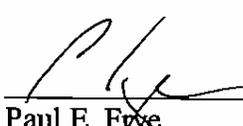


NAVAJO NATION POSITION PAPER
ON THE REQUIREMENT OF NAVAJO NATION CONSENT
AS A CONDITION FOR GRANTING RIGHTS-OF-WAY ACROSS NAVAJO LAND

THE NAVAJO NATION

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INTRODUCTION

The El Paso Natural Gas Company ("EPNG") is unwilling to pay to the Navajo Nation what its competitors have paid for comparable rights-of-way over Navajo trust land. Thus, it seeks the Secretary of the Interior to violate her own regulations, contravene federal policy promoting respect for tribal decision making, and breach her trust duties to the country's largest but most destitute Indian nation. With uncharacteristic solicitude for its end users,¹ El Paso urges this radical action to avoid a cost that would amount to at most, one and a third cent per mcf, or about \$.17 per month of an average home gas bill. EPNG's application has no support in fact, law or federal policy.

This position paper shows that EPNG is estopped by its agreements with the Navajo Nation from claiming a right to remain on Navajo land, and that Navajo Nation consent to Secretarial grants of rights-of-way across Navajo land is required by treaty, statute, regulation and the Secretary's trust duty. EPNG's arguments to the contrary have been rejected by the Secretary and the United States Department of Justice when another pipeline company made a similar run at the Navajo Nation's trustee. See Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary – Indian Affairs (Operations), 12 IBIA 49 (1983); Motion for Partial Summary Judgment, Transwestern Pipeline Company v. Clark, CIV Nos. 83-1884 and 84-0251 (D.N.M. filed Sept. 11, 1984). Federal law requires that an applicant for a right-of-way over tribal trust lands include evidence of tribal consent with the application. EPNG's defective application should be rejected.

¹ In March 2003, EPNG settled a claim by the State of California that EPNG overcharged the State by \$3.3 billion from November 2000 through March 2001. EPNG agreed to pay the State \$1.7 billion to settle the case and to pretermitt an investigation of EPNG for antitrust violations. Gary Chazen, "Details emerge on \$1.7B El Paso Settlement," Sacramento Business Journal (March 21, 2003), found at <http://www.buzjournals.com/sacramento/stories/2003/03/17/daily42.html?t=printable>.

I. THE NAVAJO NATION AND FEDERAL INDIAN POLICY

The foundation of the relationship between the Navajo Nation and the United States of America is a Treaty negotiated in 1849 and ratified by Congress in 1850. Under that Treaty, the Navajo Tribe submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo. 9 Stat. 974. In exchange, the United States promised to give the Treaty a "liberal construction" and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo people. *Id.* at 975. Those commitments indicate the Government's "willing assumption" of trust duties with respect to Navajo resources.²

The United States further promised in Article IX of the 1850 Treaty to, "at its earliest convenience, designate, settle, and adjust [the Navajos'] territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians." Despite additional treaty negotiations in the mid-1850s, the territorial boundaries of the Navajo were not established. After subsequent skirmishes with local settlers and military authorities, the Navajo people were marched on the Long Walk to a concentration camp in eastern New Mexico. There, about one-third of the Navajos died, and the Government recognized the failure of that ignoble experiment.

Consequently, a second treaty was negotiated and ratified in 1868. 15 Stat. 667. That Treaty did designate a described area of about 100 miles square to be "set apart for the use and occupation of the Navajo tribe of Indians" and further provided that the "United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees

² See Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 n.1 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as modified on other grounds, 782 F.2d 855 (en banc), supplemented 793 F.2d 1171, cert. denied, 479 U.S. 970 (1986).

of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over . . . the territory described” in the Treaty. Id., Art. II. The Navajo agreed not to “oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States.” Id., Art. IX. Thus, in Williams v. Lee, 358 U.S. 217 (1959), the Court observed that the Treaty “provided that no one, except United States Government personnel, was to enter the reserved area.” Id. at 221. Cases of the Court “have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.” Id. at 223, quoted in United States v. Mazurie, 419 U.S. 544, 558 (1975).

The Treaty reservation proved inadequate as a homeland for the Navajo people. It was subsequently expanded by numerous Executive Orders, which typically set apart other lands as additions to the Navajo reservation. By the Act of June 14, 1934, 48 Stat. 960 (the 1934 Act”), Congress ratified those additions and confirmed expanded boundaries of the Navajo Reservation in Arizona. Like the Executive Orders, the 1934 Act had no requirement that the Navajo Nation give blanket consent to the construction of works of public utility on the new reservation lands. Rather, the 1934 Act only limited the Navajo Nation’s authority over water power development under the Federal Water Power Act of June 10, 1920. See 48 Stat. at 961.

The Navajo Nation is now the country’s largest Indian nation, with territory covering over 25,000 square miles in Arizona, Utah and New Mexico. Despite the considerable size of the Navajo Reservation, the Navajo people experience poverty of a kind unknown to most Americans. Most relevant to this discussion, approximately 54 % of Navajo residents on the Reservation lack any

electric service (1993 data), approximately 90 % lack any natural gas service, and 70 % have no running water.³ If experienced elsewhere in the United States, these conditions would constitute a national emergency meriting full deployment of appropriate federal and state officials.

The causes of these conditions are many and varied. The United States defaulted in its 1868 Treaty obligation to provide schools for Navajo children. See 26 Cong. Rec. 7703 (1894). Thus, in 1948 it was reported that the median education level for Navajos was less than 1 year. U. S. Dep't of the Interior, Report on the Navajo, Long Range Program of Navajo Rehabilitation 11 (1948). The federal neglect was exacerbated by discriminatory policies of state school districts.⁴

Although the Navajo reservation has abundant natural resources, it has served as an “energy colony” of the United States, according to a federal study in 1975. See U. S. Comm'n on Civil Rights, The Navajo Nation: An American Colony 30-31 (1975) (In mineral transactions, “[o]n all accounts, either by negligence or deliberate bias, the Government’s weight has been on the wrong side of the bargaining table.”). For example, in perhaps the largest Indian mineral transaction in history, concerning a Peabody coal lease on the Navajo reservation, the Court of Federal Claims found that the Secretary of the Interior breached his basic trust duties of care, candor and loyalty, stating:

There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties’ desired course of action in lieu of action favorable

³ Troy A. Eid, “A Land of Opportunity,” Denver Post (July 25, 2005) at p. 6C. Mr. Eid is identified in the article as counsel for El Paso Natural Gas Co.

⁴ See Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 834 (1982) (referring to the Navajo “children abandoned by the State”), Natonabah v. Board of Educ., 355 F. Supp. 716, 719 (D.N.M. 1973); NAACP and Harvard Center for Law & Educ., An Even Chance: A Report on Federal Funds for Indian Children in Public School Districts 7 (1971).

to the beneficiary, and then mislead the beneficiary concerning these events. * * * [T]he Secretary approved lease amendments with royalty rates well below the rate that had previously been determined appropriate

Navajo Nation v. United States, 46 Fed. Cl. 217, 226 (2000), rev'd on other grounds, 263 F.3d 1325 (Fed. Cir. 2001), rev'd, 537 U.S. 488 (2003), on remand, 347 F.3d 1327 (Fed. Cir. 2003). Such breaches of trust occurred not only in the area of mineral leasing,⁵ but also in the Government's issuance of rights-of-way for energy pipelines across Navajo lands, extending to the present day. See, e.g., Cobell v. Norton, 2003 WL 21978286 (D.D.C. Aug 20, 2003) (reproducing Report of Special Master's visit to the Office of Appraisal Services of the Navajo Realty Office of the Bureau of Indian Affairs); Scott Patterson, "Fraud in New Mexico," Smart Money (Dec. 3, 2004);⁶ Kathy Helms, "Pipeline Firms Get Great Deals on Indian Lands," Gallup Independent (Apr. 11, 2005) at 1.

In 1871, Congress ended treaty-making with Indian tribes, but provided that no obligation to the tribes would be impaired because of the new policy. 25 U.S.C. §71. Statutes and agreements took the place of treaties, "creating rights and liabilities that are virtually identical to those established by treaties." Felix S. Cohen's Handbook of Federal Indian Law ("Handbook") 127 (R. Strickland ed.1982). After a disastrous allotment policy, Congress recognized and augmented tribal authority over reservation lands. In the same year that it confirmed and expanded the Navajo Reservation in Arizona, Congress passed the Indian Reorganization Act ("I.R.A.") in 1934 "to

⁵ See, e.g., Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980); Navajo Tribe of Indians v. United States, 610 F.2d 766 (Ct. Cl. 1979), cert. denied, 444 U.S. 1072 (1980); Navajo Tribe of Indians v. United States, 364 F.2d 320 (Ct. Cl. 1966); Navajo Tribe of Indians v. United States, 9 Cl. Ct. 227 (1985).

⁶ From [http://smartmoney.com/print/index.cfm?printcontent+/onthe street/index.cfm?story=20041203&hpa](http://smartmoney.com/print/index.cfm?printcontent+/onthe%20street/index.cfm?story=20041203&hpa) (visited Apr. 11, 2005).

rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973). "[T]he aim was to disentangle the tribes from the official bureaucracy." Id. at 153. While giving the tribes an option to adopt constitutions (typically drafted by the Secretary), the Act's benefits were not limited to those "organized" tribes, see, e.g., 25 U.S.C. §§ 461-72; see United States v. Anderson, 625 F.2d 910, 916 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); Mancari v. Morton, 359 F. Supp. 585, 588 (D.N.M. 1973) (three-judge panel), rev'd on other grounds, 417 U.S. 535 (1974), cf. 25 U.S.C. 473, and did nothing to limit pre-existing powers of the Navajo Nation, which did not adopt such a constitution, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198-99 (1985)⁷; Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 599 (9th Cir. 1983) (right to exclude), cert. denied, 466 U.S. 926 (1984); Southland Royalty Co v. Navajo Tribe, 715 F.2d 486, 489 (10th Cir. 1983); see Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002) ("the fact that a tribe is not administratively recognized does not affect that tribe's vested treaty rights"); United States v. Suquamish Indian Tribe, 901 F.2d 772, 776 n.10 (9th Cir. 1990) (same).

The pre-existing powers confirmed by Congress in 1934 include the power to exclude nonmembers of the tribe from entering upon the reservation. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-44 (1982); Babbitt Ford, 710 F.2d at 592; Powers of Indian Tribes, 55 I.D. 14, 48 (1934), cited in Kerr-McGee Corp., 471 U.S. at 199. That power necessarily includes the ability to set conditions on the entry of nonmembers seeking to enter the reservation and conduct business

⁷ Indeed, Congress amended the Indian Reorganization Act in 1990 to permit Indian tribes that chose not to adopt a constitution to obtain an I.R.A. charter of incorporation, which the Secretary granted to the Navajo Nation at its request on December 23, 1997.

there. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). “A tribe needs no grant of authority from the federal government in order to exercise this power.” Ortiz-Barraza, *supra*.

With the exception of a brief termination period which was not intended to affect the Navajo Nation, see Handbook at 166-67 & n.151 (discussing the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38), both Congress and the Presidency have consistently acted to enhance tribal authority over tribal lands. Congress did so in the 1948 Indian Right-of-Way Act, 25 U.S.C. §§ 323-328 (the “1948 Act”). The statute expressly allows Secretarial grants of rights-of-way over Indian lands without landowner consent in only four specified classes of cases,⁸ and its express prohibition of any such grant over lands of I.R.A. tribes without tribal consent was included “merely to prevent implied supersession of the Indian Reorganization Act and the Oklahoma Indian Welfare Act.” House Committee on Government Operations, Disposal of Rights in Indian Tribal Lands Without Tribal Consent, H. R. Rep. No. 78, 91st Cong., 1st Sess. 9 (1969); see S. Rep. No. 823, 80th Cong., 2d Sess. 1 (1948), reprinted in 1948 U.S. Code Cong. Serv. 1033, 1036.

The 1948 Act further empowers the Secretary of the Interior to prescribe conditions to be satisfied by right-of-way applicants. 25 U.S.C. §323. Since 1951, the Department has construed the 1948 Act as requiring the consent of all tribes, its regulations have made such consent an express condition of any grant, and Congress has ratified that construction. See 16 Fed. Reg. 8578 (1951);

⁸ See 25 U.S.C. § 324. These exceptions all apply to individually-owned allotted trust lands, where there are multiple owners and most consent or where some owners cannot be located or their identities determined, because in those circumstances “a requirement that the consent of all parties in interests be obtained would operate, from a practical standpoint, to the disadvantage of the Indians.” S. Rep. No. 823, *supra*. The same could be true with respect to tribes who have no governmental structure at all, but the Navajo Nation has the “most elaborate” of the tribal governments, whose legitimacy is “beyond question.” Kerr-McGee Corp., 471 U.S. at 201.

25 C.F.R. § 256.3 (1952); 25 C.F.R. § 161.3 (1980); 25 C.F.R. § 169.3 (2004); cf. H. R. Rep. No. 78, supra, at 3 (“The Committee believes that the Secretary’s assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.”).

The policy of honoring tribal decision making is now firmly embraced by both Congress and the Presidency. See, e.g., Kerr-McGee Corp., 471 U.S. at 200; 25 U.S.C. §§ 450, 458aa; The American Indian – Message from the President of the United States, H. Doc. 272, 90th Cong., 2d Sess. 3-4 (1968); Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573; President’s Statement on Indian Policy, 1983 Pub. Papers 96; Statement on Signing the Department of the Interior and Related Appropriations, 1991, 26 Weekly Comp. Pres. Doc. 1768 (1990); Exec. Order No. 13, 175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (2000).

II. STATEMENT OF FACTS

As stated in EPNG’s letter to Solicitor Wooldridge (Sept. 29, 2005), EPNG constructed its original pipeline system across Navajo lands in 1951. For an unbroken period of over a half century, EPNG has contractually bound itself to limited terms of years for its compressor station leases and its rights-of-way. During that same extended period of time, EPNG has repeatedly and consistently acknowledged that Navajo Nation consent is required as a condition for any grant of a right-of-way over Navajo lands. These facts are reflected in documents within the custody of the Department and are summarized below.

A. Rights-of-Way

At all times, EPNG sought and received Navajo Nation consent to its pipeline construction.

By letter dated March 3, 1953, Navajo Chairman Sam Akeah responded to EPNG's request for Navajo consent, stating: "you are hereby granted permission to proceed with construction of the Blanco-Gallup Products line in accordance with your survey across a portion of the Navajo reservation" and explaining that "[y]our application was explained to the Advisory Committee of the Navajo Tribal Council at its meeting in February 1953, and the Committee approved a motion on February 11 granting authority to the Chairman of the Tribal Council and the Area Director to approve the right of way in accordance with the regulations" App. 1. Similarly, on December 24, 1958, Navajo Chairman Paul Jones informed the BIA General Superintendent that "[t]ribal consent is hereby given for El Paso Natural Gas Company to construct the two additional lines" requested by EPNG in the Aneth area of the Navajo Reservation. App. 3. Navajo Nation consent was requested and granted on July 6, 1961 and January 30, 1962 for EPNG's line (no. 601298) to Southwest Forest Industries. App. 4, 5. The BIA Route Sheet for such rights-of-way reflect the BIA's practice of routing applications through the Navajo Nation's legal department and its Chairman before acting, App. 7, and its checklist includes as step one "Tribal Consent." App. 8. EPNG's letter seeking federal permission to construct that line enclosed the "[w]ritten consent of the Chairman of the Navajo Tribe." Letter from Gober C. Wright, Jr., to Glenn R. Landbloom, BIA Superintendent (June 28, 1961), App. 9. Likewise, Navajo Chairman Raymond Nakai recited in a memorandum dated September 27, 1963 that "El Paso Products Pipeline Company has requested permission to construct various battery ties to pipeline laterals over tribal lands" and stated "[t]ribal consent is hereby given to permit El Paso Products Pipeline Company to construct the above laterals and battery ties" App. 11-12.

EPNG's plans called for numerous segments of gathering lines in the Aneth area of the

Reservation, where royalties from oil and gas production would directly benefit the Navajo treasury. EPNG and the Navajo Nation therefore executed a more general consent document on August 14, 1958, to cover this particular gathering system, and it was approved by the BIA on August 15, 1958. App. 13-16. In 1962 EPNG needed to extend this gathering system to the McCracken Mesa, an area of the Reservation then withdrawn under federal legislation authorizing a land exchange with the Navajo Nation, and so it obtained the consent of the Navajo Nation to those lines, as well, by letter dated January 12, 1962, from the Chairman of the Navajo Tribal Council to the BIA General Superintendent. App. 17-18. That consent was expressly given “pursuant to the conditions to the consent granted on August 14, 1958.” App. 18. EPNG had previously dealt with McCracken Mesa lands under separate applications, submitting therewith “[w]ritten consent of the Chairman of the Navajo Tribal Council.” Letter from Gober C. Wright, Jr., to Glenn R. Landbloom, BIA Superintendent (Dec. 20, 1961), App. 19.

EPNG’s right-of-way supervisor sought an easement to construct a lateral pipeline by letter dated June 24, 1965 under 25 C.F.R. § 161.25(d), and so wrote to the BIA Superintendent that, “[i]n keeping with the provisions of this Section, we submit the following: . . . 2. Consent of The Navajo Tribal Council.” App. 21. In response to EPNG’s request for authorization to relocate a portion of its right-of-way in the Arizona portion of the Reservation, Chairman Nakai stated in a July 18, 1966 memorandum to the BIA’s Navajo Area Office that “[t]ribal consent is hereby granted” App. 23.

The complexity and number of EPNG’s pipelines on the Navajo Nation created an onerous administrative burden on both EPNG and the Navajo Nation. By the 1970s, the Navajo Nation and the BIA had apparently decided to grant rights-of-way that would expire contemporaneously, on

March 9, 1986. See, e.g., Grant of Easement for Right-of-Way (Feb. 15, 1973) (establishing a term for the Tocito Dome meter station to end on March 9, 1986), App. 25; Grant of Easement for Right-of-Way and Supplements nos. 1 through 15 (Sept. 28, 1979) (term for rights-of-way nos. 73632, et al., to end on March 9, 1986), App. 29, 34-64. Thus, in a letter dated February 23, 1981, David L. Larson, EPNG's Principal Counsel, suggested that, in exchange for Navajo approval of various pending applications and for expedited approval of later applications, EPNG would agree to have all rights-of-way expire as of March 9, 1986 and to commence negotiations for new terms in January 1982. The Navajo Nation saw merit in that suggestion and limited its consent to EPNG's rights-of-way so that all would expire on March 9, 1986 and extensions for all could be renegotiated at the same time. See Memorandum from Frank E. Paul, Vice Chairman, to Daniel Deschinny, Navajo Land Administration (August 24, 1981), App. 65.

Negotiations for renewing the rights-of-way concluded with an agreement dated January 29, 1985 which recites that "it will ease the administrative burdens of both parties if all existing El Paso rights-of-way on Navajo land are consolidated into a single right-of-way easement grant with a term of twenty (20) years." App. 66. It evidenced in section 1 the consent of the Navajo Nation to the "renewal of all existing El Paso pipeline rights-of-way for a term of twenty (20) years . . . [to] commence on the date the United States, through the Bureau of Indian Affairs, grants the associated right-of-way easement(s) on behalf of the Navajo Nation, or on March 9, 1986, whichever date shall first occur." App. 66-67. It further evidenced Navajo Nation consent to the issuance of eight additional rights-of-way in paragraph 10 "for an identical twenty (20) - year term." App. 70. BIA approved the grant of easements on October 18, 1985. See Amendment No. 1 to the January 29, 1985 Agreement, at Whereas ¶ 1, App. 78. This limited term was acknowledged by EPNG

repeatedly. See, e.g., Letter from Wayne C. Stephens, EPNG Director of Right-of-Way and Attorney in Fact, to the Navajo Nation (Mar. 27, 1991) (“El Paso renewed its rights-of-way across the Navajo Nation for a term of twenty (20) years.”), App. 90. The BIA understood this basic term of the agreement, as well. See Letter from Dale V. Underwood, BIA Acting Area Real Property Management Officer, to Wayne Stephens (Oct. 22, 1985) (“The easements will be covered by El Paso’s January 29, 1985, Agreement with the Navajo Tribe and will expire on October 17, 2005.”), App. 92.

On January 12, 1989, through the above-mentioned Amendment no. 1 to the 1985 Agreement, EPNG and the Navajo Nation agreed on terms to allow EPNG to build additional pipelines. The amendment expressly incorporated the terms and conditions of the 1985 Agreement and pegged the compensation to the Navajo Nation for the additional lands on the number of years remaining for the new rights-of-way divided by the 20 year term provided in the 1985 Agreement. App. 79. EPNG and the Navajo Nation further amended the January 29, 1985 Agreement on August 7, 1989, December 11, 1990, and September 28, 1995, by Amendments nos. 1, 2, 3, and 4, respectively. App. 94-158. The BIA approved them on February 16, 1989, September 1, 1989, January 7, 1991, and October 24, 1995, respectively. App. 79, 96, 106, 150. Those federal approvals and grants either incorporated by reference the 2005 expiration date or explicitly specified that the easement was for “a term of years ending October 17, 2005.” App. 78, 106, 128, 149. After amendments to the Navajo Nation Code in 1988 invested the Resources Committee of the Navajo Nation Council with the power to consent to rights-of-way on behalf of the Navajo Nation, see 2 N.N.C. § 695 (1995), the consent of the Navajo Nation was expressed in resolutions of that Committee. In the resolution approving Amendment No. 4 to the 1985 Agreement, No. RCS-214-95

(Sept. 14, 1995), that consent was conditioned on EPNG's compliance with Standard Terms and Conditions, which include EPNG's compliance with "Title 25, Code of Federal Regulations, Part 169" and which provides that "[a]t the termination of this right-of-way, the Grantee shall peaceably and without legal process deliver up the possession of the premises, in good condition, usual wear and tear excepted." See Resolution No. RCS-214-95 at Exhibit "C" thereto at ¶¶ 1(a) and (11) (App. 130, 132). The federal grant of easement incorporated those requirements. Grant of Easement for Right-of-Way, no. 930623 (Oct. 13, 1995), at 3, ¶ (F), App. 148, 150.

EPNG reaffirmed the terms and conditions of the 1985 Agreement in a Land Exchange Agreement in 1993, also. The 1993 agreement (erroneously styled as a second Amendment no. 4 to the 1985 Agreement) provides in paragraph 8 that all other terms and conditions, with the exception of the consideration provisions of the above-mentioned rights-of-way, including the expiration date, shall be governed by the January 29, 1985 Rights-of-way Agreement between the Nation and El Paso . . . " App. 167.

For over a half-century, EPNG has always sought Navajo Nation consent to the grant or extension of easements for rights-of-way in accordance with the 1948 Act and implementing federal regulations and with fundamental Navajo sovereign rights under treaty and federal common law. During that extended period of consensual dealings, the Navajo Nation has exchanged valuable consideration for EPNG's consistent agreements to limited terms of its rights-of-way.

B. Compressor Plant Leases

EPNG's conduct and contractual commitments respecting its ancillary facilities are just as consistent. Compressor stations on Navajo lands were originally authorized by business site leases, which all provide for a twenty-five year primary term, one right to renew for an additional twenty-

five year period, and the obligation of EPNG to deliver up the premises to the Navajo Nation upon expiration of the agreement. For example, section 2 of the compressor plant lease of 40 acres of Navajo Nation land in New Mexico, approved under BIA contract no. 14-20-603-1512 (Jan. 17, 1956), states that the term “shall be for a term beginning with the date of approval by the Secretary of the Interior or his duly authorized representative and continuing for twenty-five (25) years unless sooner terminated as hereinafter provided.” App. 176. Section 5 of that lease agreement provides that the lessee EPNG “is hereby granted by Lessor an option to renew this lease for an additional term not exceeding twenty-five (25) years” App. 177. In section 8, EPNG agreed to “peaceably and without legal process deliver up the possession of the leased premises exclusive of the improvements which remain its property unless otherwise provided”⁹ App. 179. EPNG and the Navajo Nation amended that agreement in March 1966 to add 13.29 acres to the leasehold, and specified that the terms of the original lease were “ratified and confirmed by the parties hereto.” App. 186.

A second compressor plant lease for three separate tracts on the Navajo Reservation, approved under BIA contract no. 14-20-603-1513 (Jan. 19, 1956), has the same limited extension option and surrender of the premises language as the above-described January 17, 1956 Agreement. See App. 193, 195. That lease was amended four times by EPNG and the Navajo Nation, in June 1956, March 1959, July 1965, and October 1967. All four of the amendments recite the 25-year term of the original agreement and expressly ratify and confirm the terms of the original agreement. App. 200-01, 204-05, 210-11, 214-15. All four were approved by the Department. App. 201, 205, 212,

⁹ Concerning the ownership and disposition of improvements on tribal land after the expiration of a lease generally, see Banner v. United States, 238 F.3d 1348, 1356 (Fed. Cir. 2001); United States v. Pilot Oil Co., 54 F. Supp. 532, 534 (D. Wyo. 1944).

215. As recently as April 4, 1996, EPNG acknowledged in a letter to the Navajo Nation Department of Justice that its rights under this lease would expire on March 27, 2006. See App. 217.

A third compressor plant lease for the Leupp station was approved under BIA contract no. 14-20-603-1514 (Jan. 17, 1956). Sections 2 and 5 of that lease stipulate a term of “twenty-five (25) years” with an “option to renew this lease for an additional term not exceeding twenty-five (25) years.” App. 220-21. In section 8 of that lease, EPNG again agreed to surrender possession of the premises upon the expiration of the lease. App. 222a. The Leupp lease was amended by the parties five times, in June 1956, October 1957 (twice), March 1961, and July 1969. App. 231-51. All five of those amendments recite the 25-year term of the original agreement and expressly ratify and confirm the terms of the original agreement. All were approved by the Department. App. 233, 242, 245, 251, 253. In addition, EPNG subleased the premises in August 1958, and the sublease properly provides that its term shall “not exceed[] the term of the primary lease and extensions thereof.” App. 256. By letter dated May 4, 1981, EPNG invoked its right to renew the leases “for a term of twenty-five (25) years effective upon our notice of renewal of December 9, 1980.” App. 263. Its December 9, 1980 letter confirmed that “[a]ll other terms and conditions will remain the same” including, inter alia, the requirement that EPNG surrender possession after the expiration of the extended term on December 9, 2005. App. 265.

EPNG’s Window Rock compressor station lease, approved under BIA contract no. 14-20-603-3206 (June 13, 1957), has the same twenty-five year term, the same one-time option to renew for an additional twenty-five years, and the same requirement to surrender the premises in sections 2, 5 and 8 as the previously described leases. App. 266, 268, 269-70. So does EPNG’s Dilkon compressor plant site lease, approved under BIA contract no. 14-20-0603-7699 (May 22, 1963),

App. 276, 277, 278. That lease was amended three times to allow EPNG to use additional Navajo lands, in January 1964, March 1966, and February 1967. App. 286-99. All three amendments recite the limited term, and ratify and confirm the terms and conditions of the original lease. App. 286-87, 291-92, 296. All were approved by the Department. App. 287, 292, 297.

EPNG's White Rock compression station lease on Navajo lands was approved under BIA contract no. 14-20-0603-8995 (Dec. 14, 1965). That lease also provides for a term of twenty-five years, a one-time right to renew for an additional twenty-five years, and the requirement that EPNG deliver up the premises peaceably upon the expiration of the term or extended term, in sections 2, 4 and 7. App. 300, 301, 302

As shown above, EPNG's conduct and contracts respecting leases of Navajo lands for ancillary facilities mirrors in all relevant respects its conduct and contracts respecting its rights-of-way. All of the contracts were accompanied by Navajo Nation consent, and all have definite and limited temporal terms.

III. EPNG IS ESTOPPED BY CONTRACT FROM ASSERTING THAT IT MAY CONTINUE TO OCCUPY AND USE NAVAJO TRUST LANDS.

Having sought and obtained Navajo Nation consent each time to advance its business interests on Navajo lands, having benefitted from the resulting contracts with the Navajo Nation for over a half-century, having agreed in those contracts to a limited term of its tenure on Navajo land, having promised repeatedly in those many contracts to deliver up to the Navajo Nation the premises upon expiration of those rights, and having sought and obtained federal approval of all of those contracts, EPNG is estopped from claiming a right to hold over. EPNG's request is contrary to the terms of numerous agreements between it and the Navajo Nation. EPNG is estopped from asserting that it has a right to continue to occupy and use Navajo lands. See, e.g., Federal Power Comm'n v.

Colorado Interstate Gas Co., 348 U.S. 492, 502 (1955); Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1282 (10th Cir. 1991); First Am. Discount Corp. v. Commodities Futures Trading Comm'n, 222 F.3d 1008, 1016 (D.C. Cir. 2000); Treakle v. Pocahontas Steamship Co., 406 F.2d 412 (4th Cir. 1969); Villani v. New York Stock Exch., Inc., 348 F. Supp. 1185 (S.D. N.Y. 1972), modified on other grounds, 367 F. Supp. 1124 (S.D.N.Y.), aff'd, 489 F.2d 1 (2d Cir. 1973); In re Guterl Special Steel Corp., 316 B.R. 843, 856 (W.D. Pa. 2004) (estoppel doctrine “applies where it would be unconscionable to permit a person to maintain a position inconsistent with one in which he acquiesced or where he accepted a benefit” and is but an application of the maxim that “one cannot eat his cake and have it too”).

EPNG’s position is no different than others who have agreed to erect improvements on Indian lands with limited term leases, then tried to sue or corrupt the trustee in order to hold over in violation of approved contracts. See, e.g., Fluent v. Salamanca Indian Lease Auth., 928 F.2d 542 (2d Cir.), cert. denied, 502 U.S. 818 (1991); Havasu Palms, Inc. v. Western Regional Director, Bureau of Indian Affairs, 40 IBIA 289 (2005) (affirming decision not to grant new lease to developer and upholding refusal to enforce arbitration award that would have granted relief to developer not provided in approved agreement); Hawley Lake Homeowners’ Ass’n. v. Deputy Assistant Secretary – Indian Affairs (Operations), 13 IBIA 276 (1985); Racquet Club Properties, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 25 IBIA 251 (1994) (rejecting developer’s effort to modify over landowner objections a lease to provide for a greater development period); see also Scott v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 29 IBIA 61, 70 (1996) (the term of an Indian lease, including any renewal option, is “an essential provision of the lease” which the Department may not modify over the objection of the Indian landowner).

Based on either its conduct or its contracts or both, EPNG is estopped from asserting that it has a right to remain on Navajo lands.

IV. NAVAJO NATION CONSENT TO GRANTS OF RIGHTS-OF-WAY IS REQUIRED BY THE 1948 INDIAN RIGHT-OF-WAY ACT.

A. The Department of the Interior Has Consistently Construed the 1948 Act to Require the Consent of All Indian Nations as a Condition for a Grant of Easement, and that Construction of the 1948 Act is Conclusive Here.

The Department of the Interior contemporaneously construed the 1948 Act to require the consent of all tribes as a condition for a grant of rights-of-way across tribal trust lands, and has done so ever since. Regulations under the 1948 Act were first promulgated on August 25, 1951, 16 Fed. Reg. 8578, and were designed to implement and harmonize that Act with earlier right-of-way statutes, see 25 U.S.C. §§ 311-321. These contemporaneous regulations construed the 1948 Act as requiring the consent of all tribes, see 16 Fed. Reg. at 8579. Regulations since that time have always maintained that construction and requirement. E.g., 25 C.F.R. §256.3 (1952); 25 C.F.R. § 161.3 (1980); 25 C.F.R. § 169.3(a) (2004). Although EPNG has no right to renew its rights-of-way under its approved agreements with the Navajo Nation, we note in any event that such consent requirement applied to right-of-way renewals when EPNG agreed to a twenty-year term for all of its easements in 1985, and it applies today. See 25 C.F.R. § 169.19 (1985); 25 C.F.R. § 169.19 (2004). This contemporaneous and longstanding interpretation of the 1948 Act by the agency charged with its interpretation is entitled to substantial deference, e.g., Udall v. Tallman, 380 U.S. 1, 17-18 (1965); Peters v. United States, 853 F.2d 692, 700 (9th Cir. 1988); Community Hospital v. Sullivan, 986 F.2d 357, 360 (10th Cir. 1993), especially when it comports with the rule that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit, see, e.g., Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir.

2003), cert. denied, 125 S. Ct. 51 (2004); Gobin v. Snohomish County, 304 F.3d 909, 914 (9th Cir. 2002), cert. denied, 538 U.S. 908 (2003); HRI, Inc. v. EPA, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000).

The Department's consistent construction of the 1948 Act is manifested in published regulations from 1951 to the present¹⁰, and should not be overturned unless it is plainly erroneous. See, e.g., Denny v. Hutchinson Sales Corp., 649 F.2d 816, 819 (10th Cir. 1981). Here, the 1948 Act only permits the Secretary to grant easements without landowner consent in four discrete instances involving allotted lands. Its reference to I.R.A. tribes was included merely to preclude an argument that parts of the I.R.A. were impliedly superseded. H.R. Rep. No. 78, 91st Cong., 1st Sess. 9 (1969). It does not negate the then-recognized authority of all tribes to exclude or to condition the entry of nonmembers.¹¹ The Department's longstanding interpretation of the 1948 Act is permissible and is therefore determinative. See, e.g., Auer v. Robbins, 519 U.S. 452, 457 (1997); Swonger v. Surface Transp. Bd., 265 F.3d 1135, 1140 (10th Cir. 2001), cert. denied, 535 U.S. 1053 (2002); Denny, supra.

B. Congress Ratified the Department's Consistent Construction of the 1948 Act.

¹⁰ The Flanery memo attached as Exhibit A to EPNG's brief concerns principally a 1946 Act relating to Crow tribal lands in relation to an application by a federal agency (the Bureau of Reclamation) for a right-of-way to serve the Yellowtail Dam. The short discussion of the 1948 Right-of-Way Act by the Acting Solicitor cannot constitute an authoritative statement of Interior policy, much less of the 1948 Act itself, because official Departmental policy is embodied in its published regulations. As the Flanery memo notes, those regulations "provide[] that no right of way shall be granted across tribal lands without the prior consent of the tribal council." Flanery memo at 1. The 1936 memorandum attached to EPNG's submission has nothing to do with EPNG's application; it concerns a 1934 Act, not the 1948 Act at issue here.

¹¹ "The legislative history of the 1948 Indian Right-of-Way Act . . . shows no congressional intent that consent ought not to be sought from unorganized tribes." H. R. Rep. No. 78, 91st Cong., 1st Sess. 9 (1969).

In a situation with far greater implications for Southwest energy production and transmission, the Secretary of the Interior once considered changing the regulations under the 1948 Act to require the consent of only the I.R.A. tribes for grants of rights-of-way. 32 Fed. Reg. 5512 (1967). The matter was brought to the attention of Congress, Congress rejected that interpretation of the 1948 Act, and the Secretary republished the proposed regulations to retain the requirement of consent by all Indian tribes. 33 Fed. Reg. 18,903 (1968).

The report resulting from this exchange shows that Congress was made aware of the Department's consistent interpretation and not only did not change that interpretation, but enthusiastically embraced it. H. R. Rep. No. 78 at 2-3. The Committee concluded that "the Secretary's proposal for granting rights-of-way over tribal land without the consent of a tribe which owns it violates property rights, democratic principles,¹² and the pattern of modern Indian legislation" and that "the Secretary's assertion of power to act in disregard of his own regulations and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained." *Id.* at 2. After the Secretary disavowed such authority by retaining the requirement of tribal consent, the Report "commend[ed] the Interior Department for having done so" and recommended that the Secretary not stray from that requirement "on any pretext, even when he feels the Indians are withholding consent contrary to their own best interest." *Id.* at 2-3. The Report relied in part on the language present in the 1868 Treaty and other treaties of that era:

Some of the "unorganized" Indian tribes have been guaranteed by treaties that no non-Indian shall ever be permitted to settle upon or pass over their lands without their

¹² See generally Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365 (1989).

consent. Such treaty stipulations are entitled to equal recognition with the Indian Reorganization Act . . . as limitations on the Secretary's authority to grant rights-of-way.

Id. at 9.

Where the Department's consistent interpretation of the 1948 Act was brought to the attention of Congress and not changed by it, Congress has ratified that statutory interpretation. See Mobil Oil Corp. v. Federal Energy Admin., 566 F.2d 87, 100 (Temp. Emer. Ct. App. 1977); Kay v. Federal Communications Comm'n, 443 F.2d 638, 647-48 (D.C. Cir. 1970) ("a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval"); Maddux v. United States, 20 Ct. Cl. 193, 198 (1885) ("When Congress permits regulations to be formulated and published and carried into effect year after year, the legislative ratification must be implied.").

The contemporary, consistent and reasonable interpretation of a statute by the agency charged with its implementation is conclusive as to the meaning of the statute. Congress has ratified that interpretation. For either of those reasons, the requirement of consent of all tribes for rights-of-way across their lands under the 1948 Act is a statutory requirement. The Secretary has no authority to disregard that statutory requirement by administrative fiat or otherwise. See generally Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949) (actions of executive officials in violation of statute are ultra vires).

C. There Is No Issue of Treaty "Abrogation."

The 1850 and 1868 Treaties are between the United States and the Navajo Tribe of Indians. "Abrogation" of treaty rights is a term that refers to a unilateral federal action that diminishes the

rights of the treaty tribe. Congress does not “abrogate” treaty rights when it confirms, confers, or delegates authority to the tribe with which it has treated. Moreover, EPNG, a stranger to the treaties, lacks standing to complain about any “abrogation” of Navajo treaty rights.

1. EPNG Lacks Standing to Complain of Treaty “Abrogation.”

Treaty rights of Indian tribes may not ever be abrogated by the Secretary of the Interior. Timpanogos Tribe, supra. Only Congress may do so, but its intention to do so must be absolutely clear. E.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202-03 (1999); Greene v. Babbitt, 64 F.3d 1266, 1270 (9th Cir. 1995); Timpanogos, supra. A statute presumptively does not modify or abrogate Indian treaty rights. Reich v. Great Lakes Indian Fish and Wildlife Comm’n, 4 F.3d 490, 493 (7th Cir. 1993). Courts have “uniformly held that treaties must be liberally construed in favor of establishing Indian rights.” United States v. State of Washington, 157 F.3d 630, 643 (9th Cir. 1998), cert. denied, 526 U.S. 1060 (1999). Doubts must be resolved in favor of the treaty tribe in order to comport with “traditional notions of sovereignty and with the federal policy of encouraging tribal independence.” Artichoke Joe’s, supra, 353 F.3d at 729, quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982).

These rules protect the Indians. They are intended to protect against abrogation of Indian rights, not to protect non-Indian interests. See United States v. Dion, 476 U.S. 734, 739 (1986) (“Indian treaty rights are too fundamental to be easily cast aside.”). These rules are grounded in the special trust relationship between the United States and the Indian tribes., e.g., Montana v. Blackfoot Tribe, 471 U.S. 759, 766 (1985), and guarantee that the treaties are interpreted “in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.” Shawnee Tribe v. United States, 423 F.3d 1204, 1220 (10th Cir. 2005).

EPNG would turn these principles on their head by applying them to prevent the United States from restoring or confirming attributes of tribal sovereignty in service of non-Indian interests. When the abrogation doctrine is properly understood, it is clear that EPNG has no standing to complain of abrogation of the Navajo Nation's rights under treaty. See, e.g., Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1036-37 (8th Cir. 2002) (non-Indian plaintiff not within zone of interests to be protected by 25 U.S.C. §§ 1a, 81 or 415; complaint ordered to be dismissed for lack of standing), cert. denied, 537 U.S. 1188 (2003); San Xavier Dev't Auth. v. Charles, 237 F.3d 1149, 1154 (9th Cir. 2001) (corporation not within zone of interests to be protected by 25 U.S.C. §§ 177, 348 or 416 or regulations promulgated thereunder; dismissal of complaint affirmed); Utah v. United States Dep't of Interior, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999) (State lacked standing to contest lease approval for nuclear waste storage under 25 U.S.C. § 415, even though regulations required Department to consider interests of neighboring landowners, because allowing suit would impair trust duties).

More generally, "[a] treaty between the United States and an Indian tribe 'is essentially a contract between two sovereign nations.'" Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 (9th Cir. 2005) (en banc) (quoting Washington, v. Wash. State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979)), petition for cert. filed, 74 U.S.L.W. 3233 (U.S. Oct. 3, 2005) (No. 05-43). A private party such as EPNG has no standing to assert rights thereunder. E.g., United States v. Chaparro-Alcantara, 226 F.3d 616, 620-21 (7th Cir.), cert. denied, 531 U.S. 1026 (2000).

EPNG patronizingly suggests that ignoring the objections of the Navajo Nation would be in the Navajo Nation's best interest. But it is clear that EPNG has no standing to assert that position, either. See, e.g., Havasu Palms, Inc. v. Western Regional Director, Bureau of Indian

Affairs, 40 IBIA 289, 300 (2005).

2. The Treaty Does Not Permit EPNG to Condemn Navajo Lands.

EPNG relies on the provision of the 1868 Treaty that states that the Navajo Tribe would not oppose “works of utility or necessity which may be ordered or permitted by the laws of the United States.” EPNG believes this allows it to obtain rights to Navajo land without Navajo consent. However, EPNG misunderstands the context and purpose of that provision, fails to harmonize it with other Treaty provisions, ignores the construction of the Treaty by the United States evidenced by later Acts of Congress, and overlooks the construction given to the treaty as a whole by the United States Supreme Court.

Treaty provisions must be interpreted “in accordance with the meaning they were understood to have by the tribal representatives in council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.” Tulee v. Washington, 315 U.S. 681, 684-85 (1942); Cree v. Flores, 157 F.3d 762, 769 (9th Cir. 1998). Interpretation should take into account the language of the treaty as a whole. Cree, 157 F.3d at 769-70. Both the historical context and the post-treaty actions of the parties are useful aids in the proper construction of the treaty. Cree, 157 F.3d at 770-73. With respect to the Government’s own course of dealings with the Navajo Nation related to rights-of-way, “[i]t is well established that the interpretation placed upon a contract by the parties themselves, before a dispute has arisen, is entitled to the greatest weight.” Reconstruction Finance Corp. v. Sherwood Distilling Co., 200 F.2d 672 (4th Cir. 1952); accord United States Cellular Investment Co. of L. A. Inc. v. GTE Mobilnet, Inc., 281 F.3d 929, 937 (9th Cir. 2002) (interpreting California law).

When viewed in the proper historical context and in the context of other treaty provisions,

the provision that EPNG relies on is unavailing. Article I of the 1868 Treaty sets forth the context: “From this day forward all war between the parties to this agreement shall forever cease.” The Navajo representatives in council would have clearly understood the significance of Article II, that “the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.” The provision that EPNG relies on is among later several subsections that prohibit killing or scalping white men and carrying off women and children. Thus, “[p]laced in context, it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe” Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597, 600 & n.2 (9th Cir. 1984), aff’d, 471 U.S. 195 (1985). It is no wonder that the Secretary, through the Board of Indian Appeals, and the federal courts have squarely rejected EPNG’s interpretation of this Treaty provision. Transwestern Pipeline Co., supra, 12 IBIA at 58-59; Kerr-McGee, supra; United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958) (rejecting position that identical provision in a treaty with the Sioux granted the consent of a tribe to a federal dam and reservoir on tribal land), vacated as moot, 259 F.2d 271 (8th Cir. 1958); see Bennett County, South Dakota v. United States, 394 F.2d 8, 15-16 (8th Cir. 1968) (rejecting county’s position that county could obtain rights to trust land without the consent of the tribe given treaty provisions similar to those of the Navajo and the “extensive legislation which has been evolved by Congress over the years in discharge of its duties towards its Indian wards”).

As the United States Supreme Court has observed, the 1868 Treaty “provided that no one,

except United States Government personnel, was to enter the reserved area.” Williams v. Lee, 358 U.S. 217, 221 (1959). This is the interpretation that the Navajo leaders would have understood,¹³ especially since there was no discussion of the provision upon which EPNG relies in the treaty negotiations. See Treaty between the United States of America and the Navajo Tribe of Indians, with a Record of the Discussions that Led to its Signing 1-11 (KC Publications 1968).

The Congress has not interpreted the Treaty as either obviating the need for tribal consent or providing a blanket authorization for private or public entities, licensed or not, to occupy or use tribal lands. The provision EPNG relies on is present in numerous treaties with Indian tribes, yet Congress has legislated to address specifically rights-of-way for highways, telephone lines and telegraph lines in 1901, 25 U.S.C. §§ 311, 319; railroads, telegraph and telephone lines in 1899, 25 U.S.C. §§ 312-18; reservoirs or materials within reservations related to railroad construction and operation in 1909, 25 U.S.C. § 320; “the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation” in 1904, 25 U.S.C. § 321; and, ultimately, the 1948 Indian Right-of-Way Act, 25 U.S.C. §§ 323-328, relating to “rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes” Id., § 323. All of these statutes are part of Congress’ “definitive and extensive legislation which has evolved by Congress over the years in discharge of its duties toward its Indian wards.” Bennett County, supra. These laws “reflect a federal policy of

¹³As the United States Department of Justice stated in its Transwestern brief, “the Navajo Nation could never have understood the terms of the treaty to include natural gas pipelines operated by private entities and licensed by FERC since neither natural gas pipelines nor the federal agency were in existence in 1868.” Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, Transwestern Pipeline Co. v. Clark, Nos. CIV 83-1884 and 84-0251 HB (D.N.M. filed Sept. 11, 1984).

avoiding or minimizing the disturbance of the Indian's quiet possession of the restricted domains they now occupy" and should be implemented "consistent with the public interest in preserving the status of the Navajo tribe as a 'quasi-sovereign nation.'" New Mexico Navajo Ranchers Ass'n. v. I.C.C., 702 F.2d 227, 233 (D.C. Cir. 1983). As the Justice Department urged, EPNG's interpretation of the Treaty "is completely at odds with the central purposes of the 1868 Treaty which was to secure the benefits of peace and provide the Navajo Tribe with a 'permanent home' set apart from non-Indian settlers" Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, Transwestern Pipeline Co. v. Clark, Nos. CIV 83-1884 and 84-0251 HB (D.N.M. filed Sept. 11, 1984) at 20.

EPNG, although a stranger to the Treaty, has exhibited its own construction of the Treaty over the past half-century. As shown above, that course of conduct has consistently recognized the Navajo Nation's right to consent to grants of easements and to condition any grant on a limited term of years.

Finally, EPNG's pipeline does not fall within the terms of the Treaty provision it relies on, even if it applied. The Treaty refers to works of utility and necessity "ordered or permitted by the laws of the United States." Again, plagiarizing freely from the Justice Department's Memorandum, EPNG's "pipeline is not 'ordered or permitted by the laws of the United States.' A certificate of public convenience and necessity issued by the FERC may indicate compliance with the laws administered by that agency, but not necessarily with laws administered by other agencies, including land management agencies such as the Department of the Interior." Id. at 20-21.

Subsequent decisions of the federal courts validate the Justice Department's view. In United States v. Pend Oreille Pub. Util. Dist., 28 F.3d 1544 (9th Cir. 1994), cert. denied, 514 U.S. 1015

(1995), a public utility district contended that the Federal Power Act and a license issued thereunder authorized it to take Indian reservation land. Likewise, EPNG argues in effect that it can take Navajo Reservation land for its pipeline facilities and operations because it has a certificate from FERC issued under the NGA. The Ninth Circuit disagreed with the utility, though. “The Utility may not condemn tribal lands embraced in a reservation under the Power Act or any other federal statute.” *Id.* at 1548 (emphasis added). Neither may the Secretary. See H. R. Rep. No. 91-78 at 9. Indeed, Congress has affirmatively precluded such attempts to condemn Indian tribal lands in the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a. See, e.g., Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956, 962 (10th Cir. 2004); State of Alaska v. Babbitt, 38 F.3d 1068, 1072-74 (9th Cir. 1994); Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (QTA constitutes an “insuperable hurdle” to a suit to establish title to an easement across reservation land); Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878, 883-84 (10th Cir. 1974) (FERC certificate under Natural Gas Act does not permit utility to condemn lands owned by the United States), cert. dis’d, 419 U.S. 1097 (1975).

EPNG’s position is essentially that it can never be denied its preferred route or be held in trespass, because any agency or court so holding would be effectively voiding its FERC certificate. That position is absurd on its face, and contravenes the case law under even the Federal Power Act, which does expressly deal with Indian lands.¹⁴ In Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 n.4 (9th Cir. 2005) (en banc), the owners of a federally licensed hydroelectric power project

¹⁴ The Natural Gas Act, by contrast, does not mention Indian tribes. See Tribal Sovereignty and Congressional Dominion: Rights-of-Way for Gas Pipelines on Indian Reservations, 38 Stan. L. Rev. 195, 210 (1985). Silence is not a sufficient basis for inferring abrogation of traditional sovereign authority of Indian nations. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc).

lawfully occupying Indian land contended that an action by the tribe for damages and equitable relief caused by the authorized flooding of its reservation was preempted by the Federal Power Act (“FPA”). The court rejected that position, as follows: “the Tribe is not attempting to collaterally attack the 1924 licensing decision; rather, it is suing for damages based on impacts that are not covered by the license. The FPA does not preempt the Tribe’s treaty-based claims.” See Transwestern Pipeline Co. v. Kerr-McGee, Corp., *supra*.

3. Congress Acts Appropriately in Delegating Functions to Indian Nations

The purpose of the federal trust is to gradually return federal functions and prerogatives to the Indian tribes. That principle underpins the modern statutes and policies promoting tribal self-determination. See Morton v. Mancari, 417 U.S. 535, 542-43 (1974); Board of County Comm’rs v. Seber, 318 U.S. 705, 718 (1943); see also Porter v. United States, 496 F.2d 583, 588 n.4 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975). It conforms with the most fundamental of democratic principles. Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365 (1989); H. R. Rep. No. 91-78, *supra*, at 17-19.

The Navajo Nation has the authority to deny or condition the entry of those seeking to do business within the Navajo territory. E.g., Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); Quechan Tribe v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975); Powers of Indian Tribes, 55 I.D. 14, 31-32 (1934). It has exercised this fundamental prerogative by legislation passed in 1970, fifteen years before EPNG agreed on a twenty-year term for its rights-of-way. 5 N.N.C. §§ 401-04 (1995). Therefore, the Congress does not violate any principle of law when it restores or confirms additional powers to the Navajo Nation to govern its territory. In United States

v. Mazurie, 419 U.S. 544 (1975), the Court ruled that, even in the area of the control of liquor on non-Indian fee lands within reservation boundaries, the “certain degree of independent [tribal] authority over matters that affect the internal and social relations of tribal life . . . is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its own authority to regulate Commerce . . . with the Indian tribes.” Id. at 557 (internal quotation marks and citation omitted); see Means v. Navajo Nation, 420 F.3d 1037, 1048 (9th Cir. 2005); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1222-23 (9th Cir. 2001) (en banc), cert. denied, 535 U.S. 927 (2002). So it naturally follows that the United States may properly delegate to Indian tribes the authority to deny or condition their approval of grants of rights-of-way, even if the 1850 and 1868 treaties had not already guaranteed that right for the Navajo Nation. See Southern Pac. Transp. Co. v. Watt, 700 F.2d 550, 556 (9th Cir.), cert. denied 464 U.S. 960 (1983); cf. Williams v. Lee, 358 U.S. 217, 221 (1959) (1868 Treaty provided that “no one, except United States Government personnel, was to enter the reserved area”); Means, supra (1868 Treaty requirement that Navajo Nation deliver Indian offenders to the United States for prosecution did not divest Navajo Nation of concurrent jurisdiction to try and punish offender).

The Navajo Nation has the authority to deny or condition approval of rights-of-way through the Navajo territory. Federal recognition of this fundamental right was and is eminently proper. The Secretary of the Interior has no authority to abrogate this right. See Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002) (“Moreover, ‘[t]he Department of the Interior cannot under any circumstance abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so.’”), quoting United States v. Washington, 641 F.2d 1368, 1371 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

V. THE MONTANA DECISION IS IRRELEVANT; THE APPROPRIATE INQUIRY IS WHETHER CONGRESS HAS DIVESTED THE NAVAJO NATION OF ITS RIGHT TO EXCLUDE.

A. Its Right to Occupy Navajo Land Having Expired, EPNG Is Subject to the Navajo Nation's Right to Exclude or Condition Entry of Those Seeking to Do Business on Navajo Land.

EPNG's rights on the Navajo Nation have expired by contract and by virtue of federal law. EPNG admits that publicly, and the federally approved grants show that fact without doubt. EPNG arguments that the Navajo Nation is exceeding its rights as a "dependent sovereign" under Montana v. United States, 450 U.S. 544 (1982), and its progeny are misplaced, because those principles relate to persons lawfully present within the tribal territory. Rather, the analysis should focus on the Navajo Nation's fundamental right to exclude or condition the entry of those without present rights who seek to conduct business on the Navajo Reservation and the extent, if any, to which that fundamental right has been divested. EPNG has simply overlooked the relevant passage in Montana relating to a tribe's right to exclude or condition the entry of nonmembers on tribal lands: "The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits." Montana, 450 U.S. at 557 (citation omitted).

The parts of Montana upon which EPNG relies concerned a tribe's ability to regulate the conduct of a non-Indian lawfully occupying privately-owned fee land within an Indian reservation. The other cases cited by EPNG similarly deal with a tribe's attempt to regulate or tax the activities

of entities holding valid rights-of-way through the tribal territory.¹⁵ See Strate v. A-1 Contractors, 520 U.S. 438, 442-43 (1997) (no tribal court jurisdiction over action stemming from auto accident on a road maintained by the state “under a right-of-way granted by the United States to the State’s Highway Department”); Burlington Northern R. R. Co. v. Red Wolf, 196 F.3d 1059, 1062 (9th Cir. 1999) (no tribal court jurisdiction over “a tort claim arising from an accident on a right-of-way granted to a railroad by Congress”), cert. denied, 529 U.S. 1110 (2000); Big Horn County Elec. Co-op. v. Adams, 219 F.3d 944, 950-52 (9th Cir. 2000) (rejecting tribal taxes on utility property on easement granted by Secretary where right-of-way grant was equivalent of non-Indian fee land)¹⁶; Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) (no tribal authority to “tax nonmember activity occurring on non-Indian fee land”); Chiwewe v. Burlington Northern & Santa Fe Ry., 239 F. Supp. 2d 1213, 1215 (D.N.M. 2002) (no tribal court jurisdiction over tort claim arising on land deeded to railroad by Pueblo under Pueblo Lands Act); Reservation Tel. Co-op. v. Henry, 278 F. Supp. 2d 1015, 1016 (D.N.D. 2003) (no tribal authority to tax utility property on easements granted under 25 U.S.C. § 319); Yellowstone County v. Pease, 96 F.3d 1169, 1170 (9th Cir. 1996) (tribal court lacked “jurisdiction to entertain an action challenging a county’s right to impose taxes on

¹⁵ Nevada v. Hicks, 533 U.S. 353 (2001), and County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998), concern the ability of state police officers to carry out their functions within reservations when investigating a crime alleged to have occurred off-reservation or where the tribe gave up its “gatekeeping” right under P. L. 280 and consented to state jurisdiction over minor crimes. In the Del-Rio cases, the tribal land was burdened with a pre-existing easement by virtue of a severance of the mineral estate prior to the tribe’s acquisition of the land. There has been no severance of the surface and subsurface estates on the Navajo reservation at any time.

¹⁶ Even when EPNG’s rights-of-way were in force, the Navajo Nation’s agreement and consent carefully reserved the right to exercise pervasive dominion and control, the land was not open to the public, and the land was not under state control. See 1985 Agreement, at §§ 12, 14 and 16; cf. Big Horn, 219 F.3d at 950.

reservation land held in fee by a member of the tribe”), cert. denied, 520 U.S. 1209 (1997). EPNG also cites Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1213 (9th Cir. 2000), for the proposition that the Hoopa Tribe lacked the authority to regulate the use of non-Indian fee land within its reservation, but that ruling was overturned by the Ninth Circuit en banc. Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001), cert. denied, 535 U.S. 927 (2002). In none of these cases was it alleged that the person or entity sought to be taxed or regulated by the tribe had no valid easement or patent to land.

Therefore, now that EPNG’s right to occupy Navajo land has terminated, the proper inquiry is whether the Navajo Nation’s consent is required for EPNG to obtain new rights to Navajo land. As shown above, federal law requires such consent, given the Navajo Nation’s “virtually absolute power to exclude.” Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 433 (1989) (opinion of Stevens, J.); see generally Montana, 450 U.S. at 557; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-44 (1982). The Navajo Nation carefully preserved that power in all of its dealings with EPNG, and EPNG acceded to such retained authority.

At the time that EPNG entered into and accepted the benefits of the 1985 Agreement, a Navajo law passed in 1970 expressly retained the Navajo Nation’s authority to grant, deny or withdraw the privilege of doing business and to set conditions on the continuation of doing business. Those conditions included, and continue to include, “the continuing effect or validity of prior leases, permits, or contracts authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation.” 5 N.N.C. § 403 (1995). In the 1985 Agreement, EPNG agreed to comply with Navajo law. 1985 Agreement at §§ 12(E), 14.

The Navajo Nation’s virtually absolute power to exclude includes the right to determine who

may enter the reservation, define conditions upon which nonmembers may enter, prescribe rules of conduct, and expel those who enter the reservation without proper authority of those who violate tribal or federal laws. Merrion, 455 U.S. at 141-44; Babbitt Ford, 710 F.2d at 593-94; Quechan, 531 F.2d at 411; Ortiz-Barraza, 512 F.2d at 1179 (citing numerous authorities). That right is a fundamental attribute of tribal sovereignty, and one recognized by the 1868 Treaty. Williams, 358 U.S. at 221 (1959); Powers of Indian Tribes, 55 I.D. at 32. “A tribe needs no grant of authority from the federal government in order to exercise this power.” Ortiz-Barraza, *supra*.

Thus the issue in this matter is not whether the Navajo Nation has Montana-based rights over EPNG, but whether the Navajo Nation has been divested of its fundamental right to exclude or condition the entry of EPNG now that EPNG’s rights-of-way have expired. That question is easily answered in the negative. For an Indian treaty right to be abrogated, there must be “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.” United States v. Dion, 476 U.S. 734, 739-40 (1986); Mille Lacs, 526 U.S. at 202-03. EPNG has identified no such Act of Congress, and there is none. And, again, the Secretary of the Interior has no lawful authority to diminish such a fundamental sovereign right of Indian nations. Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002); United States v. Washington, 641 F.2d 1368, 1371 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

As demonstrated below, if any contractual relationship related to the pipeline rights-of-way still existed under the 1985 Agreement, the Navajo Nation would plainly satisfy the five-part test employed by the Ninth Circuit for determining if tribal authority over the grantee survives the granting of an easement. But, as EPNG admits, it is now in trespass and has no current right to

operate its pipelines on Navajo trust lands. Therefore, the question to be answered is whether the Navajo Nation's fundamental right to exclude has been divested by Congress. Because it has not, EPNG must obtain Navajo Nation consent to enter and do business lawfully on Navajo land.

B. Even when EPNG Had the Right to Use Navajo Land, It Was Subject to Navajo Law and Authority.

EPNG contends that it was not subject to Navajo authority even when its easements were valid. It relies on general propositions in several cases, but ignores the provisions of law and of its own agreements that would govern that inquiry.

In Big Horn County Elec. Coop., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000), the court examined five factors to determine if tribal authority over a right-of-way survived the grant of easement. These factors are:

- (1) the legislation creating the right-of-way;
- (2) whether the right-of-way was acquired with the consent of the tribe;
- (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way;
- (4) whether the land was open to the public;
- and (5) whether the right-of-way was under state control.

Id. at 950. Application of these factors to EPNG here shows that the Navajo Nation retained authority as both sovereign and landowner over EPNG and its right-of-way.

From the beginning, EPNG sought and received its rights-of-way under the 1948 Act. See, e.g., App. 4 (1962 easement approved “[p]ursuant to the provisions of the Act of 2/5/48 (62 Stat. 17), and Department Regulations, 25 CFR, Part 161 [now Part 169]”; App. 52, 61, 148. That statute is unlike the direct congressional grant at issue in, for example, Burlington N. R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999). Rather, the 1948 Act “reflect[s] a federal policy of avoiding or minimizing the disturbance of the Indians’ quiet possession of the restricted domains they now occupy” and decisions of federal agencies under that statute should be “consistent with the public

interest in preserving the status of the Navajo tribe as a quasi-sovereign nation and in preserving the tribe's ability to maintain itself as a culturally and politically distinct entity." New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227, 233 (D.C. Cir 1983).

As shown above, the 1948 Act requires the consent of the Navajo Nation to any grant of easement, and the Navajo Nation gave its consent. The Navajo Nation's consent certainly satisfies the crucial third factor, by reserving its right to exercise dominion and control over the right-of-way. The terms of that consent, agreed to by EPNG in the 1985 Agreement, include the reservation of tribal authority over "leasing and administration" of the land for other leasing activities, soil conservation, road maintenance, remediation of surface damage, transportation of gas owned by the Navajo Nation, and assignments. App. 71-74. The Navajo Nation required EPNG to comply with Navajo law, App. 72, 74, and EPNG therefore paid Navajo Nation possessory interest and other taxes in accordance with the 1985 Agreement. See El Paso Corporation Position on Navajo Right-of-Way Negotiations, <http://www.elpaso.com/about/navajo/history.shtm>, at 2 (visited Nov. 10, 2005). Amendments to the 1985 Agreement confirmed other Navajo Nation authority. See, e.g., App. 105-06, 120-21, 128, 130-33, 148 (BIA grant incorporating the terms and conditions set by the Resources Committee); App. 128 (EPNG agrees that "[a]ny judicial proceedings regarding the [1985] Agreement and subsequent amendments shall be governed by the courts of the Navajo Nation.").

The land was clearly not open to the public generally. See, e.g., App. 74-75 (restricting assignments of rights); App. 127 (limiting EPNG's access to the right-of-way to "existing public roads"), and no state was given any control over the right-of-way or activities undertaken there. See generally Shivwits Band of Paiute Indians v. State of Utah, ___ F.3d ___, ___, 2005 WL 2995590 (10th

Cir. Nov. 9, 2005); 25 C.F.R. § 1.4 (2000). So, even during the term of the right-of-way, EPNG was subject to Navajo law and its authority as sovereign and landowner. Therefore, if Montana and its progeny applied here, those authorities would support the Navajo Nation's position.

VI. REQUIRING COMPLIANCE WITH FEDERAL LAW DOES NOT CONSTITUTE AN "ABANDONMENT" OF A PIPELINE.

A. The Department's Authority over Indian Land Does Not Conflict with the FERC's Exclusive Authority over Abandonment of Pipeline Service and Facilities.

An "abandonment" of a pipeline occurs whenever a natural gas company permanently reduces a significant portion of a particular service. United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 86-88 (1966); Reynolds Metals Co. v. FPC, 534 F.2d 379 (D.C. Cir. 1976). As evidenced by the continuing service that EPNG has provided since the expiration of its rights-of-way on Navajo lands, the issue of abandonment is not present. EPNG may operate in trespass (perhaps to the substantial detriment of its shareholders) without causing any interruption in service to anyone.

EPNG's argument is simply a variant of its flawed position that its FERC certificate gives it the power to condemn tribal trust land. The United States holds the fee title to this land, in trust for the Navajo Nation. Such lands are not condemnable under either the Natural Gas Act, Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878, 883-84 (10th Cir. 1974), cert. dis'd, 419 U.S. 1097 (1975), or any other federal statute, see 28 U.S.C. §2409a(a); United States v. Pend Oreille Public Util. Dist., 28 F.3d 1544, 1548 (9th Cir. 1994) (utility "may not condemn tribal lands embraced under the Power Act or any other federal statute"), citing Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 786 n.29 (1984). Even the United States cannot condemn tribal trust lands absent a clear expression of Congressional authorization to do so. See United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976).

Nor would a Navajo Nation action (or one filed by the United States as trustee) seeking substantial damages from EPNG constitute an attack on the FERC licensing decision. See Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 n.4 (9th Cir. 2005) (en banc), petition for cert. filed, 74 U.S.L.W. 3233 (U.S. Oct. 3, 2005) (No. 05-434). Indeed, if EPNG remains unwilling to obtain Navajo Nation consent, it has the option to transfer the facilities to another entity subject to appropriate authorization from the FERC under section 7 of the NGA. Indeed, such a transfer would likely be in the best interest of both the Navajo Nation and EPNG's shareholders, in the event EPNG management determines to continue in wilful trespass.

EPNG argues that to the extent denial of its defective and incomplete right-of-way application would require it to terminate service, it would be required to abandon its facilities and service in violation of the Natural Gas Act ("NGA"). Whether EPNG is asserting that denial of the application would require it to terminate service or that it would have no choice but to terminate service without first seeking abandonment authority from the FERC, EPNG would be wrong in either case.

Under the NGA, abandonment does not result automatically if a pipeline's right-of-way easement expires. Rather, abandonment occurs only where there is a permanent termination of service or removal of certificated facilities. Reynolds Metal, supra. EPNG's right-of-way across Navajo lands expired October 17, 2005, yet service continues unabated. Nor will the Department's rejection of EPNG's application automatically result in an "abandonment." As EPNG acknowledges in its Memorandum, the FERC has exclusive authority under section 7(b) of the Act to decide applications by pipeline companies to abandon service or facilities.

If EPNG does decide to terminate service following denial of its application, it would need

to file an application with the FERC for abandonment authorization. EPNG has other options, of course, including agreeing to terms comparable to those found acceptable by other companies, beginning to negotiate in good faith with the Navajo Nation, or sell to another company with FERC approval. In any event, denial of EPNG's application would not compel it to abandon the pipeline.

The Department has a "special trust obligation" to ensure that EPNG and others respect the authority of the Navajo Nation as sovereigns and landowners. HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000). While the FERC has exclusive authority to grant certificates of public convenience and necessity and to allow abandonment of jurisdictional facilities under the NGA, the Department has a statutory duty under the 1948 Act to ensure that pipeline companies comply with the 1948 Act and its implementing regulations before granting rights to Indian lands. There is no conflict between these separate statutory provisions.

Even within the NGA, certificate and abandonment proceedings are treated separately from right-of-way acquisition. Certificates to construct and operate are dealt with in section 7(c); abandonment under section 7(b). Acquisition of rights-of-way, however, is the responsibility of the pipeline company under section 7(h) of the NGA. The FERC has no role in this process. Therefore, denial of EPNG's application by the Department would not encroach on the FERC's exclusive jurisdiction to regulate interstate pipelines. EPNG would remain free to acquire rights-of-way through negotiation and the FERC would retain its authority to consider any application for abandonment or transfer of facilities if EPNG sought to pursue that option.

B. Cases Cited by EPNG Are Inapposite in this Respect.

EPNG relies primarily on Chapman v. El Paso Natural Gas Co., 204 F.2d 46 (D.C. Cir. 1953), and Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984).

Neither supports its contention that Departmental rejection of its flawed right-of-way application would violate the NGA.

In Chapman, the court held that the Secretary of the Interior did not have the authority to attach specific conditions expanding a pipeline's common carrier obligations, but affirmed the Secretary's authority to "provide regulations and conditions as to survey, location, application, and use," i.e., "pertain[ing] to the physical aspects of the right-of-way." Id. at 51. The main holding is irrelevant. No one has suggested that the Department should attach conditions to EPNG's right-of-way that impose new service obligations on EPNG that would conflict with obligations imposed by the FERC.

The facts and law in Escondido make that case similarly inapplicable. In Escondido, the Court interpreted a specific provision of Part I of the Federal Power Act ("FPA") relating to hydropower licensing that has no counterpart in the NGA. In Escondido, the FERC issued a renewal license for hydroelectric facilities that included a canal crossing the reservations of three Indian tribes. In its licensing decision, the FERC had ruled that section 4(e) of the FPA, 16 U.S.C. §797(e), did not require it to accept conditions that the Secretary deemed necessary for the adequate protection and utilization of the reservations. Specifically, the FERC rejected conditions required by the Secretary that would prohibit the licensees from interfering with the tribes' use of a specified quantity of water and requiring that water pumped from a particular groundwater basin not be transported through the licensed facilities without the written consent of the tribes. Escondido, 466 U.S. at 770. In overruling the FERC, the Court held, based on its reading of the statutory text, that, while the Secretary did not have the power to effectively veto a FERC decision issuing a license, the Secretary could insist on the inclusion of license conditions "reasonably related to the protection of

the reservation and its people.” Id. at 777. The Court also considered arguments that had been raised by the tribes and the Secretary, as to “whether [section 8 of the Mission Relief Act of 1891 (the “MIRA”)] required the licensees to obtain the consent of the Bands before they operate licensed facilities located on the reservation lands.” The Court of Appeals had ruled that tribal consent was required by the MIRA. The Supreme Court reversed relying on FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960), which noted that the FPA “specifically defines and treats with lands occupied by Indians – ‘tribal lands within Indian reservations.’ The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.” Id. at 118. The Escondido Court thus reasoned that under the FPA “the Secretary, with the duty to safeguard reservations, may condition, but may not veto, the issuance of a license for project works on an Indian reservation. We cannot believe that Congress nevertheless intended to leave a veto power with the concerned tribe or tribes. The Commission need not, therefore, seek the Band’s permission before it exercises its licensing authority with respect to their lands.” Escondido, 466 U.S. at 787.

The FPA specifically provides for the construction of facilities on reservations lands, subject to, inter alia, “such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.” 16 U.S.C. § 803(e). No similar provision appears in the NGA, and nothing in Escondido purports to construe the abandonment provisions of the NGA. In sum, the Court’s decision construing specific provisions of Part I of the FPA in Escondido has no bearing on certification or acquisition of pipeline rights-of-way on tribal land.

Under the NGA, abandonment and right-of-way issues are treated separately. EPNG has

provided no authority standing for the proposition that the failure of a pipeline company to obtain rights to tribal trust land is tantamount to an unauthorized “abandonment” under the Natural Gas Act, and there is no such authority. This is an example of an argument that “is not so much ‘novel’ as it is wholly without merit.” See B&J Oil and Gas v. FERC, 353 F.3d 71, 75 (D.C. Cir. 2004).

VII. THE DEPARTMENT SHOULD FOLLOW ITS USUAL PROCEDURES FOR PROCESSING THE APPLICATION.

EPNG has submitted its application, however defective, to the Navajo Regional Office of the Bureau of Indian Affairs, in conformity with the standard procedures of the Department. That office is reviewing the voluminous application, checking maps and legal descriptions, and otherwise determining EPNG’s compliance with federal law.

The process is in place. It assures an orderly procedure for the analysis and evaluation of right-of-way applications. EPNG’s suggestion that the Assistant Secretary take control now would upset that process, and invites a review by an office that lacks the technical capacity to perform the review that the Regional Office conducts on a routine basis. Even if all roads lead to the Assistant Secretary, as EPNG contends, the Assistant Secretary would require a full record and the recommendation of his subordinates in order to make a reasoned decision that could be upheld if reviewed under the Administrative Procedures Act. The imaginary emergency concocted by EPNG should not disturb the tried and true procedures that have served the Department well for over 50 years.

CONCLUSION

EPNG seeks to create a false crisis by its own obstinance. The Navajo Nation has no intention to initiate any termination of service, to either Navajo citizens or any other customers who rely on the EPNG system.

The treaties with the Navajo Nation preserved the Navajo Nation's right to exclude all but officials and agents of the federal Government. The right-of-way statutes complement the treaty protections, and "reflect a federal policy of avoiding or minimizing the disturbance of the Indians' quiet possession of the restricted domains they now occupy." New Mexico Navajo Ranchers Ass'n, 702 F.2d at 233. If EPNG's position prevails, the Navajo Nation would be unable not only to exercise its fundamental right to exclude and to condition the entry of nonmembers seeking to do business within the Navajo territory, but will also be unable to establish and implement land use and other plans for the orderly development of its communities and economy.

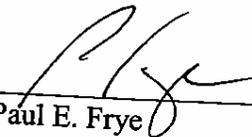
The United States owes a duty as a trustee to the Navajo Nation regarding grants of easements for rights-of-way, and the breach of that duty would give rise to a right of compensation against the federal trustee. See United States v. Mitchell, 463 U.S. 206, 223 (1983); Coast Indian Comm. v. United States, 550 F. 2d 639 (Ct. Cl. 1977). The Navajo Nation urges the Department to comply fully with its solemn trust duties, and to strongly urge EPNG to reach reasonable terms with the Navajo Nation – terms comparable to those accepted by other pipeline companies – by a date certain. Further delay will substantially harm the Navajo Nation, as the Department is aware.

EPNG's positions have already been rejected in a thorough and well-reasoned decision of the Board of Indian Appeals in Transwestern Pipeline Co. and by the courts. The Department should reject immediately EPNG's incomplete and defective application.

Respectfully submitted,
The Navajo Nation

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