Management Officer, July 27, 1990, File R/W 890609 34” O.D. Loop Line from Blanco Plt. to Gallup Plant San Juan Co., NM, File 1 of 2, unlabeled box, Room 517, EPWP.

<sup>443</sup> Grant of Easement for Right-of-Way, No. 890609, March 18, 1991, and Amendment No. One, Grant of Easement for Right-of-Way, No. 890609, May 10, 1991, both in File R/W 890609 34” O.D. Loop Line from Blanco Plt. to Gallup Plant San Juan Co., NM, File 1 of 2, unlabeled box, Room 517, EPWP.

<sup>444</sup> “El Paso Natural Gas Company and Navajo Nation Announce Interim Arrangement to Extend Right of Way,” January 17, 2006, <<http://investor.elpaso.com/phoenix.zhtml?c=97166&p=irol-newsArticle&ID=804782&highlight=Navajo>> (June 14, 2006).

types and levels of compensation that the Navajo Nation sought from El Paso. The El Paso examples also shows that, even though tribes and companies sometimes experience protracted negotiations, they can eventually reach consensus about right-of-way compensation.

### Summary

The four Navajo case studies indicate that the Nation has taken a prominent role in negotiations since at least the late 1950s. Although original easements were negotiated individually, renewals since the 1970s have generally consolidated rights-of-way into a single package. Subsequent easements negotiated with the same company have been assigned the same expiration date as those in the larger package.

Compensation for Navajo easements in the 1950s was specified as a dollar-per-rod amount for damages. It appears that starting with the 1972 El Paso renewal, compensation changed to a lump sum, often payable in installments adjusted according to the CPI. The official easement application process still requires companies to submit appraisals, which the BIA continues to review. While the appraisers generally make estimates of value using sales of comparable properties, the compensation agreed to for Navajo easements has been well above fee simple values since the 1970s. The records collected do not reveal what method, if any, the Navajo Nation has used to determine its desired right-of-way compensation. They do show that the Navajo Nation has been largely unsuccessful at obtaining consideration in alternative forms, such as throughput arrangements, for the major rights-of-way across the reservation.

## Summary

The history of energy rights-of-way on the Uintah and Ouray, Southern Ute, Morongo, and Navajo Indian Reservations reveals general trends in the negotiation and management of easements over Indian lands. In particular, negotiations on these reservations shed light on changes in amount and types of compensation, and on the role of tribal consent in the negotiation process.

Compensation in the 1950s and 1960s generally consisted of damages calculated on a per-rod or per-acre basis. In 1968, the revised federal regulations specified that consideration “shall be not less than the appraised fair market value of the rights granted, plus severance damages, if any, to the remaining estate.”<sup>445</sup> Appraisals had been used in the right-of-way approval process before 1968, but the language of the new regulation may have changed the methods used to appraise rights-of-way. Appraisers (hired by energy companies) developed various methods for determining “fair market value of the rights granted,” but generally they calculated the fee value of the land using sales of comparable lands, and then they discounted that amount by some percentage because the lands involved were being used, not sold. The BIA usually either reviewed the company’s appraisals or conducted its own. In these reviews, BIA appraisers determined fair market value through using comparable easements as a standard and through determinations of the land’s sale value based on its highest and best use. Some tribes, such as the Southern Ute, do not require appraisals for tribal lands, mainly because the tribe itself has determined what the compensation rates should be. Currently, tribes such as the Morongo Band favor appraisal methods that take the revenue-generating potential of the land into account, rather than considering only the sale value of the land.

Starting in the 1980s, types of consideration for energy rights-of-way began to vary. Per-rod or per-acre rates were replaced with annual lump payments, compensation based on throughput, and/or tribal ownership interests (particularly for pipelines). Compensation packages have also included donations to tribal scholarship funds and options to purchase service from the energy companies. One right-of-way on the Navajo Reservation involved a land exchange as

---

<sup>445</sup> 33 FR 19807 (Section 161.12).

compensation, while the Southern Ute sometimes negotiated for joint ventures or for outright ownership in pipelines. Types of consideration have depended upon the particular tribe and companies involved in the negotiations.

The Act of February 5, 1948, required tribes to be involved in the approval process by granting their consent to easements if they were organized under one of three statutes. Interior regulations that followed the 1948 Act required consent of all tribes, not just those organized by statute. The examples above involve two tribes organized under the Indian Reorganization Act of 1934 (the Ute Indian Tribe and the Southern Ute Indian Tribe) and two that are not organized (the Morongo Band of Mission Indians and the Navajo Nation). The case studies indicate that the BIA has had one administrative approach to all tribes, regardless of whether or not they are organized under the IRA.

In providing their consent, the four tribes involved in these case studies have participated in negotiations to varying degrees. The Navajo Nation began asserting its interests in the 1950s or earlier, as did the Morongo Band (albeit with limited success), while the Southern Ute Tribe and the Ute Indian Tribe made that move in the 1970s and 1990s, respectively. All four of the tribes now negotiate rights-of-way directly with the energy company involved, while also continuing to ratify agreements through the passage of tribal resolutions. The BIA retains an oversight role and the ultimate authority to approve or reject the easement.

The current difficulties between tribes and energy companies are not the first to surface, and they will not likely be the last. But the examples above demonstrate that mutually satisfactory outcomes are possible, although they do not necessarily reveal the recipe for success.

## Bibliography

### Unpublished Documents

- Administrative Records of El Paso Western Pipelines. Room 517. El Paso Western Pipeline, Colorado Springs, Colorado.
- Records of the Energy and Minerals Department, Ute Indian Tribe. Fort Duchesne, Utah.
- Records of Maynes, Bradford, Shipps, and Sheftel, LLP. Durango, Colorado.
- Records of the Minerals Department, Navajo Nation. Window Rock, Arizona.
- Records of the Navajo Nation Department of Justice. Window Rock Arizona.
- Records of Real Estate Services, Navajo Regional Office, Bureau of Indian Affairs. Window Rock, Arizona.
- Records of the Realty Department, Morongo Band of Mission Indians. Banning, California.
- Records of the Realty Office, Southern California Agency, Bureau of Indian Affairs. Riverside, California.
- Records of the Realty Office, Southern Ute Agency, Bureau of Indian Affairs. Ignacio, Colorado.
- Records of the Realty Office, Uintah and Ouray Agency, Bureau of Indian Affairs. Fort Duchesne, Utah.
- Records of the Southern Ute Growth Fund. Ignacio, Colorado.

### Personal Communications

- Woodard, Karen. Personal communication with David Strohmaier. May 5, 2006.
- Woodard, Karen. Personal communication with David Strohmaier. May 18, 2006.
- Woodard, Karen. Personal communication with David Strohmaier. June 5, 2006.

### Internet Sites

- Black Mesa Pipeline. “Major Long-Distance Slurry Pipeline Projects.”  
<[http://www.blackmesapipeline.com/slurry\\_lines.htm](http://www.blackmesapipeline.com/slurry_lines.htm)> (June 9, 2006).
- El Paso Corporation. “El Paso Natural Gas Company and Navajo Nation Announce Interim Arrangement to Extend Right of Way.” January 17, 2006. <<http://investor.elpaso.com/phoenix.zhtml?c=97166&p=irol-newsArticle&ID=804782&highlight=navajo>> (June 14, 2006).
- Energy Policy Act Section 1813: Indian Lands Rights-of-Way Study. “Comments and Information.”  
<<http://1813.anl.gov/documents/docs/ScopingComments/index.cfm>> (May 17, 2006).
- \_\_\_\_\_. “Case Study: APS 69 kV ‘Southern NN Border to Tuba City’ electric power line,” May 10, 2006. <[http://1813.anl.gov/documents/docs/NavCom/D-5-NN\\_Case\\_Study-APS.pdf](http://1813.anl.gov/documents/docs/NavCom/D-5-NN_Case_Study-APS.pdf)> (June 16, 2006).
- \_\_\_\_\_. Narrative History of Transwestern Right-of-Ways.  
<[http://1813.anl.gov/documents/docs/NavCom/D-2-NN\\_Case\\_Study-Transwestern.pdf](http://1813.anl.gov/documents/docs/NavCom/D-2-NN_Case_Study-Transwestern.pdf)> (June 16, 2006).

- \_\_\_\_\_. R. Allan Bradley to Darryl Francois, May 15, 2006.  
<[http://1813.anl.gov/documents/docs/ScopingComments/Questar\\_Southern\\_Trails\\_Pipeline.pdf](http://1813.anl.gov/documents/docs/ScopingComments/Questar_Southern_Trails_Pipeline.pdf)>  
(June 16, 2006).
- Jackson, Steve. “Rough Waters.” *Westword*. June 13, 1996. <[www.westword.com](http://www.westword.com)> (May 16, 2006).
- Kraker, Daniel. “The End of an Era: Mohave Generating Station’s Closure Saves Navajo and Hopi Water, but Leaves their Economies in Doubt.” *American Indian Report*, January 2006.  
<<http://web.lexis-nexis.com.weblib.lib.umt.edu:2048/universe/document?m=04550f7a63cfd>> (June 13, 2006).
- Lewis, David Rich. “Uintah-Ouray Indian Reservation.” *Utah History Encyclopedia*. Allan Kent Powell, ed. Online edition. <<http://www.onlineutah.com/uintah-ourayreservation/history.shtml>>.
- Lyons, Maurice. “Morongo Band of Mission Indians, Tribal Case Study: Section 1813 Report.”  
<[http://1813.anl.gov/documents/cocs/ScopingComments/MOR\\_5\\_14\\_1813\\_Case\\_Study\\_Final.pdf](http://1813.anl.gov/documents/cocs/ScopingComments/MOR_5_14_1813_Case_Study_Final.pdf)>  
(May 30, 2006).
- Navajo Nation Council. “Profile of the Navajo Nation.” <<http://www.navajonationcouncil.org/profile.htm>> (June 13, 2006).
- Southern Ute Growth Fund. “Mission & History.” <<http://www.sugf.com/about.htm>> (May 17, 2006).
- “Testimony of Neal McCaleb, Assistant Secretary-Indian Affairs, on Tribal Good Governance Practices and Economic Development Before the Committee on Indian Affairs, U.S. Senate.” July 18, 2001.  
<<http://indian.senate.gov/2001hrgs/tribalgov071801/mccaleb.PDF>> (February 16, 2005).
- Tierney, Susan F. and Paul J. Hibbard (Analysis Group) in Cooperation with the Ute Indian Tribe of the Uintah and Ouray Reservation. “Energy Policy Act Section 1813 Comments: Report of the Ute Indian Tribe of the Uintah and Ouray Reservation for Submission to the US Departments of Energy and Interior.” May 15, 2006. Copy at <<http://1813.anl.gov/documents/docs/ScopingComments/index.cfm>> (May 31, 2006).
- U.S. Department of Energy. Energy Efficiency and Renewable Energy. “Northern Ute Indian Tribe of the Uintah and Ouray Reservation: Atlas of Oil & Gas Plays.”  
<[http://www.eere.energy.gov/tribalenergy/guide/pdfs/uintah\\_ouray.pdf](http://www.eere.energy.gov/tribalenergy/guide/pdfs/uintah_ouray.pdf)> (April 4, 2006).]
- U.S. Department of Energy. Tribal Energy Program. “Navajo Tribal Utility Authority: Project Summary.” <[http://www.eere.energy.gov/tribalenergy/projects/fy05\\_ntua.html](http://www.eere.energy.gov/tribalenergy/projects/fy05_ntua.html)> (June 13, 2006).

## Statutes at Large

- Act of August 2, 1882 (22 Stat. 181).
- Act of August 5, 1882 (22 Stat. 299).
- Act of July 4, 1884 (23 Stat. 69).
- Act of January 17, 1887 (24 Stat. 361).
- Act of January 16, 1889 (25 Stat. 647).
- Act of February 23, 1889 (25 Stat. 684).
- Act of March 2, 1889 (25 Stat. 852).
- Act of January 12, 1891 (26 Stat. 712).
- Act of July 6, 1892 (27 Stat. 83).
- Act of June 6, 1894 (28 Stat. 87).
- Act of February 24, 1896 (29 Stat. 12).

Act of April 18, 1896 (29 Stat. 95).  
 Act of March 23, 1898 (30 Stat. 341).  
 Act of March 2, 1899 (30 Stat. 990).  
 Act of March 3, 1901 (31 Stat. 1058).  
 Act of February 28, 1902 (32 Stat. 43).  
 Act of March 11, 1904 (33 Stat. 65).  
 Act of March 4, 1911 (36 Stat. 1235).  
 Act of March 2, 1917 (39 Stat. 969).  
 Act of June 1, 1926 (44 Stat. 679).  
 Act of August 26, 1935 (49 Stat. 803).  
 Act of February 5, 1948 (62 Stat. 17).  
 Act of May 27, 1952 (66 Stat. 95).

## Federal Register

16 FR 8578.  
 22 FR 10581.  
 25 FR 7979.  
 33 FR 19803.  
 47 FR 13326.

## Regulations

25 CFR 169.

## Government Publications

*Handbook of North American Indians*. Vol. 8, *California* (ed. Robert F. Heizer). Vol. 10, *Southwest* (ed. Alfonso Ortiz). Vol. 11, *Great Basin* (ed. Warren L. D’Azevedo). Gen. Ed. William C. Sturtevant. Washington, D.C.: Smithsonian Institution, 1978, 1983, 1986.

Kappler, Charles J. *Indian Affairs: Laws and Treaties*. Vols. 1-5. Washington, D.C.: Government Printing Office, 1904-1941.

National Archives Microfilm Publication M-1011. *Superintendents’ Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1907-1938*. Roll 29 (Consolidated Ute), Roll 110 (Pueblo Bonito School), Roll 158 (Uintah and Ouray Agency).

Office of Indian Affairs. *Indian Land Tenure, Economic Status, and Population Trends*. Washington, D.C.: Government Printing Office, 1935.

U.S. Congress. House. *Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs*. 82d Cong., 2d sess. 1952. H. Rept. 2503.

U.S. Congress. Senate. *Assets of the Confederated Bands of Utes, Etc.* 56th Cong., 1st sess. 1900. S. Doc. 213.

- U.S. Congress. Senate Committee on Interior and Insular Affairs. *Indian Land Transactions: Memorandum of the Chairman to the Committee on Interior and Insular Affairs, United States Senate, An Analysis of the Problems and Effects of Our Diminishing Indian Land Base, 1948-57*. Washington, D.C.: Government Printing Office, 1958.
- U.S. Department of the Interior. *Annual Report of the Commissioner of Indian Affairs*. Washington, D.C.: Government Printing Office, 1901.
- \_\_\_\_\_. *Sixty-Eighth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*. Washington, D.C.: Government Printing Office, 1899.
- U.S. Department of the Interior. Bureau of Indian Affairs. *Annual Report on Indian Lands and Income from Surface and Mineral Leases*. Washington, D.C.: U.S. Department of the Interior, 1966-1971, 1973-1974.
- U.S. Department of the Interior. Bureau of Indian Affairs. *Annual Report of Indian Land and Income from Surface and Subsurface Leases*. Washington, D.C.: U.S. Department of the Interior, 1975, 1976, 1977, 1980, 1981.
- U.S. Department of the Interior. Bureau of Indian Affairs. *Annual Report of Indian Lands: Lands Under Jurisdiction of the Bureau of Indian Affairs*. Washington, D.C.: U.S. Department of the Interior, 1985.
- U.S. Department of the Interior. Bureau of Indian Affairs. Planning Support Group. *The Uintah and Ouray Indian Reservation: Its Resources and Development Potential*. Billings, Mont.: United States Department of the Interior, 1974.

## Dissertations and Theses

- Fanale, Rosalie A. "Navajo Land and Land Management: A Century of Change." Ph.D. diss., Catholic University of America, 1982.

## Articles and Papers

- Bean, Lowell John. "Morongo Indian Reservation: A Century of Adaptive Strategies." *World Anthropology: American Indian Economic Development*. Ed. Sam Stanley. 159-236. The Hague: Mouton Publishers, 1978.
- Jorgensen, Joseph G. "Sovereignty and the Structure of Dependency at Northern Ute." *American Indian Culture and Research Journal* 10, no. 2 (1986): 75-94.
- Osburn, Katherine Marie Birmingham. "The Navajo at the Bosque Redondo: Cooperation, Resistance, and Initiative, 1864-1868." *New Mexico Historical Review* 60 (October 1985): 399-413.
- Romeo, Stephanie. "Concepts of Nature and Power: Environmental Ethics of the Northern Ute." *Environmental Review* 9, no. 2 (1985): 150-170.
- Sensiba, Charles R. "Who's in Charge Here? The Shrinking Role of the Federal Energy Regulatory Commission in Hydropower Relicensing." *University of Colorado Law Review* 70 (Spring 1999): 603-640.
- Strong, William Duncan. "Aboriginal Society in Southern California." *University of California Publications in American Archaeology and Ethnology* 26 (1929): 1-358.

## Books

- Ambler, Marjane. *Breaking the Iron Bonds: Indian Control of Energy Development*. Lawrence: University Press of Kansas, 1990.
- Bailey, Garrick and Roberta Glenn Bailey. *A History of the Navajos: The Reservation Years*. Second paperback printing with a new preface by Garrick Bailey. Santa Fe, N.M.: School of American Research Press, 1986.
- Conetah, Fred A. *A History of the Northern Ute People*. Salt Lake City, Utah: Uintah-Ouray Ute Tribe, 1982.
- Correll, J. Lee and Alfred Dehiya. *Anatomy of the Navajo Indian Reservation: How it Grew*. Rev. ed. Window Rock, Ariz.: The Navajo Times Publishing Company, 1978.
- Goodman, James M. *The Navajo Atlas: Environments, Resources, People, and History of the Diné Bideyah*. Norman: University of Oklahoma Press, 1982.
- Iverson, Peter. *The Navajo Nation*. Albuquerque: University of New Mexico Press, 1981.
- Jorgensen, Joseph G. *The Sun Dance Religion: Power for the Powerless*. Chicago: The University of Chicago Press, 1972.
- Kelly, Lawrence C. *The Navajo Indians and Federal Indian Policy*. Tucson: The University of Arizona Press, 1968.
- Kluckhohn, Clyde and Dorothea Leighton. *The Navaho*. Cambridge, Mass.: Harvard University Press, 1948.
- Lewis, David Rich. *Neither Wolf Nor Dog: American Indians, Environment, and Agrarian Change*. Oxford: Oxford University Press, 1994.
- Osburn, Katherine M. B. *Southern Ute Women: Autonomy and Assimilation on the Reservation, 1887-1934*. Albuquerque: University of New Mexico Press, 1998.
- Shipek, Florence Connolly. *Pushed Into the Rocks: Southern California Indian Land Tenure, 1769-1986*. Lincoln: University of Nebraska Press, 1987.
- Simmons, Virginia McConnell. *The Ute Indians of Utah, Colorado, and New Mexico*. Boulder: University Press of Colorado, 2000.
- Tiller, Veronica E. Velarde, ed. *American Indian Reservations and Trust Areas*. Washington, D.C.: U.S. Department of Commerce, 1996.
- \_\_\_\_\_. *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations*. Albuquerque, N.M.: BowArrow Publishing Company, 2005.
- Young, Richard K. *The Ute Indians of Colorado in the Twentieth Century*. Norman: University of Oklahoma Press, 1997.

THIS PAGE INTENTIONALLY LEFT BLANK

## Appendix B

### EPAct Section 1813 Study Commenters

(*Commenter* is defined here as someone who submitted a comment in writing to the Departments. It does not include verbal comments made in pre-scoping telephone calls or at public meetings or government-to-government meetings.)

Affiliated Tribes of Northwest Indians  
Agua Caliente Band of Cahuilla Indians  
Ak Chin Indian Community Council  
Andrews Davis Corporation  
Appraisal Institute  
Arizona Corporation Commission  
Arizona Public Service Company  
Arizona Tribal Energy Association  
Arkansas Riverbed Authority  
Association of Oil Pipe Lines  
Association of Property Owners and Residents of the Port Madison Area  
Augustine Band of Cahuilla Indians  
Avista Utilities  
Bill Barret Corporation  
Birdbear, C.  
Blackfeet Nation  
Blackfeet Tribal Business Council  
Brooks, Steve  
Burton, Steven  
Chambers, Reid  
Cheyenne River Sioux Tribe  
Chickasaw Nation  
City of Toppenish (William Rogers)  
Colorado Office of Consumer Counsel  
Colorado River Indian Tribes  
Confederated Salish and Kootenai Tribes of the Flathead Nation  
Confederated Tribes of the Colville Reservation  
Confederated Tribes of the Goshute Reservation  
Confederated Tribes of the Umatilla Indian Reservation  
Confederated Tribes of the Warm Springs Reservation of Oregon  
Coquille Indian Tribe  
Cornell, Stephen  
Council of Energy Resource Tribes  
Dawson, Marlene  
Eastern Shoshone Tribe  
Edison Electric Institute  
El Paso Natural Gas Company  
Fair Access to Energy Coalition

Fallon Paiute-Shoshone Tribe  
Fond du Lac Band of Lake Superior Chippewa Indians  
Fond du Lac Reservation Business Committee  
Fuelleman, Lisa  
Frye, Paul  
Governor Bill Owens (Colorado)  
Governor Bill Richardson (New Mexico)  
Hardy, Rogers and Antonia  
Harvey, Carol  
Havens, Bill  
Honorable Ben Nighthorse Campbell  
Hopi Tribe  
Hualapai Nation  
Idaho Power Company  
Interstate Natural Gas Association of America  
Inter Tribal Council of Arizona  
Intertribal Monitoring Association on Indian Trust Funds  
Jemez Pueblo  
Jicarilla Apache Nation  
Kinder Morgan Energy Partners  
Kiowa Tribe  
Kooros, Ahmed  
Lac Courte Oreillies Band of Lake Superior Ojibwe  
Leech Lake Band of Ojibwe  
Mandan, Hidatsa and Arikara Nation  
Manzanita Band of Diegueno Mission Indians  
Marek, Joanna F.  
Meloy, Charles  
Montana Wyoming Tribal Leaders Council  
Morongo Band of Mission Indians  
National Congress of American Indians  
Navajo Nation  
New Mexico Oil and Gas Association  
Nez Perce Tribe  
Oneida Tribe  
Organized Village of Kake  
Paul, Chris A.  
Pechanga Band of Luiseno Mission Indians  
Plains Pipeline  
Public Service Company of New Mexico  
Pueblo de San Ildefonso  
Pueblo of Acoma  
Pueblo of Isleta  
Pueblo of Jemez  
Pueblo of Laguna  
Pueblo of San Felipe

Pueblo of Sandia  
Pueblo of Santa Ana  
Pueblo of Zia  
Quechen Indian Tribe  
Questar Southern Trails Pipeline Company  
Quileute Indian Tribe  
Rosebud Sioux Tribe  
Sac and Fox Nation  
Sachau, B.  
Salt River Pima-Maricopa Indian Community  
Salt River Project  
San Diego Gas & Electric/Southern Cal Gas Co  
San Xavier District of the Tohono O'odham Nation  
Santa Clara Pueblo  
Sempra Energy  
Senate Chamber, State of Colorado  
Senator Wayne Allard (Colorado)  
Seneca Nation of Indians  
Severud, Timm  
Shipps, Thomas H.  
Shoshone Business Council  
Shoshone-Bannock Tribes  
Skokomish Indian Tribe  
Southern Ute Indian Tribe  
St. Regis Mohawk Tribe  
Tanana Chiefs Council  
Taos Pueblo  
TDX Power (Ron Philemonoff)  
Tohono O'odham Nation  
Town of Aurelius (Edward Ide)  
Tribal Council of the Northern Cheyenne Tribe  
Tribes of the Mni Sose Intertribal Water Rights Coalition  
Tulalip Tribes  
Ute Energy  
Ute Indian Tribe of the Uintah and Ouray Reservation  
Ute Mountain Ute  
Western Business Roundtable  
White Mountain Apache Tribe  
Williams Energy  
Williams Four Corners LLC  
Yakima Nation  
Yazzie, Vincent  
Zuni Tribe

THIS PAGE INTENTIONALLY LEFT BLANK