



Public Scoping Meeting on Section 1813: March 7 & 8, 2006
Draft Meeting Summary

**Energy Policy Act 2005 — Section 1813 Study on
Indian Land Rights-of-Way**

Departments of Energy and the Interior

**Public Scoping Meeting – March 7-8, 2006
Adams Mark Hotel, Grand Ballroom II -- 1550 Court Place, Denver, Colorado**

Draft Meeting Summary

INTRODUCTION

Section 1813 of the Energy Policy Act of 2005 (P.L. 109-58) requires the Secretaries of the Department of the Interior and the Department of Energy (Departments) to conduct a study of energy related rights-of-way on Tribal lands. The Act requires that the study address four subjects:

1. An analysis of historical 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 to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land;
3. An assessment of Tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on Tribal land; and
4. An analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.

The Departments will consider Tribal and interested party comments in preparing a final report for delivery to Congress by August 7, 2006.

To help develop the report to Congress, the Departments conducted a 2-day nation-wide scoping meeting in Denver, Colorado on March 7 & 8, 2006. This meeting consisted of presentations from invited speakers, an open comment period, and work session discussions on the four subject areas of the study. During the meeting, participants were given four ways to provide input verbally and in writing: 1. verbal-through presentations from invited speakers, an open comment period, and work session discussions; 2. written-through a sticky note exercise – ideas, issues, concerns and possible paths forward were written down on sticky notes and posted by study subject area for everyone to review; 3. verbal-through individual conversations – several Department staff were available for individuals to relate their ideas which were written down and added to the sticky-note exercise; and 4. written- a written comment form designed for longer comments was available. Comments provided during day one - the presentations, open comment period, the sticky-note exercise, and written comment forms - were synthesized into a rough draft list of issues, concerns and alternatives used as a starting point for work session discussions on the second day of the meeting. This list was very raw for the purpose of being revised and discussed by the group. Some participants expressed concerns that the synthesis had eliminated

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important detail. The work sessions on day two modified and clarified the lists. The complete list of issues, concerns and alternatives will be used by the Departments as the study unfolds.

OVERVIEW

Woven throughout the course of the two days were comments, questions, and concerns that went to whether the study and the process as described in Section 1813 and the process as described in the December 2005 Federal Register notice was appropriate or necessary. These were tied to the totality of history and experience of Tribes and the Federal government. The meeting participants emphasized that the study of energy rights-of-way has to consider this historical context. Many Tribal speakers asserted that the study was itself evidence of a failure to understand and respect property rights and sovereignty. These two – protection of property rights and sovereignty – were paramount in the comments from Tribal members and Tribal advocates. Some questioned whether this was an exercise in asking Tribes to participate in developing the formula by which their lands would be condemned. Indian speakers indicated that absent a tax base, the ability to control and maximize Tribal assets, including Tribal lands, is essential to effective Tribal governance. Many expressed concern that Tribal consent is at risk and spoke of self-determination as a fundamental underpinning of effective right-of-way negotiation.

Tribal and non-Tribal speakers suggested that viable partnerships exist, that contracts are legally enforceable, and that failure to effectively negotiate agreements is the exception and not the rule. Some of these speakers suggested that negotiations built on mutual respect, shared risk and benefit, relationship building and decision making that accounts for the heart-mind-body-spirit are often successful.

Consumer advocates, energy company representatives and others spoke of the need for greater certainty in negotiations and of the increasing frequency of protracted negotiation. Many spoke of rising energy prices and the need to control costs in response to energy price increases. Some spoke of a need for a set of standards or, at least, standard methods, in right-of-way valuation. Interest in providing reliable, cost effective energy to consumers at reasonable rates was clearly expressed.

In response to the study itself, some speakers expressed concerns about fairness. Many worry that a skewed set of cases will produce a biased analysis. Some expressed the need for sufficient time to produce a viable report.

Some speakers offered optimism. Several comments went to the notion that creative problem-solving could lead to win-win solutions and move the conversation away from polarization and toward mutual benefit for all concerned: for Tribes, industry and the American public.

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Day I, March 7, 2006

PRESENTATIONS

The Departments selected a range of presenters to broadly reflect the different perspectives on the study in general and related to the four study subjects. The six presentations included:

1. former Senator Ben Nighthorse Campbell
2. Edison Electric Institute
3. Council of Energy Resource Tribes
4. Fair Access to Energy Coalition
5. Affiliated Tribes of Northwest Indians, and
6. Bonneville Power Association and Western Area Power Administration (*they split the time allowed for each presentation*)

For a list of presenters' names see appendix A; for a copy of the presentations please go to <http://1813.anl.gov/documents/index.cfm>.

Comments from the presentations were synthesized with other comments (verbal and written) into a list of issues, concerns, and possible paths forward/alternatives that served as the starting point for discussion during work sessions (see Work Session section, below).

The following is a list of key themes that were communicated by the presenters, not necessarily particular to the four subject areas of the study (see appendix D for full flip chart notes taken during the presentations):

- Relationships are important for future negotiations.
- It is imperative to respect Tribal sovereignty in building relationships.
- As the population grows, both for Tribes and the U.S., there is a need for economic and energy development opportunities.
- Consumers are demanding more energy from fewer foreign sources at reasonable rates.
- There is a common desire for predictability, certainty, objectivity, and stability in negotiations and valuation; as well as a desire for energy delivery and reliability at reasonable rates to consumers.
- History has created long standing distrust, and imbalance; Tribes have not always received fair compensation. Historic differences break down into clear stages -before 1871, between 1871 and 1948, and after 1948.
- The current negotiation system is effective for establishing fair market values and creative compensation scenarios. This raises a question about the need for the Section 1813 study.
- If the ability to negotiate compensation is removed Tribal economic growth will be stunted.
- Rights-of-way are very diverse; different in type/use, land rights, and terms and conditions. These differences need to be considered and make it very challenging to analyze historic rates of compensation or establish standard procedures.
- Fear and anxiety about:
 - o removing Tribal sovereignty/consent, not being able to negotiate for fair compensation;

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- the cost of moving and existing energy resource line/pipe if negotiations cannot be met; and
- the study leading in a direction worse than the status quo.

OPEN COMMENT PERIOD

The second half of day one was devoted to comments from individuals and organizations who expressed an interest in speaking either prior to the meeting or signed up to speak at the meeting. Individuals were given 5 minutes to share their issues, concerns, questions and possible paths forward on the study and the four subjects (see appendix B for a full list of speakers). It was noted that 5 minutes was not enough time for people to accurately reflect the history of the issues and their heightened level of frustration about the substance and the process. The challenge was to provide equal opportunities for all who wished to speak. Everyone who expressed an interest was called to speak and an opportunity at the end was given for any participant to spontaneously speak; 45 people spoke.

Speakers represented Tribes, utilities, power companies, Tribal organizations, energy organizations, elected officials, local business organizations, and individuals. Comments reflected the issues, concerns, questions and possible paths forward/alternatives for the four subjects of the study, as well as important elements of the context, history, case example and challenges related to the study.

The following is a list of some of the themes communicated (see appendix C for full flip chart notes taken during this session).

- Relationships are important in negotiation; building and maintaining trust will achieve successful business agreements; experience mutual respect for mutual benefit; all parties are part of the solution to energy development, economic development, mutual benefits, etc.
- Sovereignty is an integral part of the existence of the Tribes and the ability to govern and provide services
- Clear resolution processes is needed, if negotiations come to an impasse
- Control of Tribal assets is vital to Tribal economic growth
- Trust responsibilities need to be taken seriously - protect from encroachment on Tribal sovereignty; historic abuse of trust responsibility
- Current system works; “if ain’t broke, don’t fix it”; the system is satisfactory; unconvinced there is a need for change; majority of negotiations have been successful; no examples of interruption of service due to Tribes
- Concerns about the impacts to rate payers, increase of costs (incremental) and difficulty in renegotiating rights-of-way in recent years
- Concern about delivery of adequate and affordable energy; continued delivery at reasonable prices (this is currently being done)
- Creative solutions for compensation have been agreed to beyond monetary, including “shared net benefits”
- Concern that the term “energy right-of-way” is too broad; that the scope of the definition is vague and could lead to removal of Tribal lands

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- Tribes are beginning to develop energy resources for economic gain, eliminating consent is a threat to this development and gain
- Land is important beyond money and energy transportation; Tribes should assess culturally sensitive areas and be able to value their lands in negotiations with willing seller/willing buyer; Tribal lands are unique from non-Tribal lands
- History of distrust and undervaluation and the depth of the issues need to be considered. There needs to be a way to compensate for past undervaluation
- Lack of evidence to prove a casual relationship between consumer cost increases and Tribal negotiations
- Reluctance to participate in this study, which may be a step to removal of Tribal sovereignty/control over assets
- Time frame for the study is too short
- Concern that the definition of “energy related right-of-way is too broad and could lead to areas being taken from Tribal control

Day II, March 8, 2006

WORK SESSIONS

There were four work sessions for the four subject areas required by Section 1813. Session discussions began with a synthesized list of the issues, concerns, and possible alternatives or paths forward. The list was synthesized during the evening of day one from the comments provided on day one verbally (presentations and open comment speakers) or in writing (sticky-note exercise and written comment forms) by the Departments’ staff and consultants. The synthesized list was only a starting place for participants to add, modify and clarify; to build a more inclusive list. The draft list focused on the study’s four subject areas and did not include comments made about the context or other issues and concerns that are indirectly connected.

The following summary of issues, concerns and possible paths forward/alternatives reflect the suggested revisions, clarifications and expansions of the list discussed during each work session. This is not a final list. It is a starting point; draft ideas that will expand and unfold into the Section 1813 study (see appendix D for the full flip chart notes taken during the work session discussions). The issues and concerns raised that were not directly related to each of the study subject area are summarized in the Context & Other Issues, Concerns and Questions section below.

1. Analysis of Historic Rates of Compensation paid for energy rights-of-way on tribal lands

Issues identified included the fact that mistrust is a mutually experienced concern: for Tribes the starting point lies in historic undervaluation, and for industry this plays out primarily as it looks for certainty in the future. It was noted that useful information for this analysis included the what states receive in taxes from right-of-way holders and what money Tribes did *not* receive in the past due to undervaluation. Other prevailing themes included the observation that the status quo is sufficient, many rights-of-way are through historically/culturally sensitive areas which are priceless; and the need to look at the broader range of relationships in order to satisfy the needs of all parties.

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Concerns expressed about *how* the analysis is completed started with the need to clarify the scope: is it wellhead to burner tip? This affects fees, transmission capacity, equity of participation in programs, etc. Further, it is difficult to capture the variety and complexity of right-of-way types, timing in history and valuation methods; there is no central database of right-of-way transactions. Speakers expressed concern that inadequate time has been afforded by Congress to complete a thorough analysis. Related to this were concerns about undefined criteria for selection of, and potential for bias in selecting case studies. A balance would need to be struck vis-à-vis confidentiality protections and transparency; open records might violate existing contractual provisions. Finally, there was concern that the case study method does not address the heart, mind, body and spirit.

Several options for moving forward were explored. The first was a sampling of case studies, reflecting the best representation of the status quo from Tribes and industry, with a clear upfront disclaimer that qualifies the credibility of the method from which to extrapolate broader lessons or legislation. This could illustrate historical instances of injustices and recent successful negotiations. Concerns with this approach included the inability of this approach to adequately reflect the universe of diversity in play with respect to right-of-way types/uses, land uses, markets, etc. Further, using this type of snapshot would lead to decisions based on incomplete or inaccurate information. Concern was raised that the term “Energy right-of-way” is far too broad and needs to be narrowly defined and scoped for effective outcomes. Linked to this was the note that similar rights-of-way need to be analyzed for an apples-to-apples comparison. There is a need to scope the critical, fundamental issues prior to development of a case study. Finally, it was observed that subjectivity and bias will undermine the value of what Congress is seeking.

Other alternatives offered for consideration were looking at data submitted to support applications to the Federal Energy Regulatory Commission (FERC) for permits to construct new interstate natural gas pipelines which require submission of costs and includes a break out for rights-of-way cost (although not delineated for Tribal lands alone) or FERC data related to interstate eclectic transmission line construction. Other alternatives to the case study method included Tribes/utilities submitting all information on right-of-way renewals; a voluntary third party survey on renewals; a voluntary third party survey on rights-of-way believed to represent fair market value by Tribes and energy industry; a comprehensive study; a uniformly focused analysis on one type (e.g., pipelines); a review of existing databases; and a literature search of available data.

2. Sovereignty: *“assessment of Tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on Tribal land”*

The discussion focused on the need for agency officials and energy company representatives to understand the concept and demonstration of sovereignty and the need for the study to reflect that sovereignty is an integral part of Tribal existence, including how the Tribes exist in relation to the U.S. government and how they provide government services to Tribal members. The exercise of sovereignty through self-determination has benefited the Tribes and the American public through economic development and increased energy capacity. Tribal representatives see preservation of sovereignty as a fundamental principle in any study or solution.

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Sovereignty provides Tribes the capability to address environmental and cultural impacts of rights-of-way as well as address emergency preparedness. Tribal economic prosperity is linked to the exercise of sovereignty which allows Tribes the ability to make investment choices and create opportunities to address Indian land infrastructure needs. This is accomplished when Tribes manage all Tribal assets (minerals, access etc.) for the health and welfare of the tribe. Strengthening sovereignty has proved successful at strengthening Tribal capacity.

A major concern communicated during the discussion was that sovereignty has been eroded throughout history and that the study may be used as another step to further erosion. The concern is that if consent is changed for energy rights-of-way will it set precedent to remove consent in other areas. Sovereignty is constitutionally recognized and supported by many U.S. polices, executive orders, treaties and government leaders. A question was raised about the conflict between sovereignty and the Energy Policy Act provisions in Sections 1813 (this study) and Section 368 (transportation corridor programmatic Environmental Impact Statement (EIS)).

A lack of understanding about sovereignty has led to disrespect. The suggestion was made that new employees need to be educated about sovereignty and Tribal self-determination.

During the discussions in all the work sessions participants raised relevant policies regarding sovereignty. The following is a list of the policies mentioned:

- 9th circuit case ruling that right-of-way is the legal equivalent to fee land
- EAct 2005, Title V – Tribal Energy Resource Agreements
- Affirmations from U.S. presidents regarding sovereignty and self-determination in speeches
- DOE Policy
- Tribal self government act
- Clean Air Act
- Clean Water Act
- Emergency Planning and Community Right-to-Know Act
- National Historic Preservation Act
- Native American Graves Protection and Repatriation Act

3. Valuation Standards and Procedures: “*recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian Tribes for grants, expansions, and renewals of energy rights-of-way on Tribal land*”

Issues raised by participants included a need for objectivity, fairness, and certainty; and the need for valuation to be completed in a reasonable time frame. Valuation needs to account for the uniqueness of Tribal lands and Tribal spiritual values linked to the land. The focus needs to move beyond dollars to alternative methods to create win-win partnerships.

Concerns expressed included the difficulty of determining fair market value or beneficial use of land and concerns about whether fair market value (across the fence) would be an inadequate measure of the value of Tribal land. The participants discussed whether there should be a premium based on the difference between Tribal lands and other types of lands. They discussed

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whether there is a need for a standardized process and how such a process might address vastly different rights-of-way situations. There were many comments about why, if the current system is not broken, there is a need to create a new system. There was also a concern about what types of dispute resolution processes were available if negotiations reach an impasse and, if there was a standard process, would companies avoid Tribal negotiations.

Participants suggested many different appraisal and valuation procedures. The focus was on looking beyond the cash for rights-of-way to shared net benefit, non-cash transactions (land swaps, resource facilities or capacity) or wheeling charges on transmission lines. There should be consideration for the difference between negotiations for new rights-of-way and renewals of existing rights-of-way, possibly even creating two different processes. Valuation procedures need to address Tribes use of right-of-way payments as a revenue stream for government services (due to a lack of tax base).

There were concerns about the terms/timeframes for rights-or-ways. There was a concern about the stability/certainty of costs and therefore the need for longer terms. It can take a long time to build an agreement and if the terms are short there will be a level of uncertainty from agreement to agreement and parties may feel they are continually negotiating. With regards to perpetual rights-of-way, the concern was that if terms are in perpetuity that the U.S. government will divest those lands from sovereign rule.

4. Relevant National Energy Transportation Policy: “an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on Tribal land”

This discussion moved from relevant energy transportation policy to include policies related to sovereignty and self-determination (some of which is reflected in the Sovereignty section above). The following is a revised list of relevant national energy transportation policies for the Departments to consider (this is not a final list):

- EPLA 2005, Section 368 – designation of energy corridors on federal lands
- EPLA 2005, Title V – Tribal Energy Resource Agreements
- National energy security
- Energy reliability
- Economic impacts
- National Energy Policy of 2001 and supports executive orders
- Executive orders relating to Tribal consultation
- United States Codes sections 323 and 423
- Minerals Management Service transportation cost audit
- 2006 State of the Union address

Context & Other Issues, Concerns and Questions

Throughout the work session discussions, participants raised contextual, historic and other issues that significantly influence the study but are not directly related to the four subject areas. The

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following is a list of some of the other issues and concerns mentioned during the work session discussions.

- Question of whether there is a need to study a process that is not broken; “if it’s not broken, why fix it”
- Tribes wish to share in the benefits of rights-of-way and that fulfills Tribal economic development and leads to parity with the American economy and promotes overall public good
- Tribes feel blindsided by Section 1813
- Heritage is important
- Concern about escalating costs of rights-of-way
- Question about whether Tribal negotiation is the cause of consumer cost increases; assert there is no causal relationship between Tribal negotiation and increase in consumer costs
- Concern about the value of single issue legislation
- Concern about smaller Tribes being left out of the process
- Erosion of Tribal sovereignty
- Erosion of relationships by questioning a process that is working except for one case
- Decisions are lived with at the local level
- There are no guarantees that an energy company will not close (e.g., Enron)
- Tribes have different monetary needs than states/counties
- There is a failure to understand Indian rights and policies
- Rights-of-way have been negotiated with specific terms yet no guarantee of renewals.
- Indian policy goals are a public benefit, a public good; non Indians benefit from Tribal policies
- Possible ways to solve a negotiation impasse include FERC, DOI, DOE, judicial branch, mediation/alternative dispute resolution, and memoranda of agreement or understanding
- Tribes have been taken advantage of for the lack of access to geological expertise
- Sacred sites and sensitive environmental areas are important
- Recognize the unique government to government relationship between Tribes and the U.S. government, especially in energy matters
- Look at industry incomes
- Ensure Tribes are not penalized through undervalued rights-of-way and inaccurate transportation costs

NEXT STEPS

1. Post a meeting summary and notes on the <http://1813.anl.gov> website
2. Publish a Federal Register Notice and Tribal Leader Letter requesting comments on study content, and announcing the April meetings
3. Hold a public meeting (April)
4. Develop a draft report
5. Hold 3 regional Tribal consultations
6. Hold a public meeting to review the draft study
7. Prepare a final study report

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Appendix A: List of Presenters

- Former Senator Ben Nighthorse Campbell
- Edison Electric Institute – Meg Hunt
- Council of Energy Resource Tribes – David Lester and John Jurrius
- Fair Access to Energy Coalition – Nancy Ives and Tom Sansonetti
- Affiliated Tribes of Northwest Indians – Margaret Schaff
- Bonneville Power Association– Sonja Tetnowski & Western Power Association – Susan Starcevich

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Appendix B: List of participants who spoke during the open comment period

1. Ute Indian Tribes - Maxine Natchees
2. Berry Petroleum Corporation – Logan Magruder
3. Questar Corporation – Perry Richards
4. Black Feet Tribe/Golden Eagle Energy – Ted Bland
5. Warm Spring Tribe – Jim Noteboom
6. El Paso Western Pipelines – James Cleary
7. Crow Tribe – Cedric Black Eagle
8. Confederated Tribes of Salish & Kootenai Tribes – Brian Upton
9. Sonosky, Chambers – Doug Enderson
10. Eastern Shoshone Business Council – Kassel Weeks
11. Bill Barrett
12. Fondau Lac Reservation – Bruno Zagar
13. Giant Industries Arigopa, AZ – Luke Wethers
14. Colorado Petroleum Association – Stan Dempsey
15. Cherry Creek Investments – Sean Castle
16. Confederated Tribes of the Umatilla Reservation – Bill Quaempts
17. DRG Construction & Denver Metro Chamber of Commerce - Deidre Garcia
18. Interstate Natural Gas Association – Joan Dreskin
19. Jicarilla Apache Nation – Levi Pesata
20. Colorado Association of Commerce – Chuck Berry
21. Independence Institute – Jon Caldera
22. Morongo Band of Mission Indians – C. Morris Lyons
23. National Congress of American Indians – Jacky Johnson
24. Colorado Oil & Gas Association – Greg
25. Navajo Nation Oil & Gas Company – Paul Frye
26. Navajo Nation – Louis Denetsosie
27. Office of Colorado Governor Owens – Drew Bolin
28. Office of US Senator Wayne Allard
29. Oneida Tribe – Gerald Danforth
30. Public Service Company of New Mexico – Rob Roberts
31. Pueblo of Isleta – Robert Benavides
32. Pueblo of Sandia – Lynn Trujillo
33. Pueblo of Zia – Peter Pino
34. Shoeshone Bannock – Nancy Eschief Murillo
35. Southern Ute Indian Tribe – Chairman Clement Frost
36. Salt River Project – John Felty
37. Saint Regis Mohawk Tribe – James Ransom
38. White Mountain Apache Tribe – Amy Mignella
39. Dine Citizens Against Ruining Our Environment – Lori Goodman
40. Hobbs, Straus, Dean & Walker – Dean Suagee
41. Continental Divide Electric Cooperative – Bruce Prichard
42. Navajo Nation member – Carol Harvey
43. Confederated Tribes of Yakima – Fidelia Andy
44. Intertribal Council on Utility Policy – Terry Fredericks
45. Hopi Tribe – Lyrelle Hartway

**Appendix C: Flip chart notes taken during the presentations and open comment period
Day I – March 7, 2006: Presentation and Open Comment Period Flip Chart Notes**

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Opening Presentations

Still Desperate Needs

- Employment
- Healthcare
- Water Quality
- Legal Obligation to remedy

Section 1813 – Problem not there, arbitration should have taken care of the one case

Tribes – Involved in discussions and fair compensation

Self Determination and Compensation

Different rights-of-way (ROWs)

Right to exclude???

Migration of animals

Sovereignty – Consultation – not after the fact

Legislative Language Based on study – outcomes 1813 bad president

Constitution – for sovereignty Recognized

Same protection against condemnation as states

Time frame leaves too little opportunity to comment

Sacred number - 4

Foundation for Dialogue – mutually agreeable framework for compensation

Renewable Experience –

1. Uncertainty
 2. Higher fees than other land
 3. Lack of objectivity
 4. Short periods
-

Access limited in some cases – relationships important, want to respect tribal rights and sovereignty

Dew investments coming

Ability to make decisions

Companies avoiding tribal land if possible

Delivery, reliability, fair prices

Not seeking Eminent Domain

Objective, reasonable, fair market values, accepted appraisal me???

Certainty, stability, reasonableness

Direct service and Indirect (fees)

Access to investment linked to study – vehicle for dialogue – so all objectives realized

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Health transmission infract—tribal benefit from nat. Resources will work in dialogue with tribes and agencies

Confidential business info – companies and tribes

Provide confidential info to tribes from member survey

1813 Study questions fundamental principle underlying our right to exist our right to control our land

Tribe – companies are communicating Indian resources contributing to benefit of others

Most underserved – quality, access price

14% Lack regulated services

25% of tribe with most resources is not served

Historic imbalance – fear of repetition of transfer of ownership from public to private hands

Era of self-governing. And government to government relationships

Chaos – 1948

Diversity of circumstance – fix one problem create in justice elsewhere

Fair relations – stability

Across the fence was once our land that was taken from us

Population growth twice; Economic growth thrice

Revert to 19th century tactics if outside determination

Long-term economic stability

Max value of land – surface and mineral access is asset

Cost of governing; lack tax base

Lack of federal subsidy

Fed agencies fail to secure adequate value for access

Substantial assets, not obstacle

No interruption due to tribes

Emerging market – economic transition is fast growing

Taking power to negotiate away – chill economic growth

Example – Utah – Uintah Ouray

- Interconnect or R.O.W.
- Surface and mineral estate
- Jurisdiction is important
- Reg. and Unreg. Pipeline
- Wells and drilling

Across the fence valuing doesn't work

Difference in management issues across the fence

Compensate – access and management

Fund ongoing costs plus provide self determination

Natural gas market – less than 1% of cost is tribal ROW cost

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Availability and price
Fair process for negotiation
Two policies – self determination and provides energy security
Fair market value
Federal land examples

- objectivity
- transparency
- uniformity
- consistency

Not over fair market

Support self governance
Fear of retaliation
Encourage consumers to speak
1948, DOI Inter., consent by tribe
New and renewed
Compensation not clear
Unreasonable demands
Costs to consumers and businesses
Unbalanced contracts
Just and reasonable rates, fair and reasonable terms tribes and consumers
Middle ground between status quo and eminent domain
2nd element – standards and procedures
Certainty across all land holder - federal, state, tribal
Fair and open process
Certainty of process

Predictability
Lack or perpetuity possibilities
Unclear access to courts
Renewal magnifies uncertainty
Disruption possible – one unreasonable party
Fixed procedure for review and resolution
Future remedy required – lack of recourse
150 days – focus on 2nd element

Tribal self determination and sovereignty

- cultures, ways of life, religions
- concessions – promises of use and protection
- breach of every treaty – usurpation
- continuation of insidious history
- differences define “highest and best use”
- similar to military reservations – where we avoid crossing

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National security linked to respecting treaties

Unique – governances

Historical rates – Prior to 1871; 1871-1948; and 1948-present

1. Consent
2. Fair Market

Different land rights, eminent domain not used on allotted lands

Different terms and conditions; different uses

Pay attention to all of these differences

Successful negotiation has occurred

Relationship problems – ROW problems

Long-standing undervaluation

- site visit in Cobell

Survey of tribes to assess whether current negotiations are satisfied

Good standards already exist

Recommendations:

- Improve record systems
- Improve record access to records
- Improve standards of appraisal
- Encourage and fund tribal regs.
- Encourage and fund L.U. planning
- Improve probate

4th part of study

- Regulated utilities – profit set by regulation
 - Tribes should set benefit of bargain
 - Unregulated – not limit on profit, so not limit tribe
 - Sovereignty
-

Creative negotiation – examples

- moving lines – 186 acres transfer back to tribe
- MOA – cost based compensation – 20 year lease
- MOA – compensation forest loss – perpetuity ROW

Negotiations are working today

- part of process to review historical rates
- Fair market value with flexibility for non-monetary compensation
- Consideration for term-understand not wanting perpetual easements
- Creativity
 - o Timeframes – 5-10 years in renewal
 - o Share of revenues comes up in negotiation
 - o Opportunity lost pricing comes up negotiation
- Stream line – set deadlines and time frames

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- Valuation technique
 - Perpetual vs. terms
 - Negotiation time and deadlines for response
-

Open Comment Period

1. Policies have sovereign implications; asset control; self determination ___ federal policy to create positive results; federal government protect from encroachment; consent doesn't impede energy access; long-term renewals coming up – negotiation is better; tribes stand ready to help w. energy security ; committee of senate – hearing. B.N. Campbell – importance of Indian-owed energy; underdevelopment; tribes want development; 10% of onshore production; 11% of U.S. coal; 890 million barrels of liquid; tribes are the solution not the problem; Opportunity – TERA – then enter into leases. TERA = certainty; tribes allowed to manage its estate. Current system works – don't think otherwise; cooperation exists in current system; thousand of acres are put into access; don't encroach
2. As producer, experience with Northern Ute favorable 200 wells with lines; business as usual; effective negotiation is key; willingness and fair value; achieve trust to make business work; current system effective; look to Northern Ute for example; relationship is good
3. Producer; work with Northern Ute; long relationship; global access agreement; success with today's rule; don't want to see change; entering into joint business arrangements; current model satisfactory
4. Emerging market; in leasing mode; now finalizing negotiations based on market conditions; 1813 is stealing sovereignty; if not broke, don't fix; we recognize one another's interest; failed neg. are the exception; challenge to think like Indian – recognize cultural needs; it works now
5. Unconvinced of need for change; if change, there is an example – 1910-1920 Federal Power Act negotiation/ law making; consent is required so tribe decides how to commit its land; reasonable annual charges – license and renewal at FERC – analogous to his circumstance in Federal power Act – tribes derive value treats tribes different – value of project is factored in – more like joint venture 'sharing of net benefits' – Developers and tribes share 86 years that worked; makes joint venture partners with mutual interest; first tribe decision to commit, then "shared net benefit", creates relationship
6. Energy security; experience of mutual respect and mutual benefit; sovereignty and shared stakeholders; inflated demands; FERC issues permit and fair and reasonable rates; we haul, don't own; in past neg. similar to other landowner; 50-100 times value elsewhere are current demands; middle ground between status quo and eminent domain; clear standard to protect all stakeholders; reasonable premium to F.M.V.; congress act, otherwise chaos and unpredictability
7. Eliminating consent is threat to tribes; we give – we develop our energy; need transmission but don't want to force access on other tribes' land; each tribe should assess its culturally sensitive areas; protect sovereignty, provide for dispute resolution ; protect allot tees; consider trial partnerships with industry – no change is needed

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8. 1813 should acknowledge sovereignty in study; keep word; control of access is treaty issue; reacquired land and we set conditions for its use; protect and manage our own lands; acknowledge that tribes are competent to negotiate; we effectively manage federal programs; we provide power and negotiate ROW- take both sides; examples of successes should be in study (Flathead reservation is a good example); roads and highways with Montana Department of Transportation are good examples; Restored ownership of spiritual lands successfully in environment of consent; study should show no problem exists; Yellowstone – leaks were problem and remediation happened; come to our reservation.
9. Consent – most fundamental principle since 1823; foundation of self determination; Consent allows tribes to establish factors to consider environment, culture, history, and tribal service needs; Consent permits negotiation to occur; negotiation works; energy is getting to market; price – not increasing because of Indian ROW, unfair past negotiation is not a good argument; access to service for tribes should be highest priority; one means to determine value unfair; argument of risk of future unfairness on part of tribe contradicted by experience
10. Oil and gas revenue is means of survival; mismanagement is shameful; theft of mineral resources; no accurate accounting; no attempt at recovery; guilt payments; crime against tribe; now theft with a pen – long-term, unfair arrangements using net. not gross proceeds; royalties formula set by DOI – tribes have experiences that differ from arrangements for non Indian mineral owners; tribes cheated
11. Recognize that all activities require ROW – reach of regulators to every activity not anticipates – creativity and spirit of promoting production; single approach not advisable; tribal negotiation much faster than on BLM or Forest Service land; creditability key; new rules will make matter worse and create delay; little rational for rule making from energy and power company perspective
12. Cost increase driving this issue but no experience of 50-100% Fair market value; we negotiate and renew our leases fairly
13. Negotiations have been successful; very few unsuccessful experiences; most negotiations are very productive
14. Support study; condemnation power doesn't exist; costs rising; working to meet demand; consumers-price rises; predictable outcomes; no objective standard for establishing price; congressional action needed; equitable method needed; utility cost containment; objective method needed; economic impact of rising utility prices; objective standard necessary; condemnation if not standard;
15. Price increase long overdue to correct injustice, 20 year lease negotiation thru BIA \$3,000 then \$15,000 (\$38,000 total 40 yrs.); 1995 renewal; no additional claims in 40 yrs.; in '95 - tribal negotiation including overdue payments; new agreement \$2 million and AG interference compensation; 1995 all laws had to be followed; risks also have to be accounted for
16. Cost of energy impacts small business; no objective method; arbitrary prices aren't credible; fair compensation; credible basis for setting values; impact to utility rate payers; objective, defensible, fair method
17. Incremental cost increases in recent years; there is an issue; making up for past value – same approach to private ROW – no reason to make up for past valuation; need a public

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- mechanism – not simply a private matter; condemnation goes too far; need to find a way to agree to a mechanism that's fair
18. Price comparable to private ROW access; incentive for fair payment given ongoing relationship; increasing difficulty renegotiating ROW; premiums rising too high; lack of objective standard for resolving disputes; lack of 3rd party, objective venue for resolution
 19. Have always found ways to reach agreement and keep natural gas flowing; 1995 opted for 10 years; now negotiating; trying to agree to terms; questions – will study include our gas gathering system? What information tells you there is a problem? What info exists that says we are restricting supply? If none: why do this? If investigating, investigate profits so everything is in report – complete and accurate; sovereignty; will U.S. reach highest responsibility or give away unlimited access?
 20. Reasonable, dependable energy; reform; objective method; potential for disruption; arbitrary; energy prices drive business decisions; method consistent for private lands; objective standard ensures equity and protects prices; support assurances of link to recognized methodology; energy consumers
 21. Property rights and sovereignty of tribal nations; paramount; eminent domain abuses (field case); legitimate role for true public purposes; roads, etc.; not private purposes but true public purposes; water ways; eminent domain proper use; private-private different standard method needed; business planning; long-term vitality of tribal nations; land ownership protection under constitution
 22. Historic abuse of trust responsibilities; history of lack of constitution in ROW decisions; use L.A. case study;
 23. Process – scoping should be about how we proceed; how dialogue takes place; study conflicts with intent of Title V; Energy Policy Act Section 638 not included in this process and consultation not occurring; object to case study method; could skew results from wrong cases; 4 working groups to many; group 1 and 2 and 3 and 4 to help tribes participate; consultation key; sovereignty and consent; request 1 year extension from congress; need more information on Argonne National Laboratory and objectivity of study
 24. Delivery of adequate and affordable energy; Recommendation to congress method for fair compensation; risk of arbitrary costs; continued delivery at reasonable prices
 25. Democracy is messy; adhering to treaties is messy; tribal energy company; negotiation keeps business operating; no need to go back to 19th century; taking money from tribes not the answer; congress studied this in 1969
 26. Right to exclude non members from reservation; tribal members with no utilities; never stopped energy delivery despite trespass; we answer the national call; emerging consensus – no problem; sovereignty paramount; please that speakers not seeking eminent domain; 69 study – 2 years – no case studies – conclusion – full consent necessary to law and good government; court of claims will be venue if consent erase – protracted litigation; report that 1969 study conclusions still hold
 27. Letter Governor Owens – objective methods; personal fund for low income energy assistance program – struggle with price of energy; fluctuation of infrastructure costs; farm – ROW negotiation; wide range of neg. prices;
 28. Study necessary – objective method; fair to tribes and consumers; outline rec. to congress;

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29. Relationships and profit sharing; support sovereignty; 20 year easements – difficult but timely negotiations; improve process (not broke); consider – 1. fair market value better defined standard 2. Easement perpetuity 3. dispute resolution provisions for compensation disputes
30. Relationships; cultural concerns; environment; providing tribal service; in 5 years – rapidly rising demands for multiple of fair market value shorter terms create perpetual negotiation; 20-25 yrs. reasonable; compromise: new ROW as is; renewals – more certainty; multiple appraisal process with set multiplier – 2,3, or 4 times appraised value – to create certainty; don't erode sovereignty; no condemnation
31. Land central to identity and to religious observance; respect ceremonial significance; Federal government did not respect; self-determination; history of loss of land; we have to decide; increased access possible when tribes acknowledged as partners; not 'owned' by federal government; our land held in trust; trust responsibility has to be exercise and for so long not taken seriously
32. Fairness – history of giving permission; history of 50 year terms for \$10,000; 50 yr. \$900; 50 yr. \$14,000; Are these fair? In renewal; we are unique – one side fits all not solution here
33. Can't play we and they – we are in this together; leave ego; compromise and negotiate; have to be concerned with whole of tribe; sacred four – heart, body, mind, spirit; Address spirit
34. Undervalued – land control is major part of sovereignty; Allow tribe to create economic opportunity; Oppose change to consent; oppose case study; oppose condemnation
35. Effort to compensate at or above fair market value; Current system benefits tribes and companies; Welcome working together to deal with problem of existing facilities; ROW process is cumbersome; getting power to tribal members requires thoughtful work on part of tribes with companies
36. Surprised and disappointed that study will occur; scare tactics; untruths about relationship between tribal ROW costs and energy prices; recommended tribal consent stays in place; no abuse of authority over access to our lands; all know that terms are limited; not cause of costs of energy – pennies on hundreds of dollars in bills; duty requires quantity cost due to ROW costs; land not same as private lands; we fund full government costs; companies should not ignore difference between tribal land and other land; example for case study – public service and Western Gas – Stephan's group and tribal joint venture was result – not possible w/ out consent power; reluctant participation is study; Time frame too short; need fair study w/ trust obligation carried out
37. Success stories blue print for tomorrow; national (not western issue); standards should give difference to tribal input; tribes best positioned to determine fairness; build on bedrock of consent; tribes are honorable in ROW this history must be included; inequities must be part of study; being held hostage – withholding connection until we sign – this must be art of study
38. Rate case intervention – upside-down price increases; tribal actions benefit consumers; references to fair market value should be broader – visits to reservations have economic value – unique value, not same as off-reservation tracts; easy to draw wrong conclusions; extreme undervaluation
39. This venue lets us see one another's realities; huge profits and water contamination; fairness in water prices; consider health impacts – asthma; examples of unfair pricing;

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- fair and just compensation; tribal members not making huge profits – poverty is real; different tribes have different needs; study profits of energy companies as well;
40. Sovereignty – implications of providing ROW – responsibilities come with sovereignty – tribal members, future generations, ancestors and sacred places and non-human beings; laws make it possible to manage programs within context of sovereignty; chipping away at government thru government actions; limited tax base;
 41. Obtaining and renewing ROW getting more difficult; usually can work something out with tribes; when BIA gets involved we get stuck in their regulations; can't serve given regulation barriers; BIA procedures interrupt negotiations; fair appraisal methods clear; narrow definition of compensation; renewals – BIA definitions of comp. interfere; dialogue among us can help make need modifications;
 42. Legislate vs. negotiate – negotiate with tribes should be supported; fought for land; don't forget to survive, need control; address poverty, suicide, trauma, crime, housing, civil rights, access to utilities, “we survived or died...”
 43. Examples of past, unfair compensation; not justice; adequate compensation; meaningful value; negotiation; fair study; objective study; voice of Indian people must be heard; eliminate perpetual; deal with subcontractors – forfeiture; preference for tribal self sufficiency; opportunity to take over facilities; main. Functions; local jobs; tribal preference; TERA preference; protect cultural values; reduce impact to lands;
 44. Understand history and depth of issue; land flooded for hydropower; infrastructure promises not met; no hospital; growing population; tribes qualified to negotiate; negotiate in good faith; we are developing wind energy, negotiating our own distribution; respect for us as a people
 45. Tribes are all 4 categories under 1813 – tribe, appropriate government, energy company, consumer and business; historic rates – totality of history and experience; (1st 20 yrs. \$700 total; utility compelled to serve; pay fee to get electricity and waive ROW fee to get power); 5 years review never done by DOI; DOI not met current obligation;

Appendix D: Flip chart notes taken during the work session discussions – Day 2
DAY II – March 8, 2006: Discussion Flip Chart Notes

The line across the page delineates flip chart page breaks.

Missing from Day 1

- Whether problem is with
 - o Consumer rate
 - o Impacts
 - o Sovereignty
 - Problem – asking tribes to develop formula for condemning our lands
 - Need to respect and understand belief systems of tribes – part of conversation
 - Whether there is a problem – yes/no
 - o 2 problems not in the 4 topics of the study
 - Yellowstone pipeline
 - El Paso / Navajo
 - Congress can determine whether changes in legislation are necessary
 - Create another topic area to address whether there is a problem
-

Should focus on government to government equal sovereignty

- sovereignty should not be tied to consumer
 - consumer needs should not drive sovereignty
 - sovereignty does not equal economic needs
 - wrong questions being asked
-

Analysis of historic rates:

Missing –

- Clarify reports of rising costs on rights-of-way (ROW)
 - Convert anecdotes into actual costs and contextualize those as ROW on tribal lands
 - Contextualize how significant are ROW in total cost structure
-

Recognition of study time limits

Different types/purposes of ROWs – how differences affect cost (i.e. interstate FERC regulated ROWs)

FERC has costs for tribal ROWs costs/tariffs

One possible group: FERC certificates of convenience

Proposal: Tribes/utilities submit all information for ROW renewals – committed to full disclosure even where confidential?

Issues to be identified:

Sovereignty – analysis and historic rates

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- Cotton Petroleum case – outcome tribe and state can access
- We should know what state taxes ROW holders pay – so no double taxation

Status quo fine – Navajo nation will do economic study on ROW, including El Paso

- Consumer price rise negligible
-

Navajo nation – will comply with contacts – expect others to as well
Confidentiality - won't open records if contract violation

Disclosure on ROW

Negotiation – What is the megawatt hour increase for companies? As transacted across tribal lands

Use FERC information, use subpoena powers – get complete record of rates – no reason to not have

What is the fear with regards to what tribes & companies are being paid

Specify from the draft list – what parties expressing fears? The intent was no attribution, but to capture concerns expressed

Needs to be known who is saying what

Tribes we don't have trust because of history – industry fears future

Case studies not appropriate –

Snapshot in time won't convey all concerns – case study would pick single issue and go back in time

Concept of ROW – broader sense allowing one person to use land

- Different types of relationships between tribes, government and industry
 - Necessary to look at broader range of relationships to satisfy need for all parties
-

Could these be evaluated as necessary component for moving forward? insert into valuation/procedures?

Edison Electric Institute (EEI) – More complete picture than case studies; EEI would do voluntary survey on renewals

Support case study - it puts face on past inequity, efficient

Compensation and testimony

- government to government – unfair industry advantage
- historically leery of the word compensation – Yellowtail Dam (not fair or just)

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- many ROWs thru historic/cultural values – these are priceless
-

Criteria for selecting case studies?

- Utilities survey thru EEI
- More information/better
- Industry/tribes each develop
- Before selection – clarify scope of ROWs
 - o “Energy ROW” too broad
 - o Are the Departments going to cover well head to burning tip?

Before any action – clarify land status with each tribe – government to government = taking?

Bureau of Indian Affairs (BIA) mistakes on land status records – e.g. not records of mineral rights

- How to base ROW decisions on poor data?
- How did non-Indian people get mineral rights on our lands?

Case study approach impossible

Tough position – trust responsibilities to tribes, many tribes oppose 1813

Alternatives – has to recognize congress didn’t understand what they were asking Departments to do

- issue more complicated than process allows
 - tell congress responsible move is thorough inventory of examination of issues
 - parties are of different views; can’t agree in room; congress needs to clarify intent/direction of public and tribal needs
-

- Case study approach – subjectivity/bias will undermine value of what congress is asking
 - Comprehensive study of ROWs is the only way to go
 - If case study, disclaimer about credibility should be attached, will be challenged by tribes
 - Maybe best case negotiations for case studies?
-

Gather data tribes/industry are pointing to

Fears – Tribes asking for more, price of energy harms consumer/America in global economy

1. What are drivers on global market and what is driving it? - not tribes driving price upward

If pipeline was agreed to in past, removing it disrupts market?

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2. Tribes wish to share in benefits of ROW and that fulfills tribal economic development and leads to parity with American economy
- promotes a public good

Record energy profits – tribes not making record profits but wish to share

Fear of distrust growing – tribes will fight subpoena – nations, now companies feel blindsided by 1813

- past violation led to Cobel case – feds will pay out billions – case study should include all money tribes were cheated out of in past
 - cultural elements – heritage is important to tribes – many other factors to be considered in ROW negotiations
 - 1813 failed to involve tribes, false start point
-

Compensation analysis limited to pipelines then report should be limited to this – departments need to answer question of paths forward because they are trustees

Tribal entity should be working on disseminating this information

Coal abundant in North Dakota, much on tribal land, access to wind resources – want to negotiate with EAPA for power purchase agreements recognized by feds as partners and protected

Scope needs to be established – roads, wellheads, transmission lines; fees, capacity of transmission, equity participation in programs all depends on scope

Only way is a complete survey, those ROWs – tribes believe represent fair market value

- Disgusted with trustees' inability to have government to government meeting – not substantive
- Escalating costs of ROW – continue to negotiate more, want to both partnerships with companies – this seems to satisfy small number of people
- Need more conservation, we are energy consumers, tribes can provide energy is it a done deal?
- Tribes appear to be the low man in this process – unjust
- Tribes working with states to determine water quality
 - o Fear – why single issue legislation; riders can destroy; ensure this will be heard, single legislation issue, all tribes present for vote
- Sovereignty – to tribes on reservation, many problems with ROWs
 - o Today small tribes present
 - o 573 tribes federally recognized now – this study detrimental because government has hoodwinked Indian people and we don't have trust necessary in state to state

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relationships – non constituted tribes should have government to government relations

Slow, but sure loss of sovereignty – we say yes in good faith but it causes us harm
Disrespectful to us – here today and this process we are here as tribal leaders
Map – shaded areas on Navajo Nation – distinguish different ROWs

What historic rates? Starts at zero, ends at zero?

- set boundaries if studied, we think study not necessary
- don't buddle, case by case, distinguish fee form trust lands

Two industry flavors –

- Those seeking partners
 - Those playing hardball
 - o Source of this legislation
 - o We will not stand for continuing effort to separate Indians from our land
-

Trustees should focus efforts on righting past injustices – convince us of this or we will fight this

Leave things are they are – what is happening now erodes relationships – don't change for all because one company/tribe can't figure it out

Recognized us as states with in states – shame that this continues today

Alternative possible?

- If it ain't broken don't fix it with blanket fix
- Repair what needs to be fixed

Go to each tribe – government to government

Study – ask congress if they want to infringe on tribal sovereignty?

- stealing lands by energy companies
-

Return to Congress - Request extension or explain parameters, too complex or do case study with credibility disclaimer

Scope – energy ROW too broad, no handle on scope

- include case studies
 - old, where tribes were ripped off
 - recent, successful negotiations
-

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If return to congress, danger El Paso will return with energy ROW proposals

Shared dilemma, perhaps this study could benefit Indian country

- Pipeline – El Paso/Navajo take this as pipeline of study – on different tribal lands (apples to apples)
 - Requirement to protect existing ROWs – can't afford to erode foundation
-

Mesa Verde – human remains of fore-fathers

13 years to resolve well – heart, mind, body and spirit

- takes time

- Treat each other with dignity, respect, honor
 - Resources belong to people not attorneys
 - We live with decisions at local level
 - Need to be heard – genuine discussion
 - Solution will come with time and effort
-

Support future meetings:

Heart, mind, body, spirit – find solution

Annual meeting between Arizona tribes and congressional delegation – next week attend or submit information to, reference these meetings/issues and be addressed

1967 template for this study – see written Navajo nation comments

Wealth of info available

Question – to do study as 1967, possible

Next meeting –

Tribes only – government to government

Support 1813 – not single utility driven

Industry/tribes should provide information necessary

- Issues will be: Trans. ROW and Pipeline ROW
-

Sovereignty and Self-Determination

- Problem with how issues identified suggest conflict between sovereignty and self-determination
- The exercise of these have benefited consumers and increase energy supply

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Responsibilities of sovereignty – capabilities to deal with environment/cultural impacts and emergency preparedness – tribes should have statutory recognition in Clean Air Act, Clean Water Act, National Historic Preservation Act; case law renders it risky for tribes to assert regulatory authority

- Congress could clarify

Feds don't talk to one another – BLM/BIA, don't keep accurate records; tribes are emerging as solid business players in America; we are not owned and controlled by BIA/DOI; tribes initiated with upper/lower co.; river water worked with states successfully

Multitude of approaches – how to remedy Cotton case? Congress not interested

1813 – Turn it around. Tribes negotiate with companies – tribes not guaranteed companies won't go defunct. e.g. Enron

- How do we get assurances?
 - Federal government failed to properly assess Enron, tribes pay price
-

Tribes have different monetary needs than states/counties

- We want that infrastructure to be able to do things; Feds fail to understand Indian rights and policies.
- Can't separate sovereignty – talk government to government (every tribe)

Sovereignty – nurture and taking over mineral at same time. You're not listening to us. Tribes with mineral have to talk to each other; Government has failed, industry has failed, Council of Energy Resource Tribes, National Congress of American Indians failed. We need to tell our success stories.

Tribes concern – cost to sovereignty w/ ROW; may divest lands from sovereign rule.

Generalizations to be corrected

- Tribes have individual dispute resolution processes – contract vs. sovereignty issues
- Many tribes have commercial codes – Uniform Commercial Code (UCC) doesn't apply to real estate but to sale of goods.

Rec: Study includes REOs from dean and council of Hopi:

Up sovereignty; up energy productions

- Rid impediments to produce ROW on Indian land
 - Tax/investment opportunities for Indian land infrastructure equivalent to what state opportunities are
 - ROW should remain part of tribal land base – rec. that easements retain sovereign status
-

Corrections:

- Oversights – tribal obligation to govern without tax base need to be highlighted

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- Analysis consider legal context
 - DOE/DOI trust responsibility, how trust reform may/not affect
-

Challenge to departments: Constructive recommendations supportable by tribes/industry

- Strengthening self-determination/sovereignty should be guiding principle – proven successful
- Look at legislation to approve agreements that are not old agreement structures
- Strengthen tribal capacity
- Create model documents – processes where all understand rule/procedures

Missing/Hole: Sovereignty – minerals and access are assets; tribes trying to manage all assets for tribal health and welfare; need those assets, economic engines to ascertain self-determination; tribes cannot become self-determined if assets are stripped away.

Contracts –

- ROWs have been negotiated with specific terms with no guarantee of renewals.
- What would aggregating those agreements do?
- Planned according to timelines
- Is it appropriate for federal policy to appreciate those questions

ROW Case Law:

- 9th circuit cases ruled ROW legal equivalent to fee land
 - Exceptions to tribal jurisdiction on ___?
 - o Where consensual relations
 - o Where conduct threatens health and welfare of tribe
 - Consent is only legal handle, tribes have to preserve sovereignty
-

Judicial Divestiture Doctrine – When tribal jurisdiction is not congressionally clear, courts determine, otherwise congress determines, courts follow, congress can overturn cases interpreting scope of sovereign power.

- Double taxation remains key concern/issue

Perpetual ROW choice has been stripped from tribes.

Could we barter for permanent ROW - would be constructive

World has changed

Could bargain, were it not for artificial derogation of sovereignty

Importance of meaning of respect for sovereignty and self-determination:

- Tribes have inherent power; expect to manage our affairs
- More communication
- Federal family needs better understanding of self-determination
- This condemnation is assassination on our lands

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- We need to participate, not looking for a handout; want you to fulfill obligations

EEI – has/will not seek condemnation. Have emerging concerns around renewals; invite to consult with us on dialogue about use of your lands.

- Tribal leader's legislative summit focused on budget cuts; met with congressman Kildee.
 - Sovereignty is base of why we exist – congress recognizes us as sovereign nations.
 - New members need education on sovereignty and what it means to us and to companies, state and federal governments
 - Recognize us as other governments – other nations
 - We wish to continue to exercise that right, such a negotiation with energy companies and developing partnerships.
 - We rely on oil and gas
 - 1813 – Included, because of Bush initiative to not rely on foreign oil. You have to deal with us, our lands. Tribal council had right to say so – let it remain as is.
-

ROW system flawed around land/leaseholder wanting most/least costs

- develop mechanisms to unify interest
- don't constrain view to landlord/tenant relationship

Timeframes – terms of lease

Tribes need flexibility to choose, craft provision to deal with changing circumstances

Case study – Cart before horse; need to scope for critical, fundamental issues first

Alternative methods –

- Share net benefits of projects
 - o Attribute value to generation, production and distribution
 - o Then determine fair compensation for tribes
 - o As economic values go up, payments go up
 - o As economic values go down, payments go down
 - Wheeling charge on transmission lines; FERC order 888
 - o Analogous mechanism for wheeling energy on Indian lands
 - o Standard appraisal methods don't appropriate; pay tribes – instead value lands
-

Based on energy transmission

- certainty for utilities, up willingness to negotiate

Fully recognize value of Indian lands, industry get certainty = win-win

Legislation should advance energy development opportunities on Indian lands and mechanisms for positive partner opportunities with tribes/industry – cast for positive outcomes

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Bighorn electric case – perpetual easement; ruling were tribes lose control and may lose ownership

Federal government is ignoring trust responsibilities – should have had government to government meetings with tribes – recognize us as sovereign nation

We have unique relationship with federal government; Self-determination is exercise of sovereignty; to meet demand and quality of life for our people. Right to consent because we are landowners; who is best positioned to determine value of land? We have sacred sites.

This is only one aspect with which we are faced. Our sovereignty is being eroded at every turn. We have to start with government to government meetings. Today we are mature, knowledgeable and access experts. Hard for Indians to grasp this change now, beginning point – disagree with process, but it is a start. This will be an ongoing right throughout our future because of demands about national security. We are stewards of land given to us by the creator. We must protect. Open to more meetings, discussions.

Changes/missing from list

- valuation standards and procedures
 - Certainty, reasonableness – conclude that there is certainty through
 - o Contracts
 - o Process – negotiate
 - o Standard – what contract says
 - Terminology of condemnation valuation standards and procedures are formula for condemnation
-

Additions

- unique nature of tribal lands
 - unique tribes
 - say how and whether to standardize process
 - written with focus on cash for land
 - focus on alternative methods for win-win – e.g. partnerships
-

Issue of artificially imposed costs

- Assumption that market forces not suitable to determine cost item
- Departments should look at to their mechanisms. When regulated, distortion resulted.
- Why returning to artificially imposed cost controls?

Missing – PNM mentioned change by new and existing facilities

- no limit on what tribes can demand currently (cost)

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Should this drive national policy? Utilities might have to relocate facilities that benefit all

(To PNM commuter) can't assume gas gathering lines are public – they are private

Indian policy goals are as much public good as “public policy”

- Indian goals are as much public benefit as cost of electricity
-

Non Indians benefit from tribal policies. Does government have right to regulate energy companies as they do tribes? Energy companies making billions. Should be equitable on both sides

DOI/DOE give congress options on alternatives. Draft this portion like National Environmental Policy Act – Standards/Decision process

- Contract between tribes and companies
 - Methodology to close gap between unreasonable circumstances
 - How to close?
 - o Executive/judicial
 - o Alternative Dispute Resolution
 - o Court
 - o Exec. Order
 - o Mediation
-

Ask FERC, DOI, DOE to close gap

- If not here, then judicial branch
- Chapter of section on FERC
- Certificate is appealable
- Intersection between FERC/congress on ROW

Concern: if alternative dispute resolution option available, why sit with tribes and try to work it out?

- have someone else resolve by legislation
-

Past problems with ROW

- Yakima renewals on ROW involves trespassing, fractionated lands, pay attention

State of Wyoming recently recognized tribes

- wanted constitution to include tribes
- MOA's/MOU's preferable – tribes concerned about being passed by
- how to determine fair market value with all injustices don't?

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Study acknowledge that any alterations presented outside tribe/industry negotiation that there would be a finding that justifies

Abrogation, breach of contract

No Indian lands provision that deals w/ subsurface minerals

Issue of unconscionability is not recent

- historic – tied to underlying agreements
 - significant issue – tribes taken advantage of when lacking geophysical org. expertise
-

Sacred sites, sensitive environmental areas

- distinctions are necessary when discussing ROW – (noted in every ROW)

Include rise in valuation standard – e.g. emergency response plan/cost

Under concerns –

Premium – El Paso position is fair market value with multiplier to factor for attributes – what's needed for sovereignty /governance

Don't support flat fair market value

Do support premium

Fair market value –

- EEI view as useful tool to provide baseline
- Expect company will pay above and beyond baseline – don't know what methodology is
- Companies come into renewal feeling concerned about brevity of terms

Direct legislation congress could engage in to direct appropriate compensation

- Reforms
-

Fair Market Value and premiums common in the oil and gas industry

Cost – gathering/transmission companies often get free or transportation rates – audit of gas valuation and transportation costs?

Resistance to fair market value – multitude of ways to determine

Fast – limited to comparable sales

Other – capitalizing income stream – economics of what happens on land rather than what activities happen on surrounding land.

Tribes use scientific methods to determine price/value – not arbitrary

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Alternatives – non monetary compensation
Land swaps, providing substation or other facilities,
Capacity, use of pipelines

Relevant National Transportation Policies

- Include tribal consultation (executive orders)
 - United States Code sections 323 and 324
 - Royalty undervaluation
 - o Are transportation allowances being cost-audited?
 - DOE Policy
 - o Reaffirmed – recognizes unique tribes and US relationship, especially in energy matters
-

Include affirmations on former U.S. presidents WRT Indian self-determination

EPAct contravenes self-determination/consent

FERC rate making policies

- industry income and profit

Mineral Management Service transportation cost-audit

Formula exists –shift burden to companies – DOI

Should ensure tribes aren't penalized – undervalued ROW's and inaccurate transportation costs

Include 2006 State of Union messages, Bodman messages to get off foreign oil

Tribal self governance act

BIA role in negotiating ROW – some subcontracting on that role

fair market value of oil – some companies have a monopoly

Tribal resources = standardize

How oil is valued - level

Playing grand – equalize variance between tribes and companies that have wellhead –refinery monopolies in absence of arms length dealings

U.S. is the biggest exporter of foreign oil

Appendix E: Sticky-Note exercise comments – Day 1 & 2

STICKY NOTE EXERCISE – MARCH 7 & 8, 2006

Participants were encouraged to write down their ideas, issues, concerns, questions and possible paths forward about the Section 1813 study's four subject areas on sticky-notes (one idea per note) and adhere them to the subject area flip chart. Also added to this exercise was DOE/DOI Staff's notes from individual who related their ideas verbally to them; staff wrote down the person's ideas on sticky-notes and added them to the appropriate flip chart. Day one notes were synthesized with comments heard during presentation and open comment and any written comment forms collected, into a list of issues, concerns and alternative by subject area. That list was used during work session discussions. All comments will be used to expand and unfold the study.

Flip Chart: Assessment of Tribal Sovereignty and Self-Determination -*What are your concerns, issues, questions and possible paths forward on this element of the study?*

Day 1 Sticky Notes:

- What specifically gives Congress the authority to set or authorize the setting of compensation for ROWs on Tribal lands? This is the threshold question.
- How is industry going to be able to protect themselves from legal issues, trespass, individuals and ROW policies
- Individual Indian lands have been condemned...e.g. Pick-Sloan project
- Don't confuse ROWs with condemnation
- Each tribe is a sovereign nation. Each should be dealt with honor and on a one by one basis.
- Use binding arbitration to resolve differences in valuation if parties can't agree – not eminent domain.
- After any ROW, what about safety, maintenance, and security of lines/transfer stations.
- How do we know what is fair?
- Under treaty, executive orders and agreements, tribes also have inherent power to manage their affairs. It is imperative for tribes to manage and plan their destiny. The U.S. government has failed in many ways.
- The legislation of standards for tribal ROWs is the taking of a tribal asset, the tribe's control of access to its lands. The tribes' sovereignty demands that it retain its control in order to achieve self determination.
- Any compromise of sovereignty is not sovereignty. Forced compliance is not sovereignty.

Day 2 Sticky-Notes:

- There is only one way for tribes to become sovereign and self determination is for them to be able to negotiate and regulate their own business arrangements
- On other aspects of energy that are not being discussed and the main one is agriculture. This may have a huge impact and it will have a major impact on how we move forward.
- Land is a fundamental attribute of sovereignty. ROWs impact this sovereignty.
- Tribes can't grant ROW's on individually owned trust land.

Flip Chart: Standards and Procedures for Determining Fair and Appropriate Compensation - What are your concerns, issues, questions and possible paths forward on this element?

Day 1 Sticky Notes:

- B.I.A. has no reliable accountable system – whether land, money, probate, leases...etc. How is the B.I.A. going to do ROWs?
- Existing models between utilities and tribes need to be shared in a workshop forum so tribes receive just compensation.
- The process is broken, tribal ROW fees are skyrocketing with not end in sight. Something must be done to control the unlimited costs utilities face. Maintaining the status quo for new lines ok, but an objective method for existing is important.
- Utilizing compensation received in that past as a benchmark for determining “fair compensation” today and in future is unacceptable.
- This is the problem. Some tribes do not have any standards, guidelines, regulation, or protocols. What do we do? Overall inclusive standards are needed.
- A number of successful new ROWs have been discussed. Perhaps all parties can learn good approaches from them for renewal process.
- Is there current knowledge about the renewal process?
- No problem with current process. What about past mitigation for tribal losses?
- Tribes being sovereign have a responsibility to conduct business on their respective lands. Negotiations with tribes need to take place.
- Don't change the law, change the B.I.A. handbook – needs a more rigorous appraisal method.
- DOI/DOE must get actual costs (annual) to energy companies for tribal consent and compare that cost to other operating costs of those companies.

Day 2 Sticky Notes:

- 1813 does not apply to individually owned trust lands (allotments).
- Formula is fancy name for condemnation.
- Compensation for ROW should also evaluate tax schemes that increase over all ROW costs.
- To be fair – Health impacts need to be included.
- The current process is already incensing utilities to not put new lines on reservations. A continuation will lead to long – term planning to remove existing lines of reservations, where possible.
- In the case of a liquids pipeline, if the cost of a right-of-way and other construction costs become excessive, shippers will elect to use rail or truck transportation which is less safe, less reliable and ultimately a bad alternative for tribes. Particularly, if that alternative transportation crosses tribal land.
- Are we talking about 10%, 1%, or 1/10 of 1% of annual costs?
- I think a distinction also needs to be made in regards to the type of utility, non regulated – regulated – non profit.

Flip Chart: Analysis of Historic Rates of Compensation - *What are your issues, concerns, questions or possible paths forward?*

Day 1 Sticky Notes:

- Confidentiality is a must.
- Industry associations today have tribal members and must note their position in their presentations.
- Comprehensive analysis of all B.I.A. databases pref. to case study approach.
- Inclusion of Affidavit of Deborah Lewis in Case No. 96 CV 128S (RCL) – Cosell v. Norton as part of historical problems with ROWs.
- Inclusion of articles by Scott Patterson, fraud in New Mexico at Smartmoney.com
 - o 12/3/2004
 - o 12/7/2004
- Pipeline cos. do not follow TERA requirements and under employ Native – especially at headquarters.
- It seems fair value market would be a place to begin. What happened in the past is not our responsibility. B.I.A trust and mistakes are not in question – move forward.
- From the testimony form today it seems compensation for the western tribes is fair. What about the mid-west and east? They do not have the oil coal, gas like the west.
- Historic rate is zero. Future rates should compensate tribes for loss of the use of land affected.
- “When I was a child. Daddy told me the Earth was Red from the blood of our People. I told my children the same story so they can tell their children the same story and it will never be forgotten”.

Day 2 Sticky Notes:

- Historical rates should include not only tribal historical but also private, city, county historical rates comparisons of the time. Are they comparable?
- Review taxes and other fees provided to tribes associated and to compensation for ROWs.
- ROW fees are not the only payments to tribes. Many pay taxes for the facilities installed. Need to consider all aspects.

Flip Chart: Analysis of Relevant National Energy Transportation Policies - *What are your concerns, issues, questions and possible paths forward on this element of the story?*

Day 1 Sticky Notes:

- Such policies and resulting corridor designations should not be able to take place without 1st consultations and 2nd consent to f affected tribes. Tribes in or within a certain radius of corridor.
- Process is being “fast tracked” for energy interests. DOI and DOE need to honor true consultation on a one to one basis with each tribe.
- DOT does not share information about shipping utility waste or fuel on the highways and railways. How can tribes deal with a secretive policy procedure?
- Federal condemnation is for national public purposes only
- Federal condemnation is on a case by case basis
- Who ultimately will issue approval and how will oversight be designated?

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- There need to be a “backstop” where renewal discussions fall apart. The risk is too great.
- The condemnation model reflects experience that individual landowner will try to capture the entire public benefit of infrastructure for themselves. It is a single pint of failure model. If it doesn’t apply in even on “pinch point”, it might as well not apply anywhere.
- Indian land is sacred and filled the blood of our ancestors who fought for it. It cannot be replaced with money.

Day 2 Sticky Notes:

- Congress did not empower tribes to capture the value provided to the American people for the power lines crossing their lands, when they gave the consent power.
- All tribes are now required by BIA to have transpiration plans. They may tribe specific energy transmission policies.
- So, if we don’t have reform for tribal ROW standards, the entire public policy of promoting infrastructure development will be compromised.
- Does SAFETEA-LU have any new energy guidelines?

Flip Chart: Process –*What are your concerns, issues, questions about this process? (this was an additional flip chart to provide an opportunity to provide input on the process)*

Day 1 Sticky Notes:

- Also include input from tribes that do not have experience with energy rights-of-way
- Many companies support this study as indicated by the participation of their trade associations: INGAA, AOPL, Edison Electric Institute. It is not in any individual company’s interest to stand up here and risk retaliation in the ROW negotiation process.
- My concerns are cultural, environmental and sacred rights will be circumvented by providing cheap power.
- Challenge industry and tribes to establish a joint foundation to address r/w issues and educate their constituents on best practices.
- Government to government consultation does not involve private third party cos. This is not a true consultation with tribes.
- Imperialism – power conflict theory playing out against tribes! Honey is more effective...
- Retaliation is a real concern
- People “fearful” of tribal retaliation. Hearsay – if they don’t present ANY weight to them.
- Fear of reprisal from tribes in future negotiations
- If industry take a back seat. How can industry get equal, honest, and fair decision from tribes??
- I don’t feel energy companies should have a say in how tribes negotiate their business partnerships and agreements
- What are management employment rates if Native Americans (registered member) by El Paso, et. al.
- This conference should take place on tribal lands.
- What is comparison of El Paso philanthropy to Navajo Nation (past 20 years) to other areas – such as arts
- Oversight and participation is mandated for resolution and tribes must be an activate participant.

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- Any “steering” committed should have equal utility and tribal membership
- Fear – that congress will listen to energy companies, antidotes rather than Facts, Figures, and Reality.

Day 2 Sticky Notes:

- What is the final product?
- DOI and DOE made every effort to include the view of are statutory participants. They went beyond the call by allowing tribes to have private consultations within the meeting. DOE and DOI should be commended for their efforts at consultation, inclusion, and participation

Appendix F: Transcription of Handwritten Comment Forms Submitted as part of the meeting

Submitted at March 7/8 scoping meeting
(Author names were neither solicited nor offered)

1.

The demonization of the Tribes as a risk to the security of the country's energy system is nothing more than hyperbole that provides no useful information or evidence which the parties to the consultation can use to develop any understanding relevant to the four elements of the study. It also has no basis in fact and is not supported by any evidence.

The analysis of historic rates of compensation paid to the tribes should also include information regarding the actual compliance with those compensation terms. This means finding out if Tribes were actually paid the amounts owed and if the annual or periodic review and increase of rates was ? and paid by the lessee.

2.

Distribution lines serve members of the load, the electrical service has value.

RUS cooperatives are non-profit compensation for ROW will make electric line extension unfeasible.

For unlocatable allottees a public comment period could be a method to get input that would allow BIA to sign for unlocatable.

Transmission lines do not provide service. A fair compensation should be expected.

3.

Valuation Methodologies Issue:

Non-Indian lands are not generally a valid basis for valuation determinations. The standard practice for commercial valuations is to identify properties that is/are parallel to the parcel being valued with respect to size, type and special features. Indian land cannot reliably be compared to non-Indian land for valuation purposes because of its unique characteristics and also often because of its scale as a continuous tract. Lost future use must be incorporated into any valuation approach, due to the different legal status of tribal lands (i.e., they cannot be replaced as can private property holdings).

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4.

As former Senator Campbell properly noted in his opening comments for this scoping meeting, the 1813 study is actually a “disagreement” that has escalated between the parties (El Paso Natural Gas and the Navajo Tribe). If there is any validity to this premise, why doesn't the DOE or the DOI Secretary (or both) seek specific targeted information on the four elements of the study. In essence, such a step would /should help define the parts of the issues that are really important and could serve as a tool to evaluate all the other issues brought up.

5.

To get the full benefit of the study, confidentiality is a must for both tribes and industry. Both sides can then communicate freely w/o fear of retaliation or compromising business secrets.

I suggest EEI, INGAA and AOPL be the clearinghouse for the data. Or a team of 5 industry representatives develop guidelines with a team of 5 tribal members.

6.

I heard various tribes say the status quo works and I've heard about the El Paso case. The facts are as follows: The 3rd party appraisal which is required in all renewals states a new 20 year easement to be valued at 1.2 million dollars for 20 years, the Navajos have demanded 440 million for the same 20 year term. The latest renewal in 1985 between the parties was valued at 27 million in 2006 dollars. If I could demand 440 million for something appraised at 1.2 million I would want the status quo also. This is not an isolated case. Many pipelines and electrical transmission lines have seen similar cases.

7.

There must be a wealth of information on rates and terms of right-of-way obtained by industry. Unfortunately most of that info is confidential. If there were some way to access that info while not jeopardizing confidentiality the entire 1813 effort would benefit.

8.

RE: Sovereignty and Self-Determination – Discussion points from summary of Day 1. In particular, the topic “given sovereignty, there is no formal dispute resolution process if negotiation fails”.

My comment: That is why it is called **NEGOTIATION**. In a negotiation each party is voluntarily entering agreements – not being forced into an agreement. The heart of sovereignty is the right to make choices.

If parties are forced through a dispute resolution process – that is tantamount to “forceful arbitration.”

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Dispute resolution doesn't even come into play until an agreement has been reached and subsequently breached.

Possibly the summary point is referring to sovereign immunity rather than sovereignty. Regardless – a dispute resolution process is only needed once an agreement is reached – not used for force parties into an agreement.

Also “BAD FAITH” claims need a process to be resolved but b/c each party has the option to “walk away” and not negotiate – that process is not needed until an agreement has been reached.

If the concern is Sovereign Immunity – that can be a double edge sword in negotiations; tribes use it to shield themselves; industry use it as a tool – saying hard to come to terms w/o a waiver (even if limited) of sovereign immunity. The agreements can provide limited waivers of sovereign immunity.

If dispute resolution is a key issue, it should be a major part of negotiations.

9.

Underlying much of the discussion today is the assumption that unless tribes are receiving electricity from a transmission line there is no benefit to the tribe. Tribes do benefit, however, if the grid is reliable, which can change over time depending on economic growth (increased demand for electricity) or the changes in the configuration of generation. Tribes, like states, need to begin to recognize that their own use of electricity is part of an interconnected grid.

Concern about what is happening in renewal transactions is not only a cost issue, but a reliability issue. Companies in a difficult negotiation do not have the option to walk away because terminating the facility or moving it present significant reliability concerns. In that sense, they are no longer a willing buyer in the same sense as when the facility was originally sited on Indian land.

As companies make the decision to avoid siting on tribal land for new facilities, they are exercising a right to walk away that they cannot exercise for existing facilities.

10.

Some overarching themes came out of yesterday's comments which don't seem to have been captured. These are perhaps principles that should guide the study:

- Is there a problem that need to be fixed? People were saying its harder to negotiate renewals (cost has gone up; shortened renewal times.) If there is a problem is t should be identified.
- Tribes have central concerns:
 - Don't erode Tribes' sovereignty

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- Don't erode Tribes' right of consent.
 - Don't allow eminent domain as that erodes sovereignty and right of consent.
 - There is a history of significant underpayment of Tribes and lack of respect for Tribes' sovereignty and right of consent. This underpayment must be understood and acknowledged in order to understand the Tribe's position now.
 - I would recommend the study begin with a set of principles including the points above.
 - Case studies should be representative of the range/diversity of ROWs and relationships. Case studies that show extremes – eg. Underpayment, irrational demands – must be identified as such. Case studies may be “sitting on the horse looking backwards,” i.e., they may show situations that no longer exist. Thus case studies must be carefully chosen as providing good information on how to go forward.
 - The study should call for federal appropriations to help Tribes create data bases of their mineral/energy assests. This could be done through the TERA process (Tribal Energy Resource Agreements as created in EPA 2005 Title V).
-

11.

Report should acknowledge and summarize constraints on regulated utilities. Misstatements about a utility's ability (or lack thereof) to serve outside of its CCN should be acknowledged. Also, the Tribe's own contribution to the delay in extending service to new residential connections or to ROW renewal (we have at least one renewal for which we have applied several times over many years) has to be recognized.

Generally, our experience with tribes for new ROWs has been reasonable and works well. Renewals, however, are a key concern. Tribes do not give adequate consideration to potential impact on the reliability of the grid. Cost is not the only issue. Just as the tribes ask industry to give consideration of tribal values, they should give consideration to the overall impact of delays, etc. on national energy policy.

12.

For the electric industry, ROW renewal concerns are an emerging issue. It is more than just cost to the consumer, but also a grid reliability issue if a renewal cannot be negotiated. Contrary to certain comments, the only industry comments indicating the system is working were those working with one tribe in Utah. We all can learn from these experiences. It is not working that well on many other reservations. We need some backstop in place if the tribes and the ROW applicant cannot work out a resolution on a renewal after a good faith effort to maintain grid integrity.

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