

# Indian Lands Rights-of-Way Presentation: “APS in Trespass on Hopi Land”

- Prepared for Department of Energy & Department of Interior Study mandated by Section 1813 of the Energy Policy Act of 2005
- Originally presented by Bill Havens to Hopi Organizational Political Initiative (H.O.P.I.), a grassroots political activism group of Hopi Tribal members.

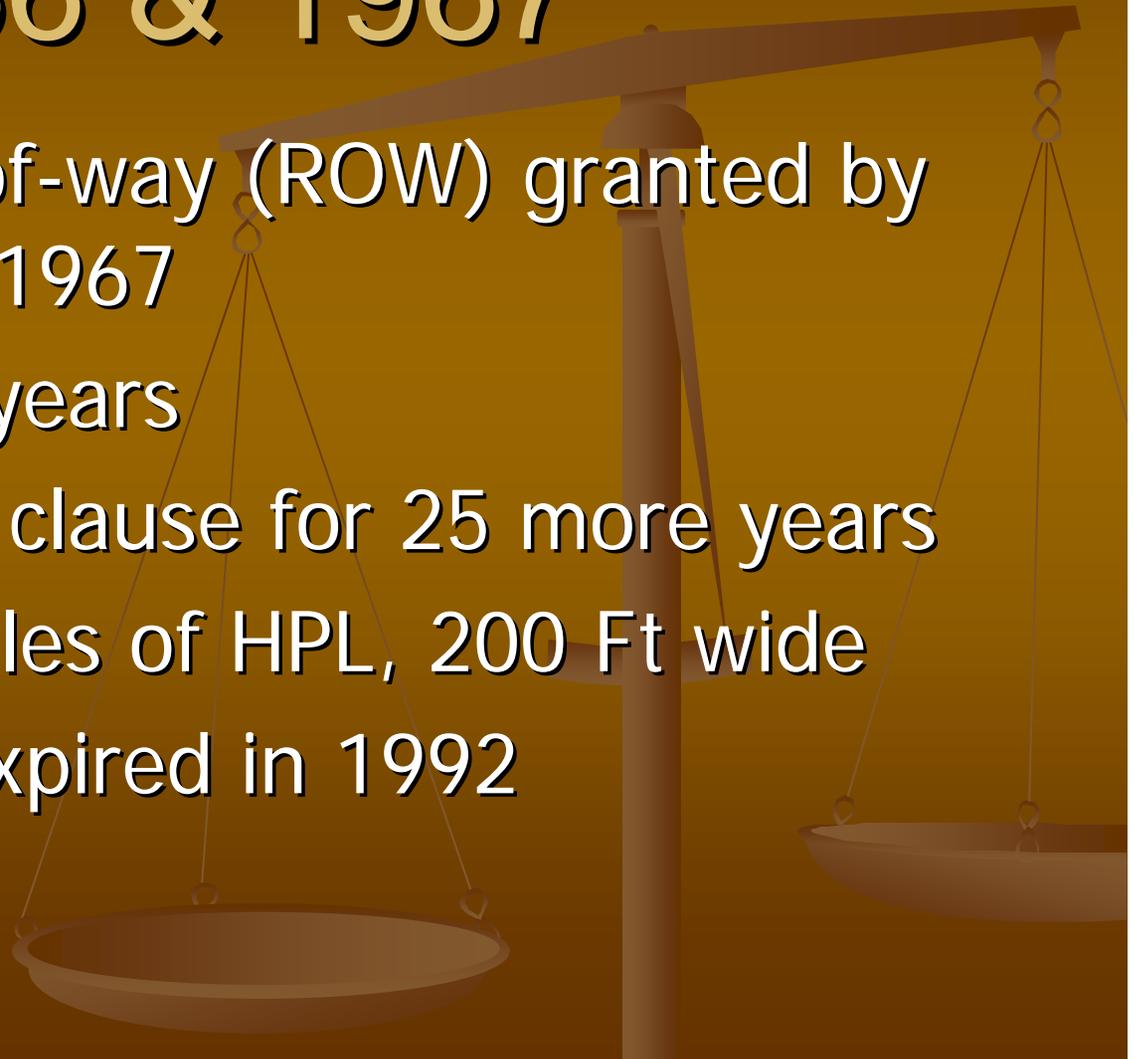
# APS in Trespass on Hopi Land

Looking For Fairness,  
Equity  
&  
Justice

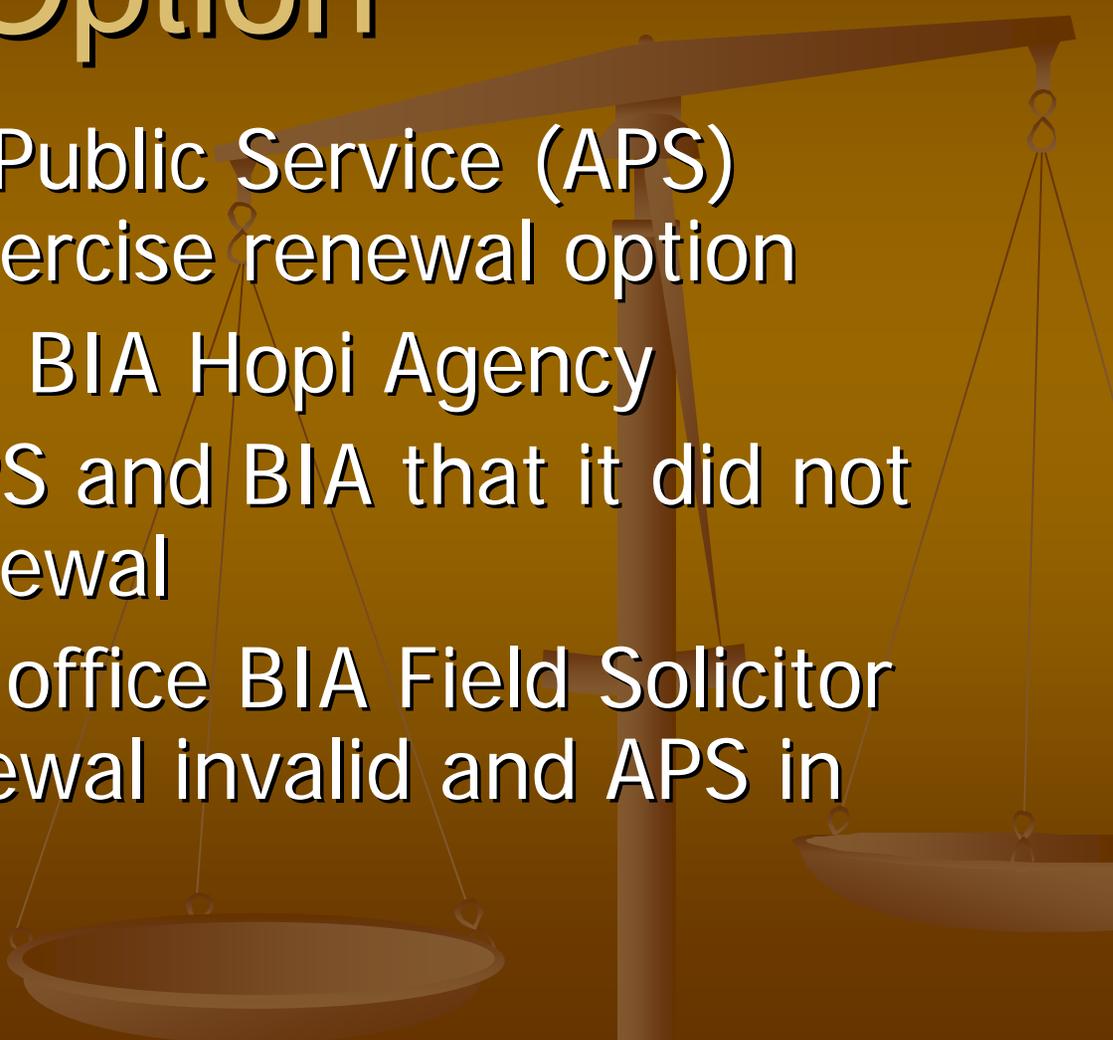


# Original Rights-of-Way 1966 & 1967

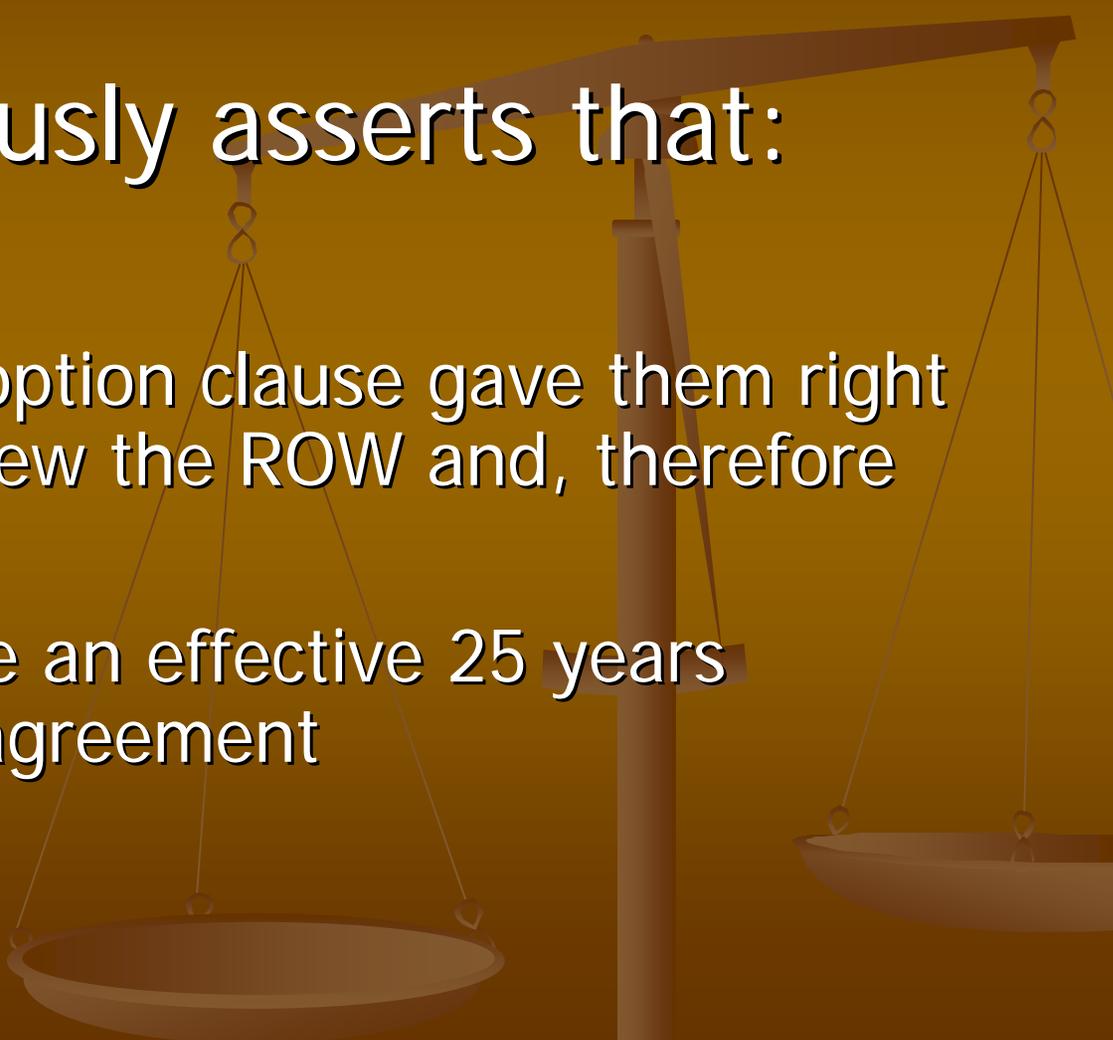
- Original rights-of-way (ROW) granted by Hopi in 1966 & 1967
- Granted for 25 years
- Renewal option clause for 25 more years
- Crosses 30.5 miles of HPL, 200 Ft wide
- First 25 years expired in 1992



# APS “Exercises” Renewal Option

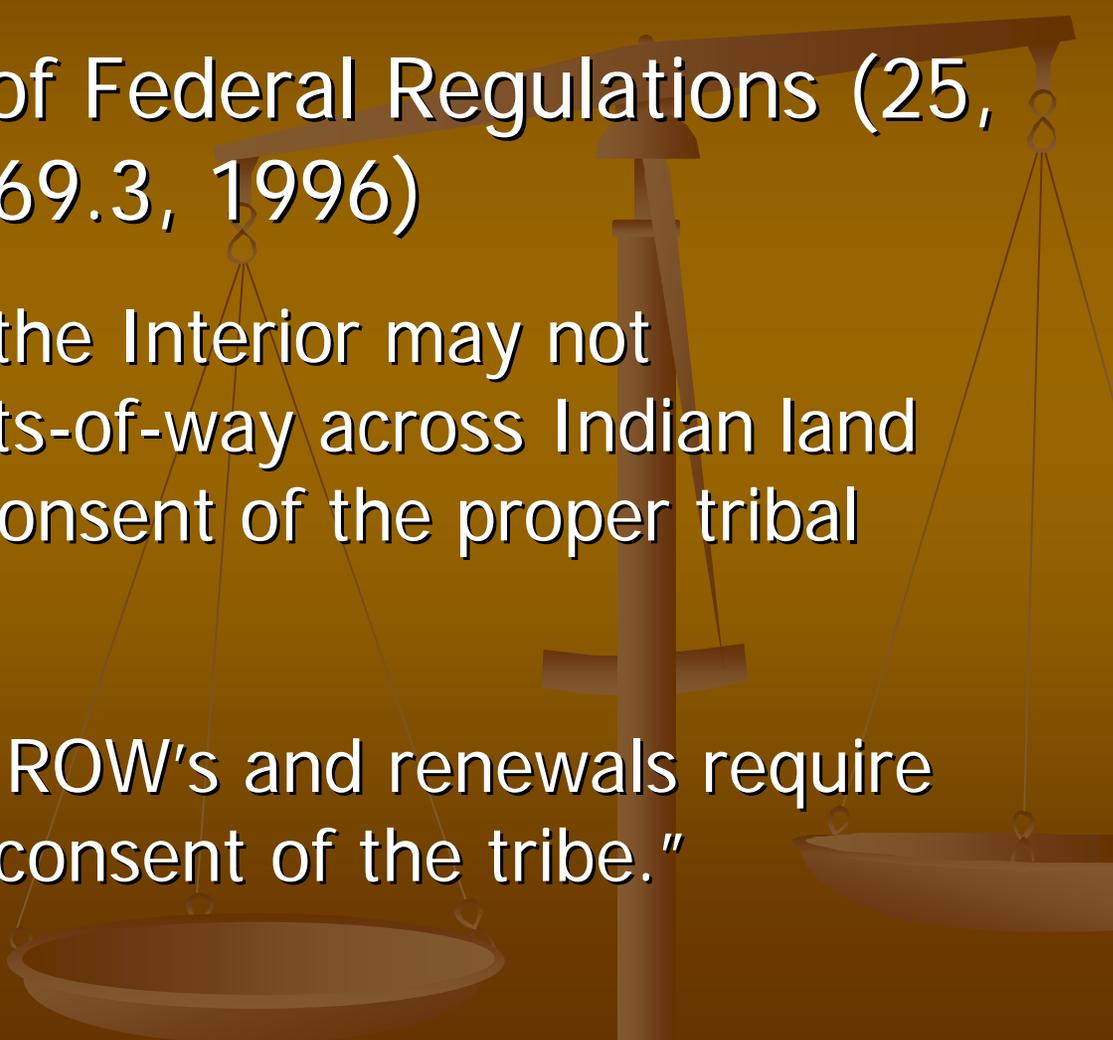
- 1992 – Arizona Public Service (APS) attempted to exercise renewal option
  - Sent \$23,000 to BIA Hopi Agency
  - Hopi notified APS and BIA that it did not approve the renewal
  - 1994 – Phoenix office BIA Field Solicitor determined renewal invalid and APS in trespass
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# APS Position



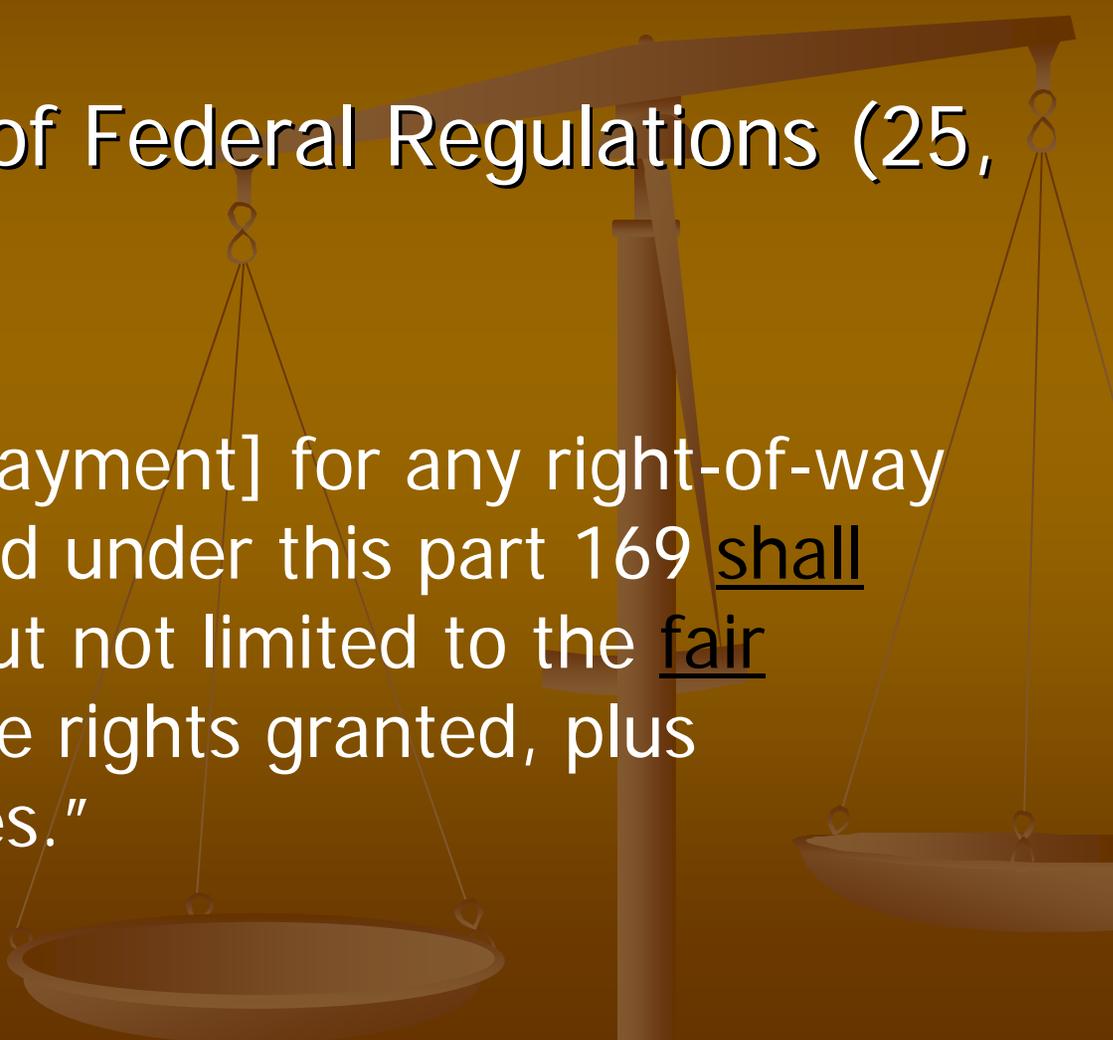
- APS erroneously asserts that:
  - Original renewal option clause gave them right to unilaterally renew the ROW and, therefore
  - They already have an effective 25 years extension of the agreement

# Federal Regulations



- CFR 25 – Code of Federal Regulations (25, §169.19 and §169.3, 1996)
  - Secretary of the Interior may not authorize rights-of-way across Indian land “without the consent of the proper tribal officials” and
  - Both original ROW’s and renewals require “prior written consent of the tribe.”

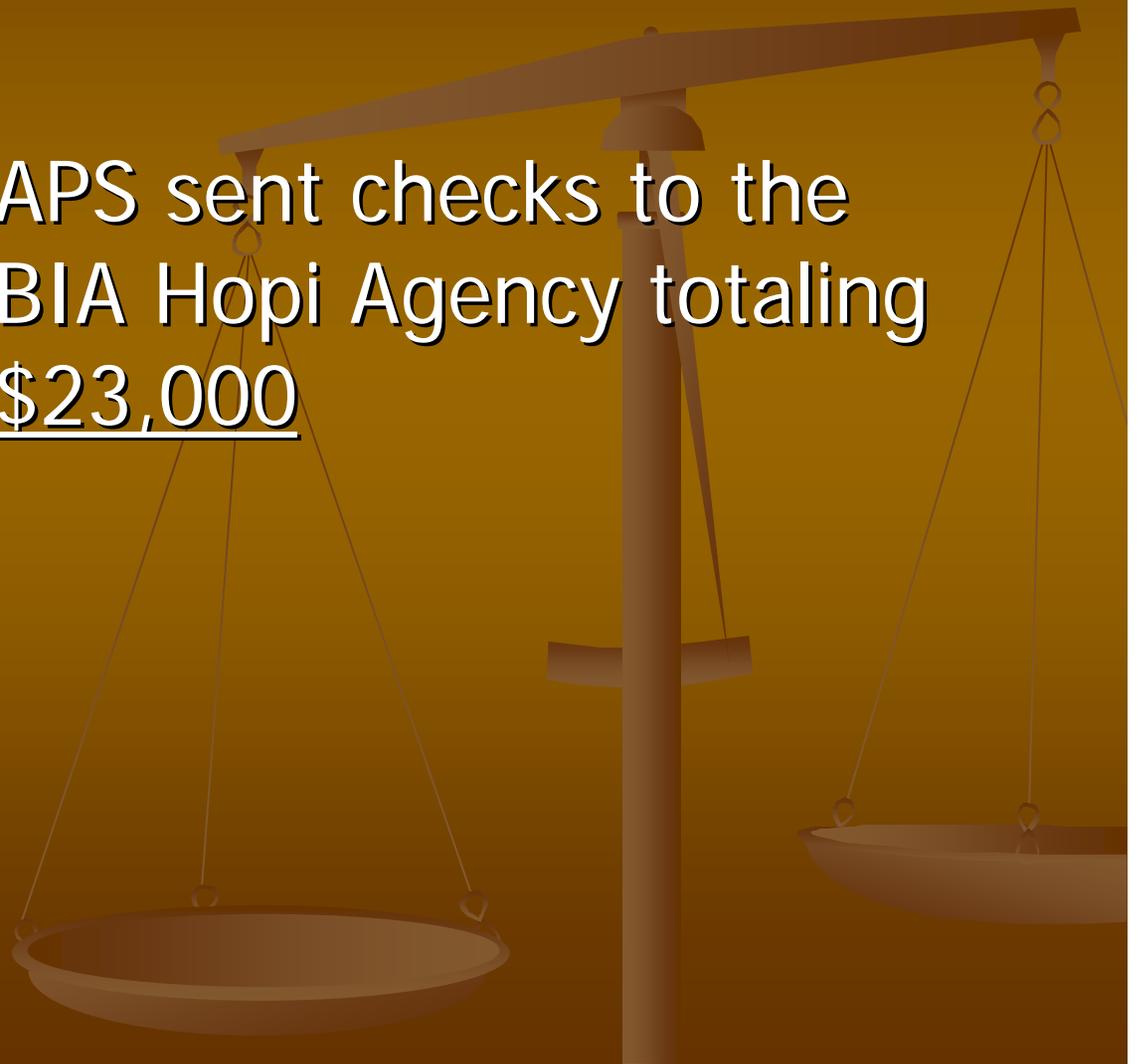
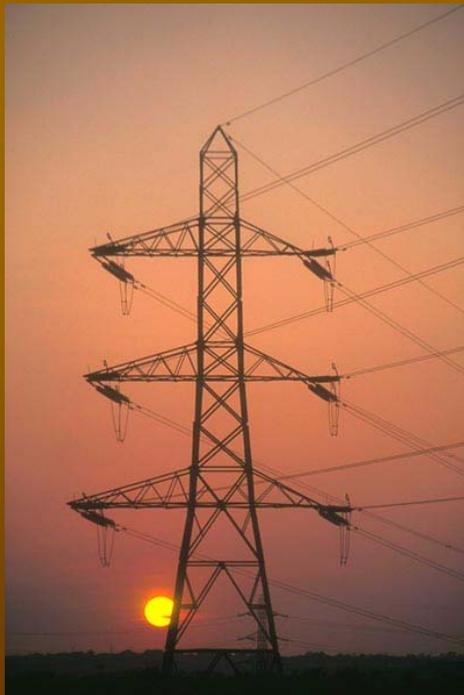
# Federal Regulations



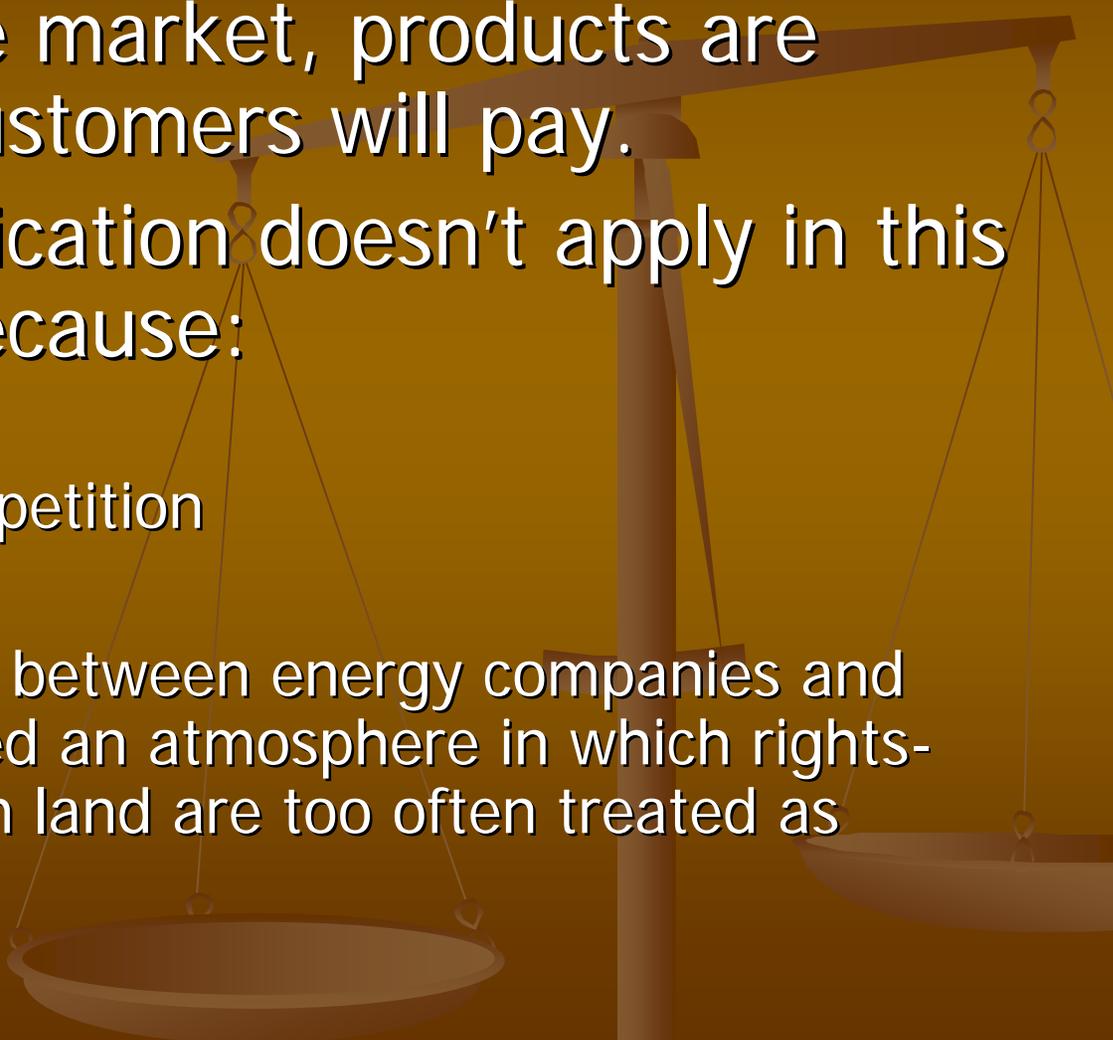
- CFR 25 – Code of Federal Regulations (25, §169.12, 1996)
  - “Consideration [payment] for any right-of-way granted or renewed under this part 169 shall not be less than but not limited to the fair market value of the rights granted, plus severance damages.”

# APS Paid How Much?

- APS sent checks to the BIA Hopi Agency totaling \$23,000



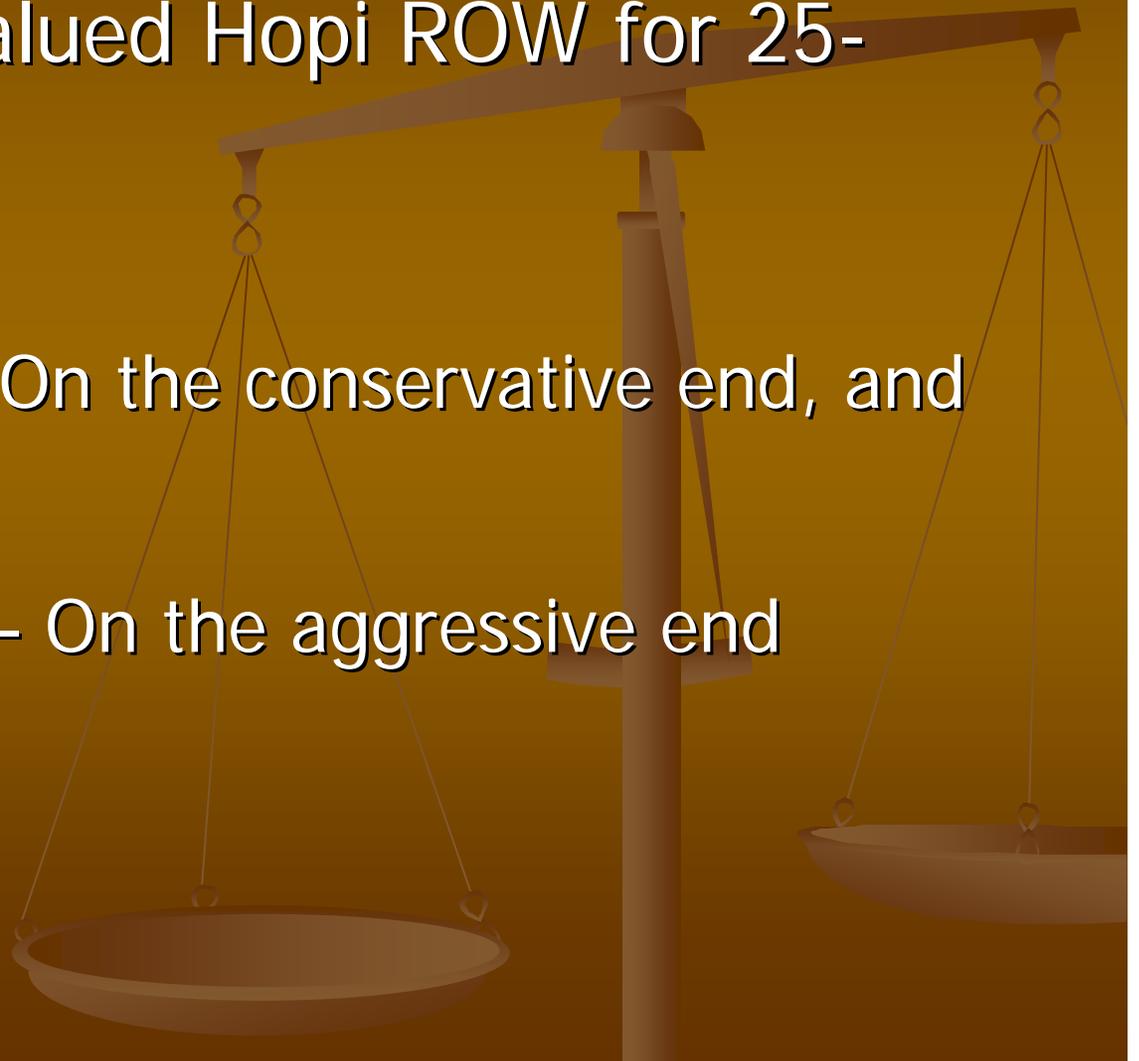
# What is the ROW Worth?



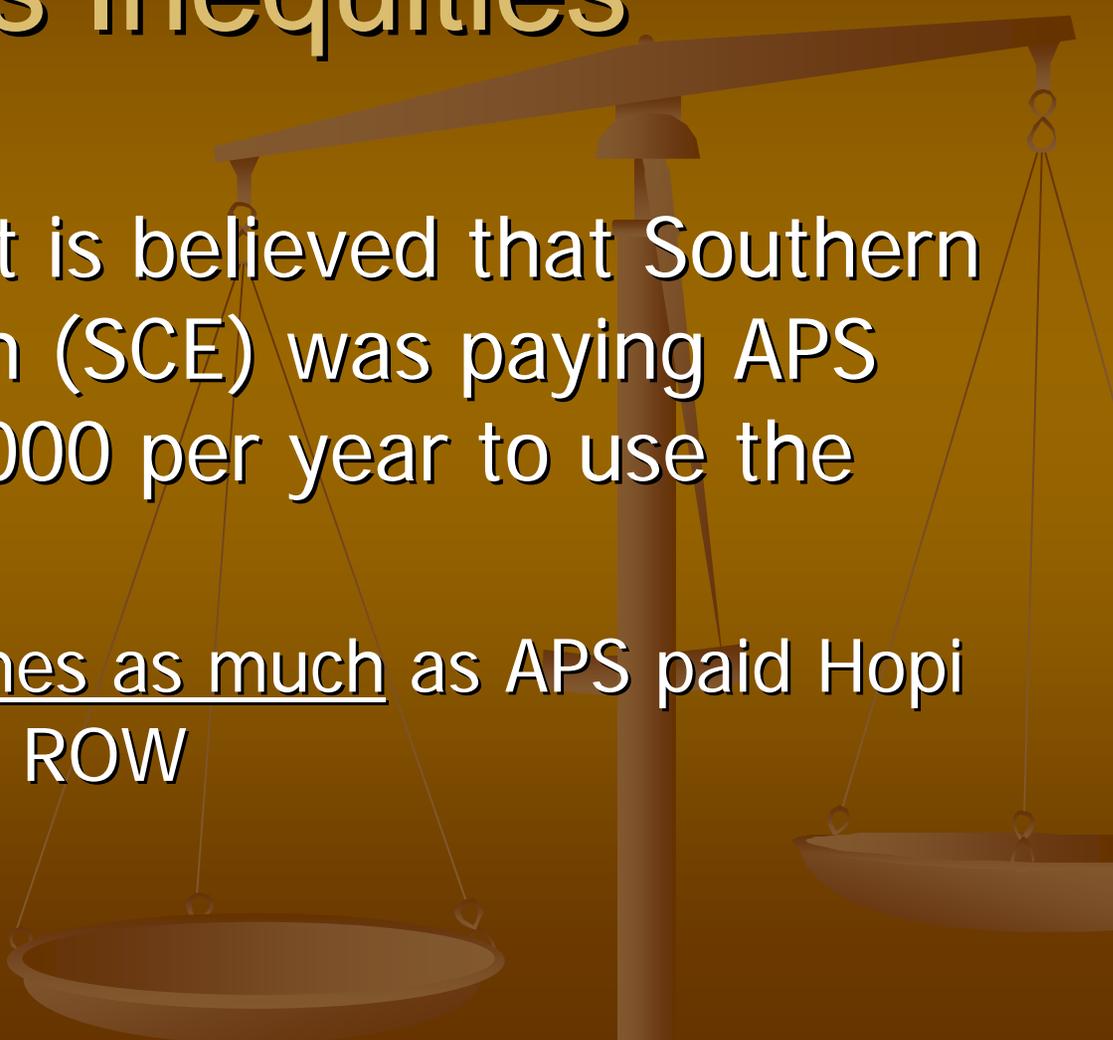
- In a competitive market, products are “worth” what customers will pay.
- This oversimplification doesn't apply in this circumstance because:
  - 1-There is no competition
  - 2-The relationship between energy companies and the BIA has created an atmosphere in which rights-of-way over Indian land are too often treated as entitlements.

# “Value” of Hopi ROW

- 1994 – Study valued Hopi ROW for 25-year period at:
  - \$7,000,000 – On the conservative end, and
  - \$34,000,000 – On the aggressive end



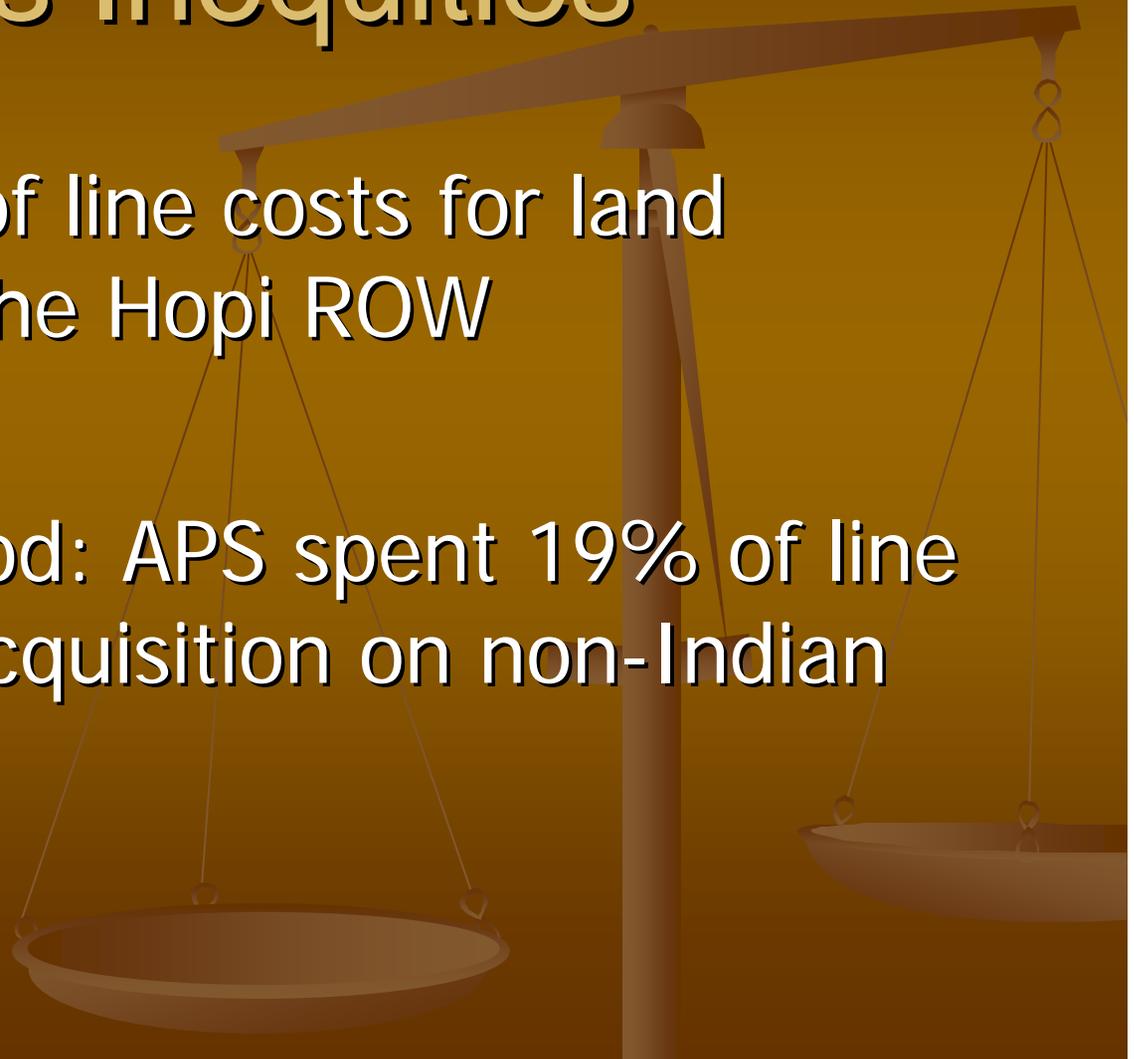
# “Value” of Hopi ROW- Gross Inequities



- Also in 1994 – It is believed that Southern California Edison (SCE) was paying APS around \$4,500,000 per year to use the power lines
  - That's 4,891 times as much as APS paid Hopi per year for the ROW

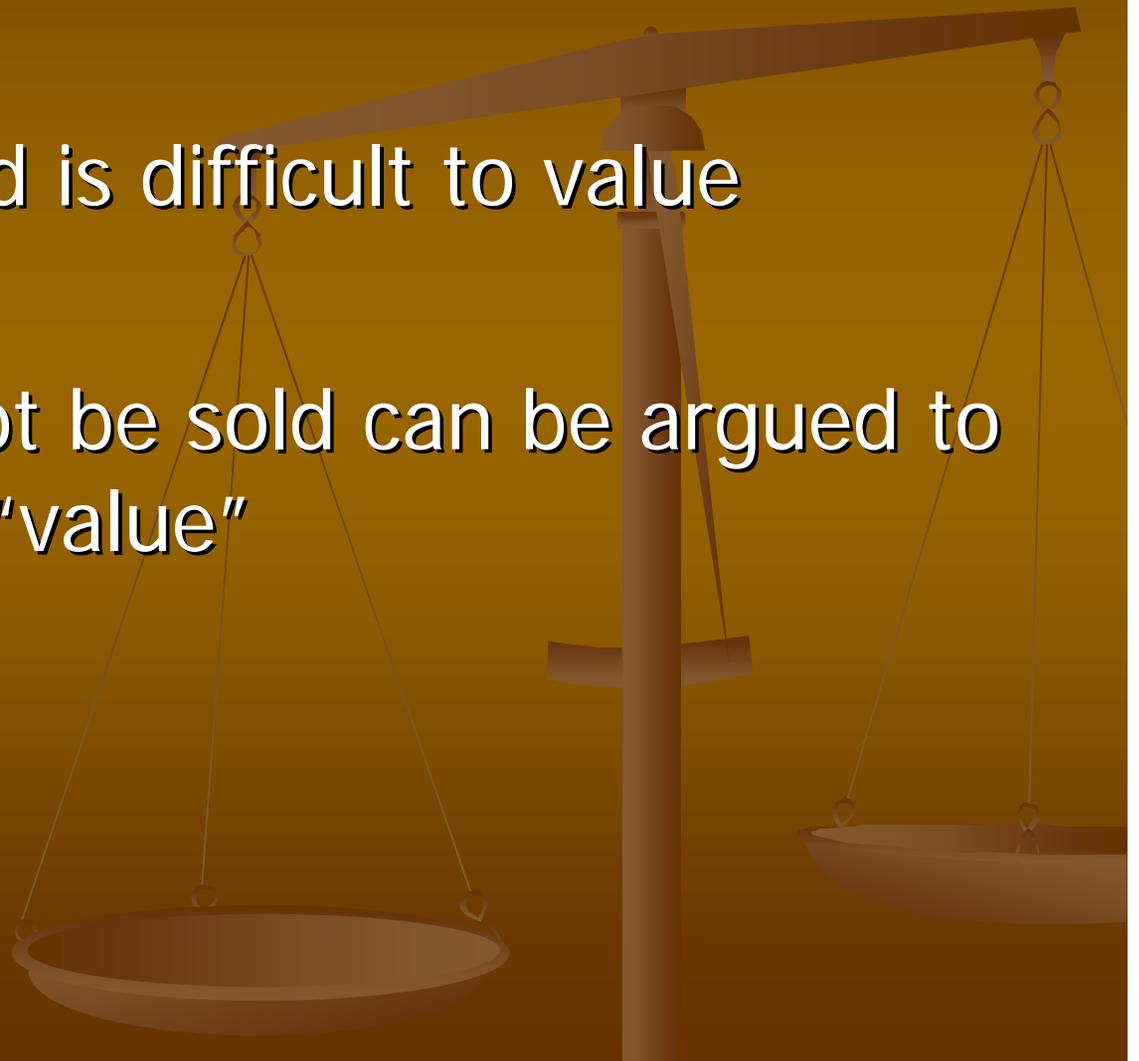
# “Value” of Hopi ROW- Gross Inequities

- APS spent 1% of line costs for land acquisition for the Hopi ROW
- Same time period: APS spent 19% of line costs for land acquisition on non-Indian land



# One Attorney's Opinion

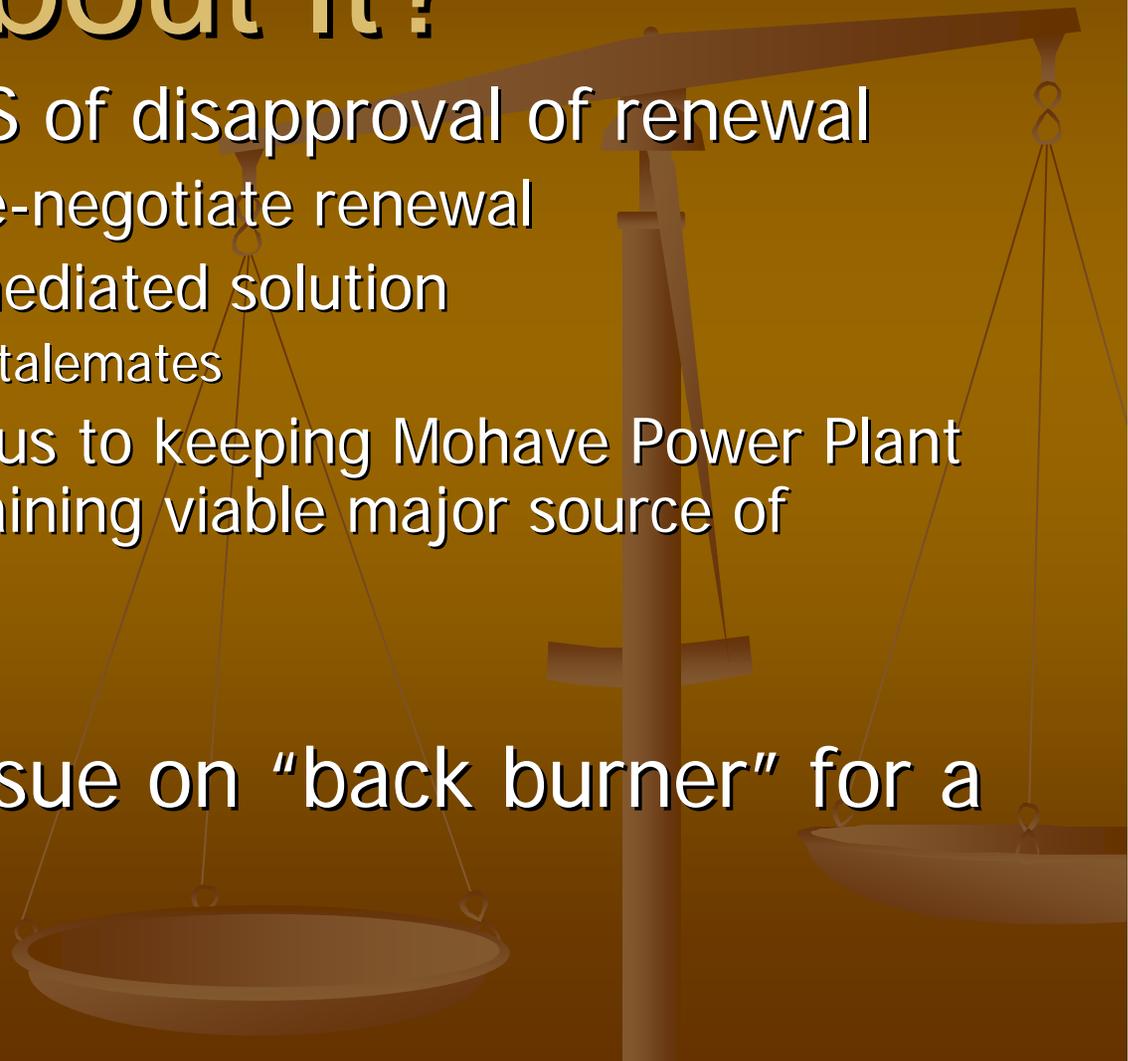
- Reservation land is difficult to value
- Land that cannot be sold can be argued to have very little "value"



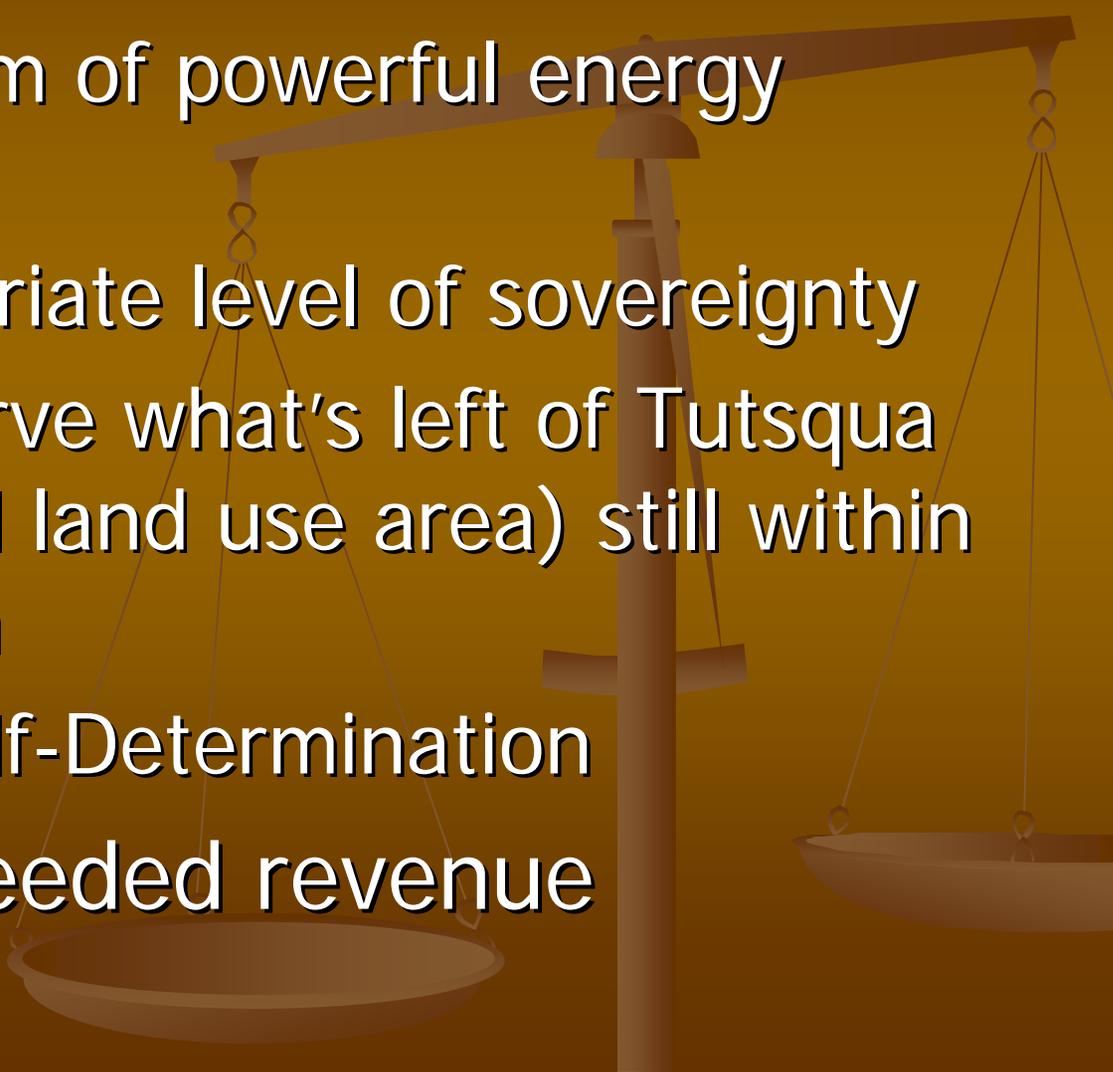
# What Has the Tribe Done About It?

Notified BIA and APS of disapproval of renewal

- Brief attempt to re-negotiate renewal
  - Brief attempt at mediated solution
    - Both Resulted in stalemates
  - Tribe changed focus to keeping Mohave Power Plant open as only remaining viable major source of revenue
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- APS Trespass issue on “back burner” for a decade

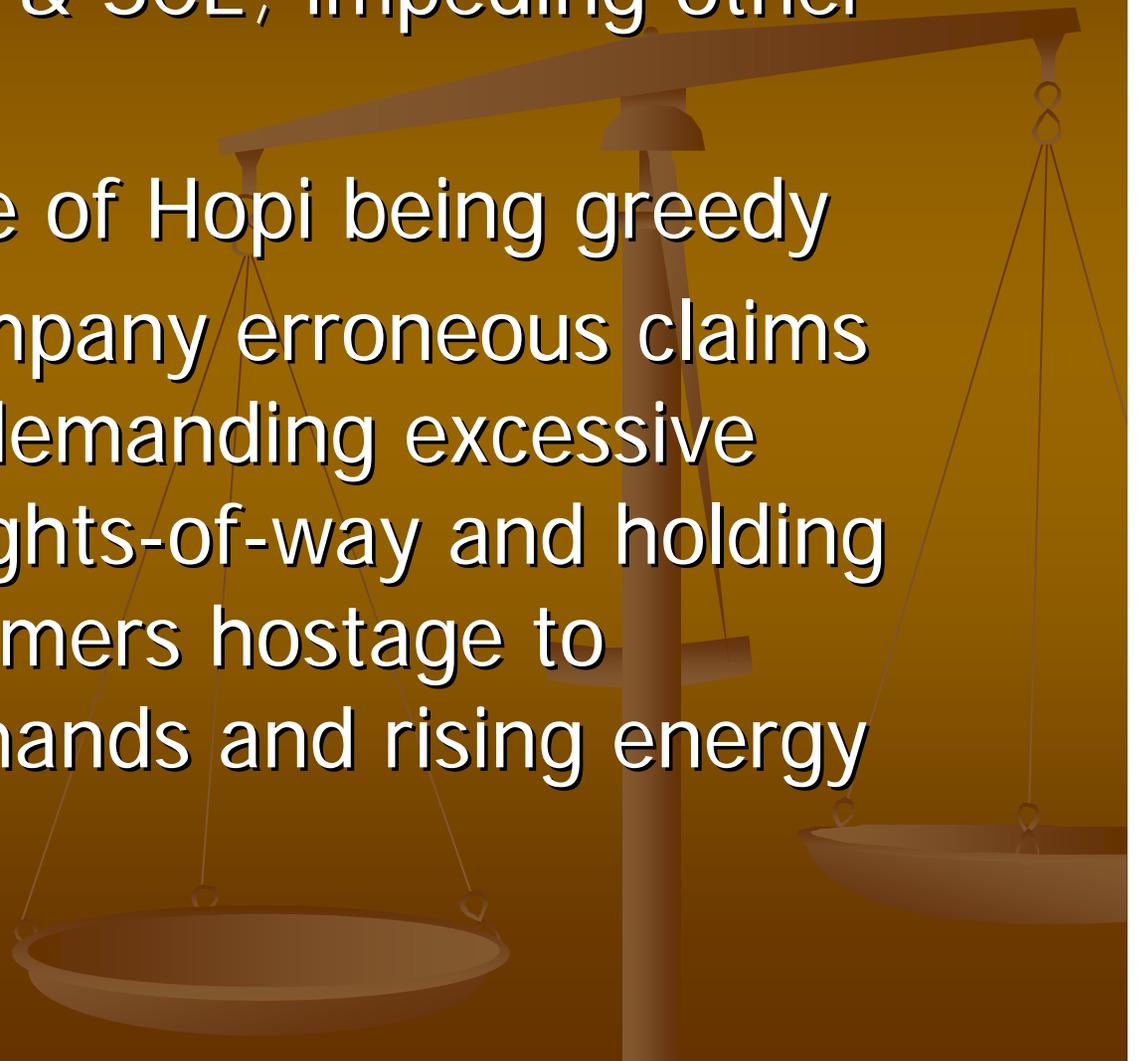


# Benefits of Pursuing APS

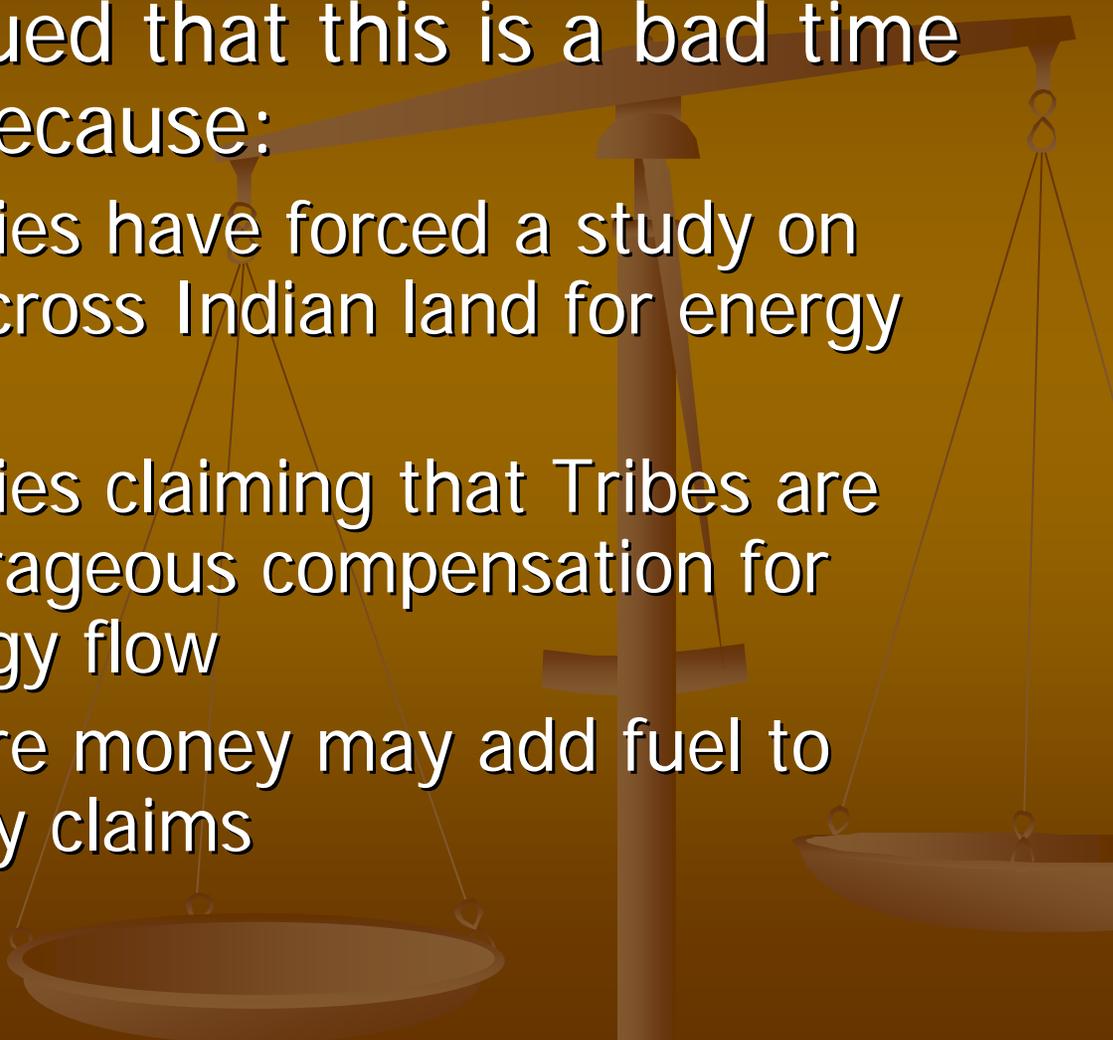
- Stop being victim of powerful energy companies
  - Exercise appropriate level of sovereignty
  - Protect & Preserve what's left of Tutsqua (Hopi traditional land use area) still within Hopi jurisdiction
  - Stand up for Self-Determination
  - Raise much needed revenue
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# Negatives of Pursuing

- Antagonize APS & SCE; impeding other negotiations
- Risk appearance of Hopi being greedy
- Fuel energy company erroneous claims that tribes are demanding excessive payments for rights-of-way and holding American consumers hostage to outrageous demands and rising energy costs



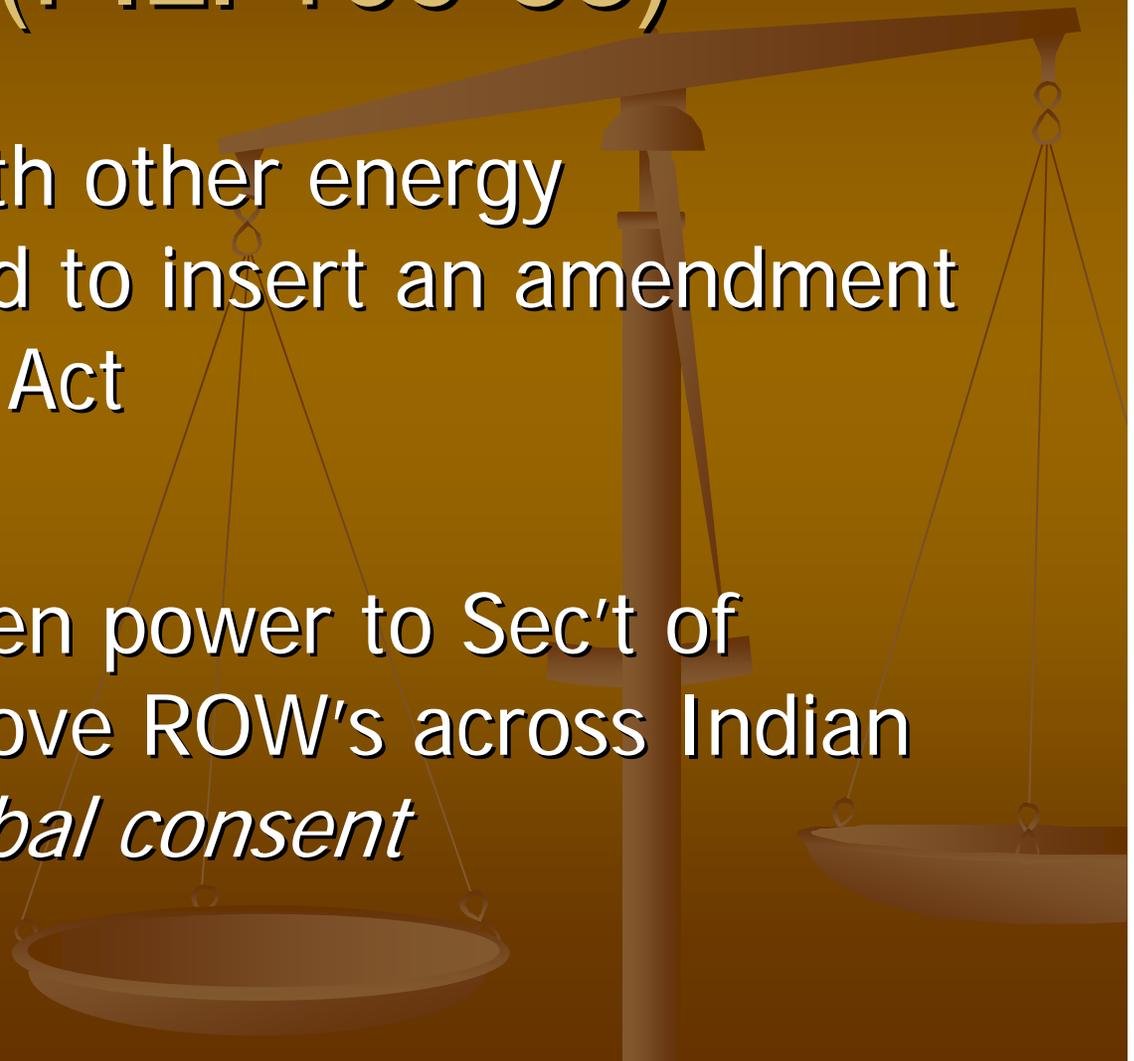
# One Attorney's Opinion



- It has been argued that this is a bad time to pursue this because:
  - Energy companies have forced a study on rights-of-way across Indian land for energy transport
  - Energy companies claiming that Tribes are demanding outrageous compensation for ROW's for energy flow
  - Demanding more money may add fuel to energy company claims

# Federal Energy Policy Act of 2005 (P.L. 109-58)

- El Paso Gas (with other energy companies) tried to insert an amendment into the Energy Act
- Would have given power to Sec't of Interior to approve ROW's across Indian land *without tribal consent*



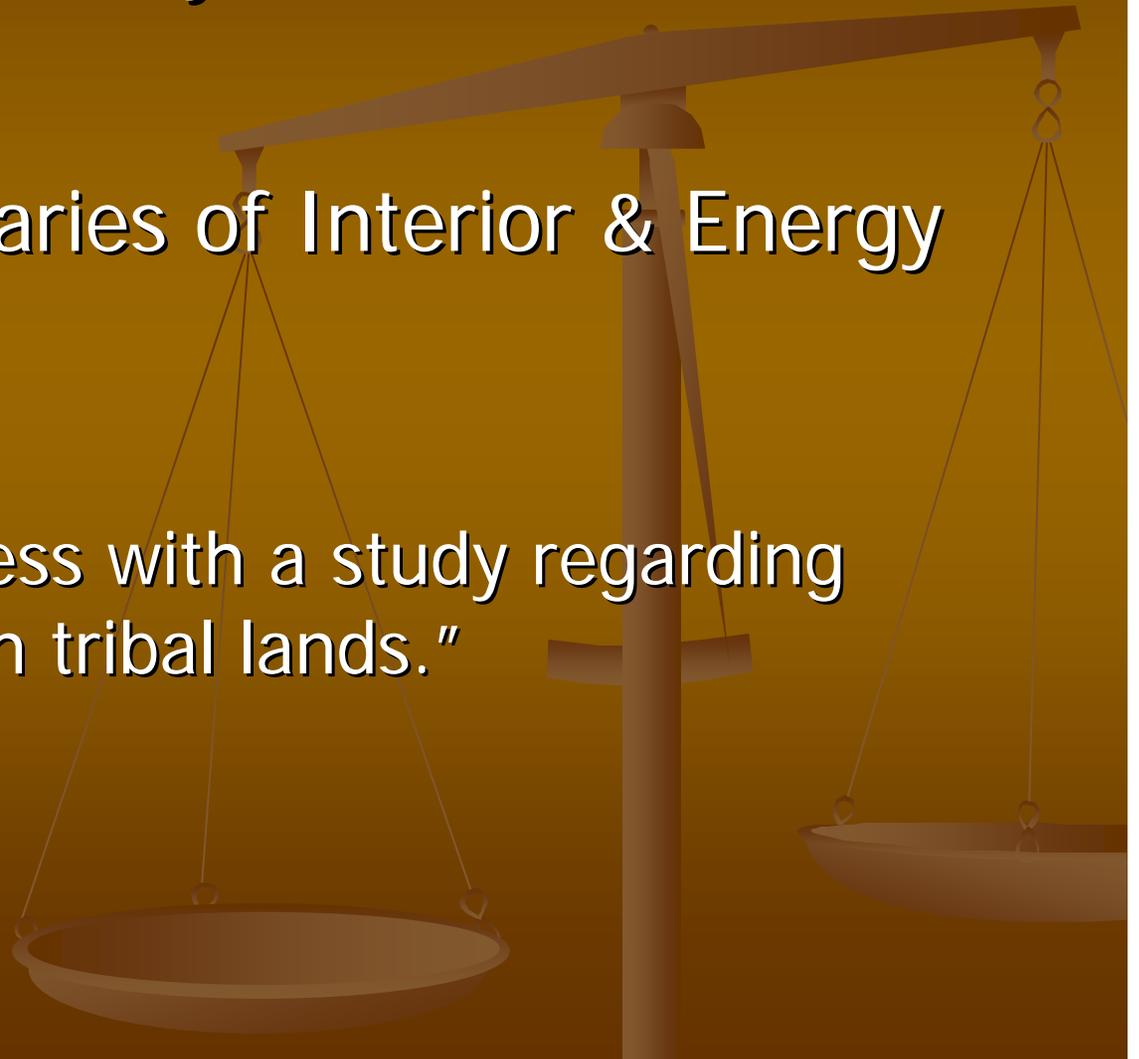
# Federal Energy Policy Act of 2005 (P.L. 109-58)

- Amendment failed
  - However:
    - Section 1813 was added to Energy Policy Act

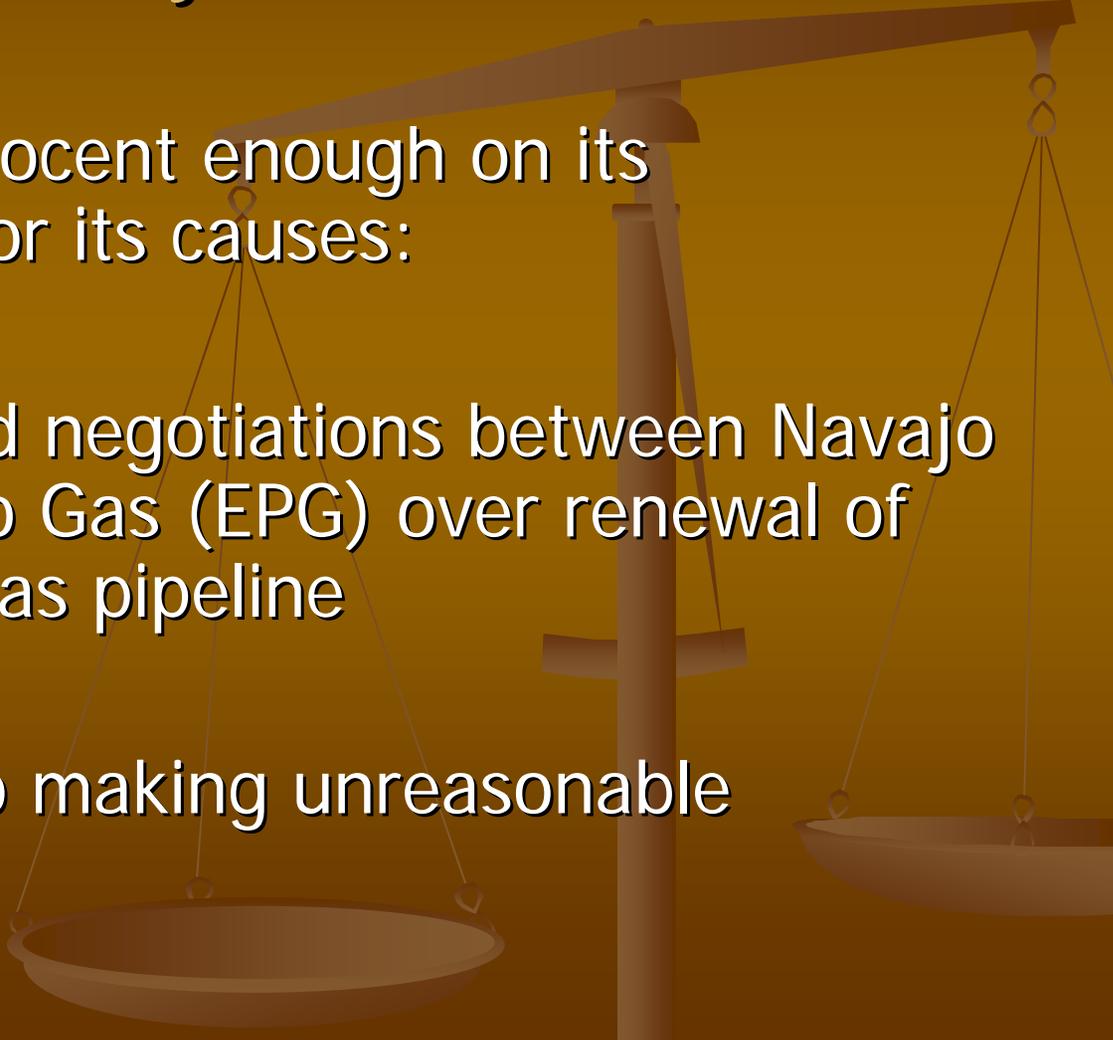


# Section 1813 – Energy Policy Act

- Requires Secretaries of Interior & Energy to:
  - “Provide Congress with a study regarding rights-of-way on tribal lands.”



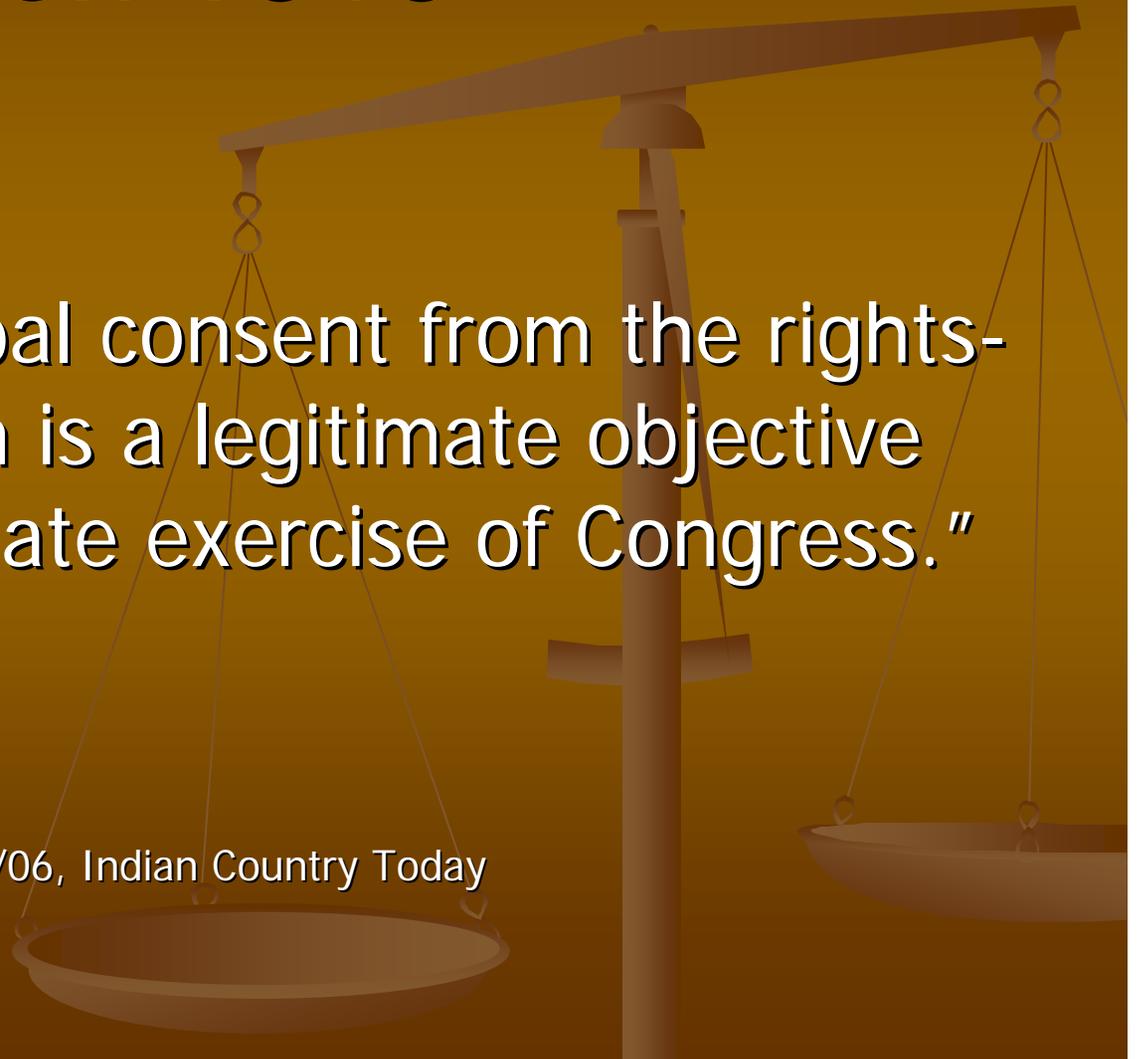
# Section 1813 – Energy Policy Act

- “Study” seems innocent enough on its surface....except for its causes:
  - Impetus was failed negotiations between Navajo Nation and El Paso Gas (EPG) over renewal of ROW for natural gas pipeline
  - EPG claims Navajo making unreasonable demands
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# “Unspoken Premise of Section 1813”

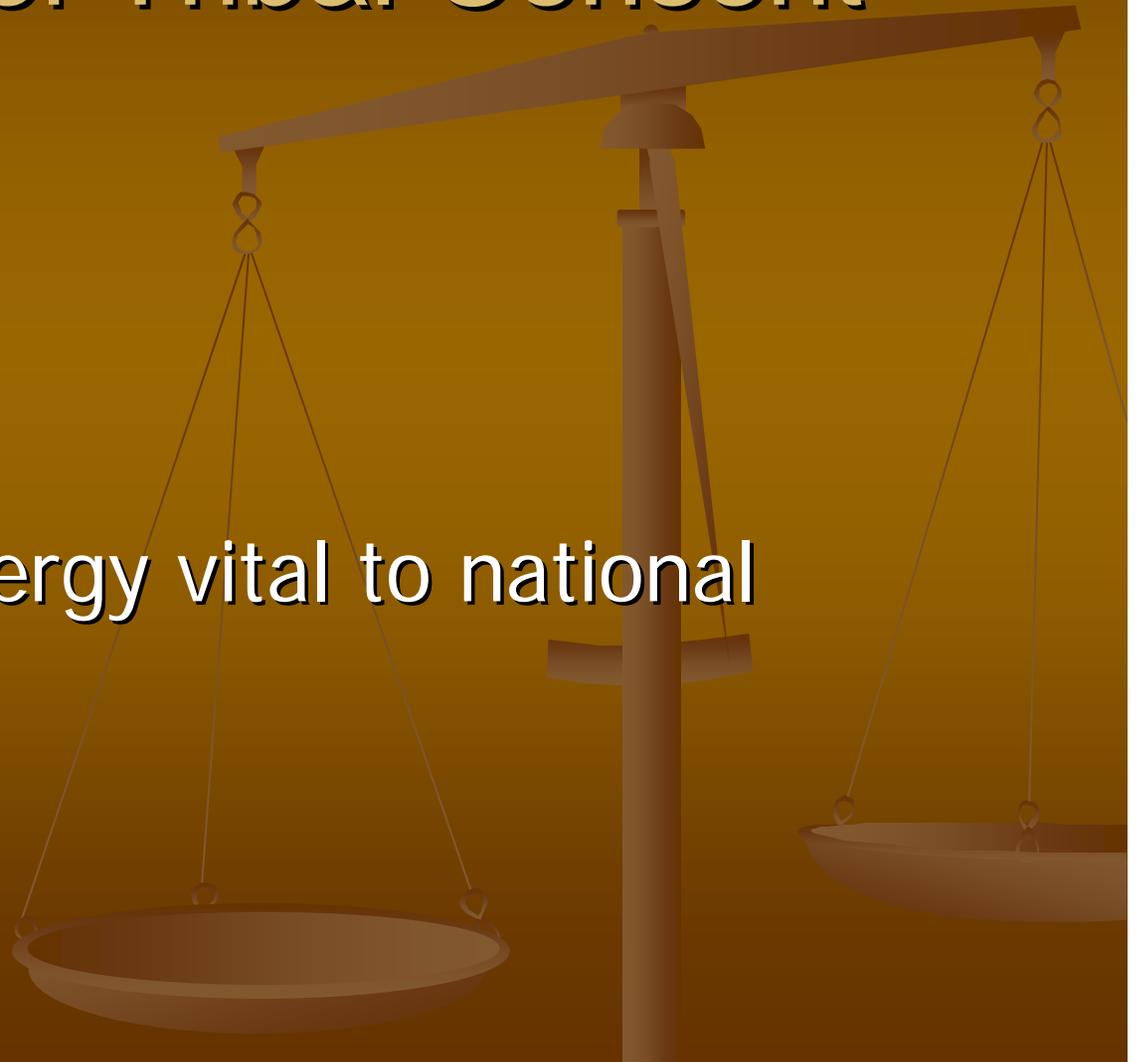
- “...removing tribal consent from the rights-of-way equation is a legitimate objective and an appropriate exercise of Congress.”

■ \*A. David Lester, 3/31/06, Indian Country Today



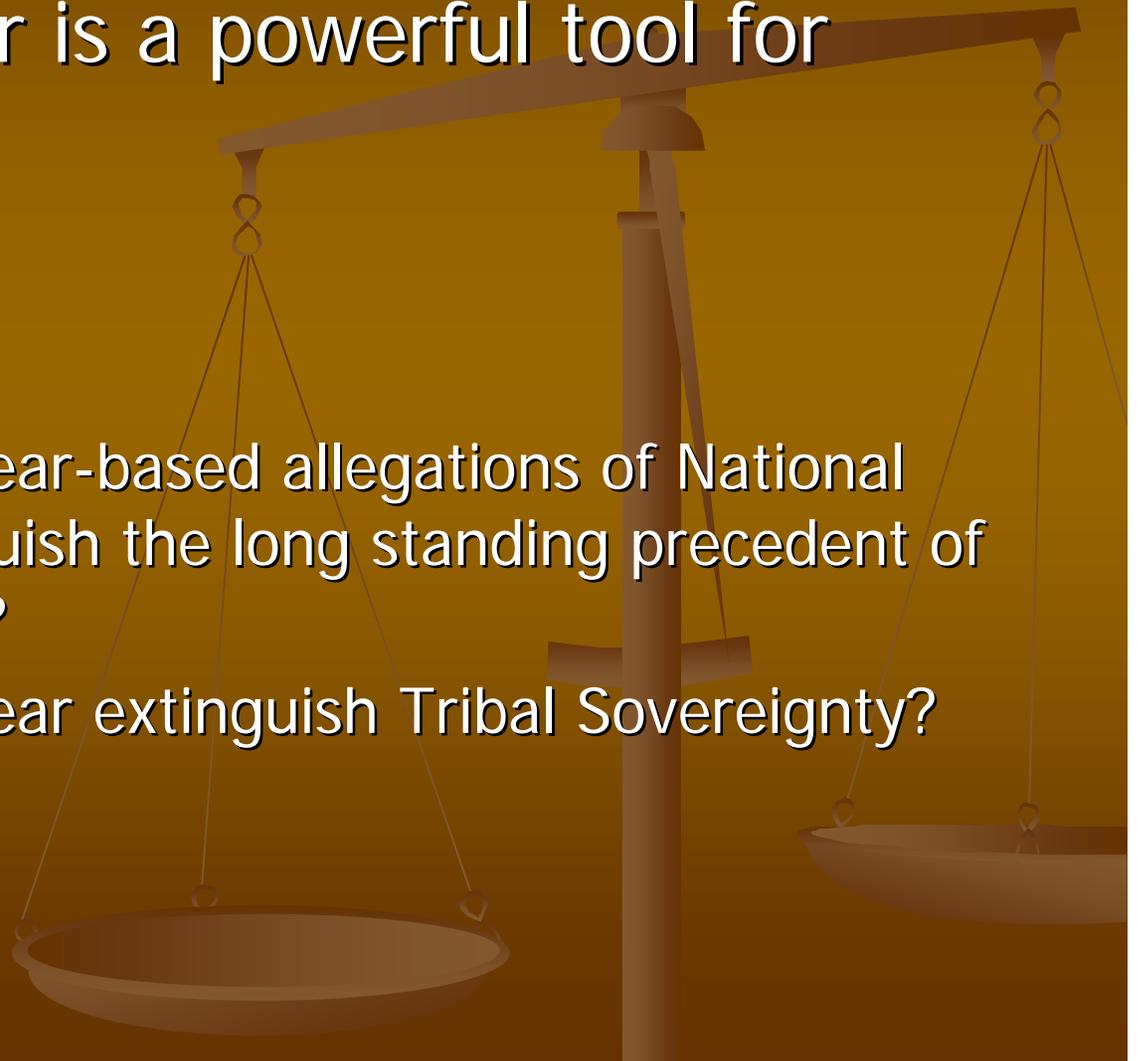
# Fueling the Argument for Removal of Tribal Consent

- 9/11 Attack
- Fear
- "Terrorism"
- Transport of energy vital to national security



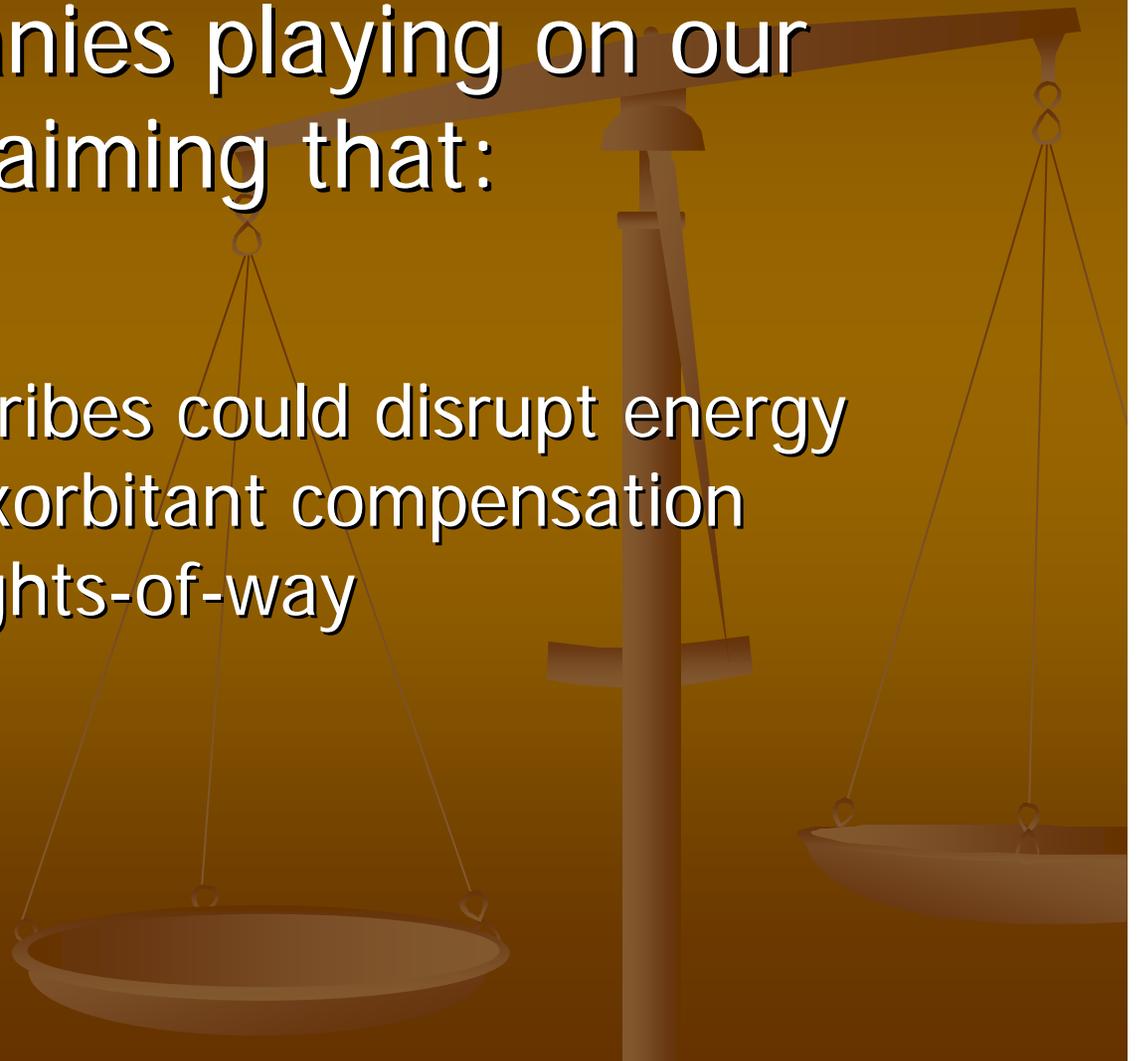
# Post 9/11 Fears

- Post 9/11 – Fear is a powerful tool for taking of rights
- Questions:
  - - Why should fear-based allegations of National Security extinguish the long standing precedent of Tribal Consent?
  - - Why should fear extinguish Tribal Sovereignty?



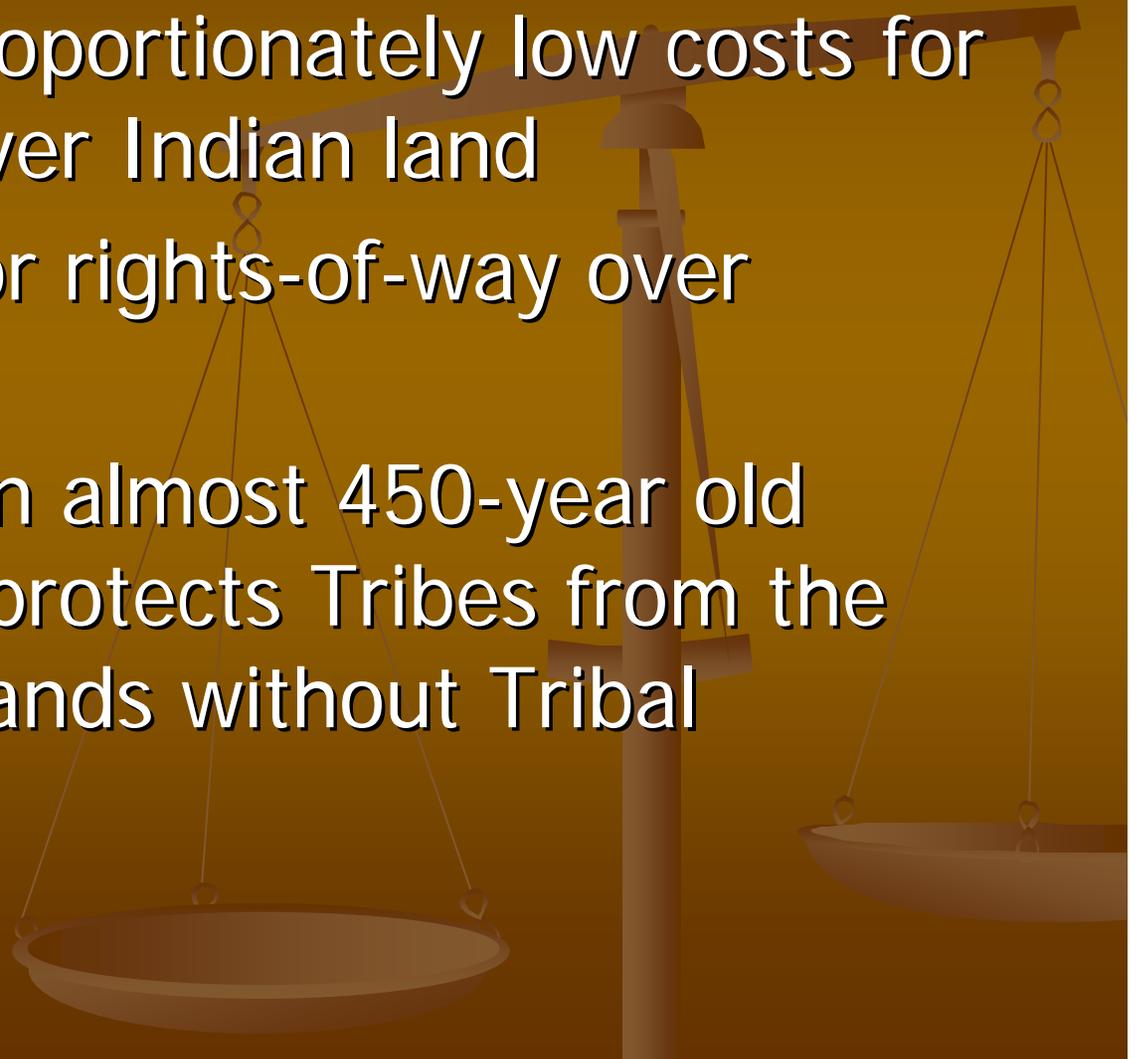
# Fear & National Security

- Energy companies playing on our fear, falsely claiming that:
  - Unrestrained, Tribes could disrupt energy supplies with exorbitant compensation demands for rights-of-way



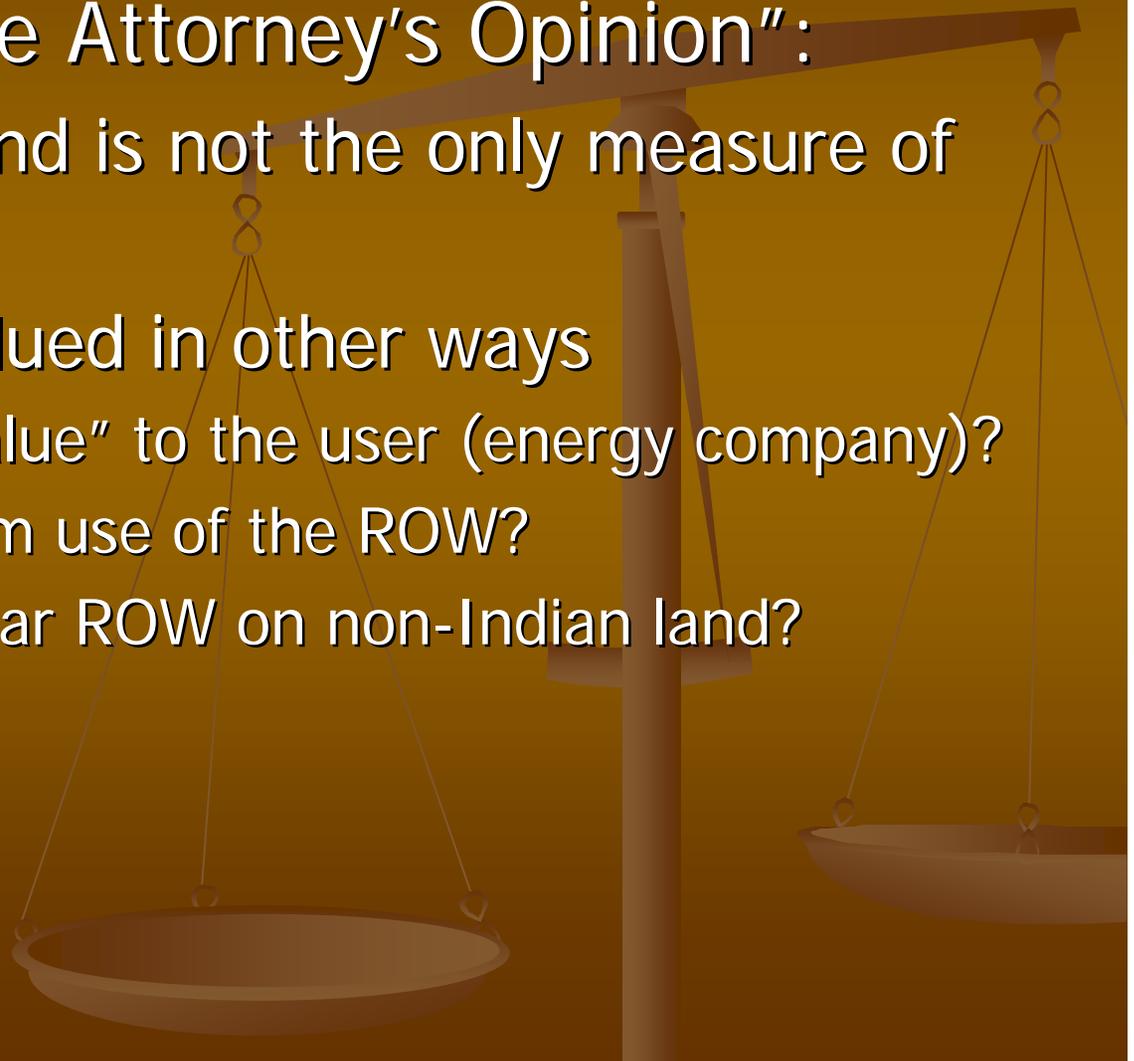
# Energy Company Goals

- Continued disproportionately low costs for rights-of-way over Indian land
- Price controls for rights-of-way over Indian land
- Elimination of an almost 450-year old precedent that protects Tribes from the taking of their lands without Tribal consent



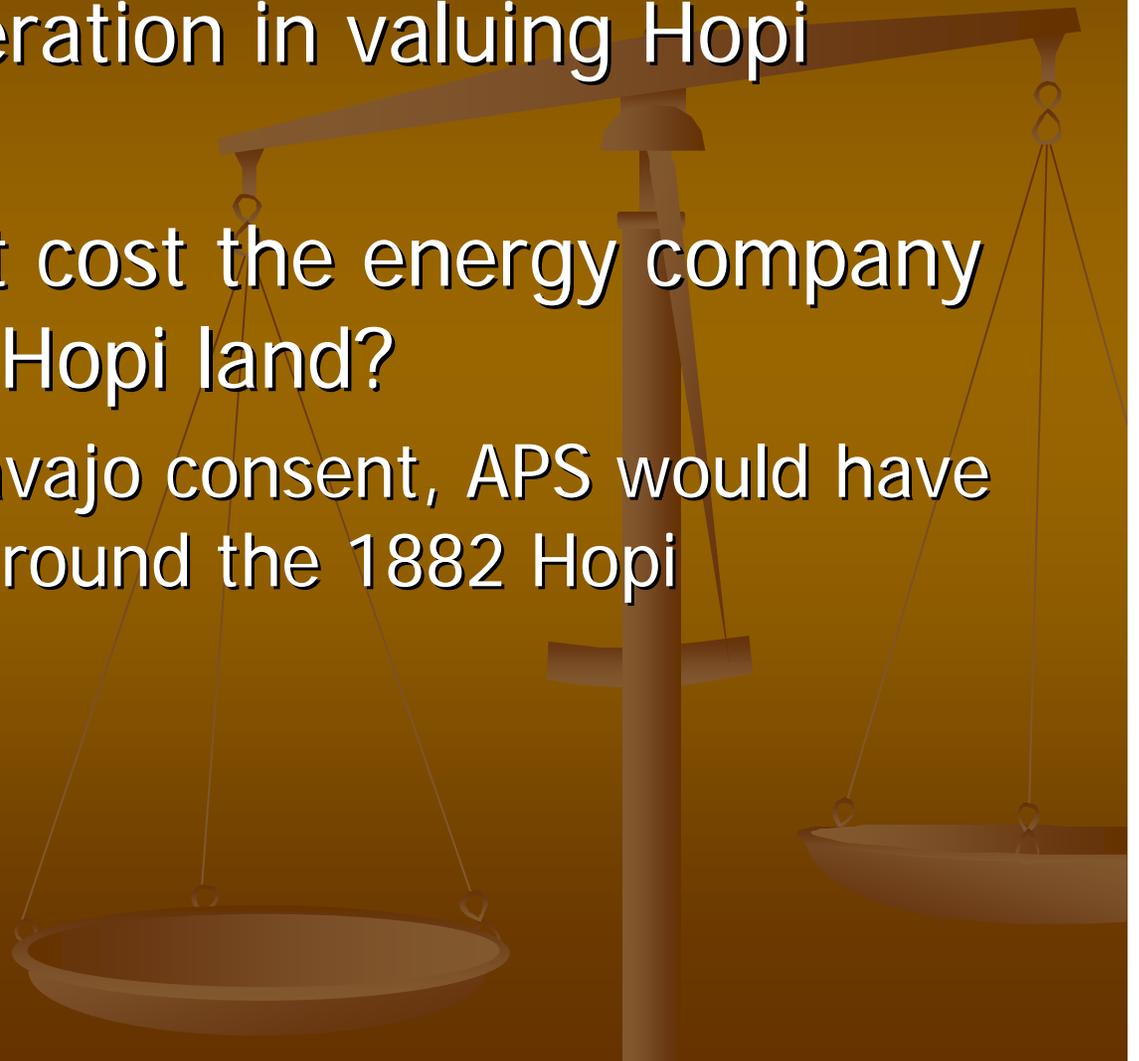
# Valuing Hopi Land

- Contrary to “One Attorney’s Opinion”:
  - Sale value of land is not the only measure of value
  - Land can be valued in other ways
    - What is the “value” to the user (energy company)?
    - Their profit from use of the ROW?
    - “Value” of similar ROW on non-Indian land?

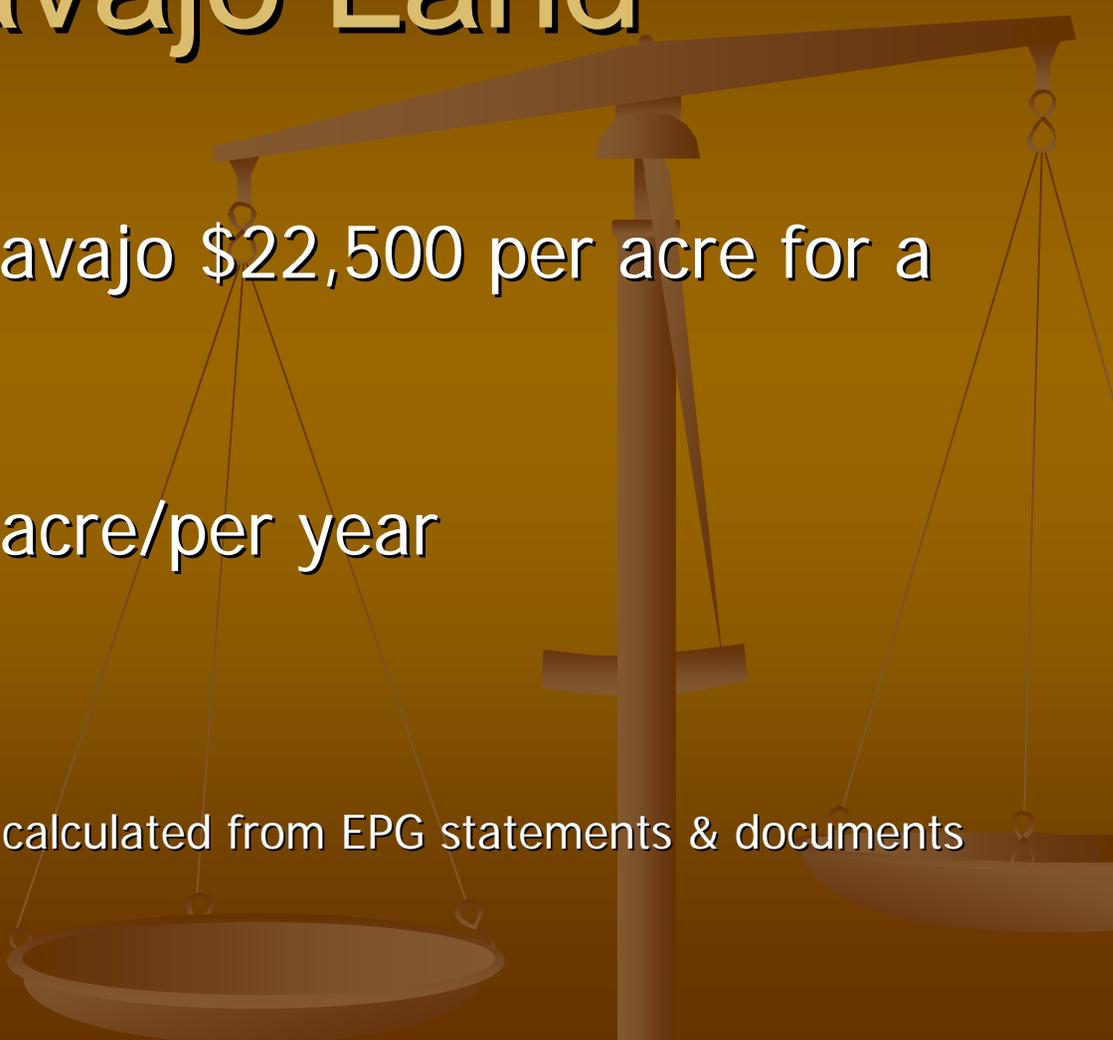


# Valuing Hopi Land

- Another consideration in valuing Hopi land:
  - What would it cost the energy company to go around Hopi land?
    - Even with Navajo consent, APS would have to navigate around the 1882 Hopi Reservation

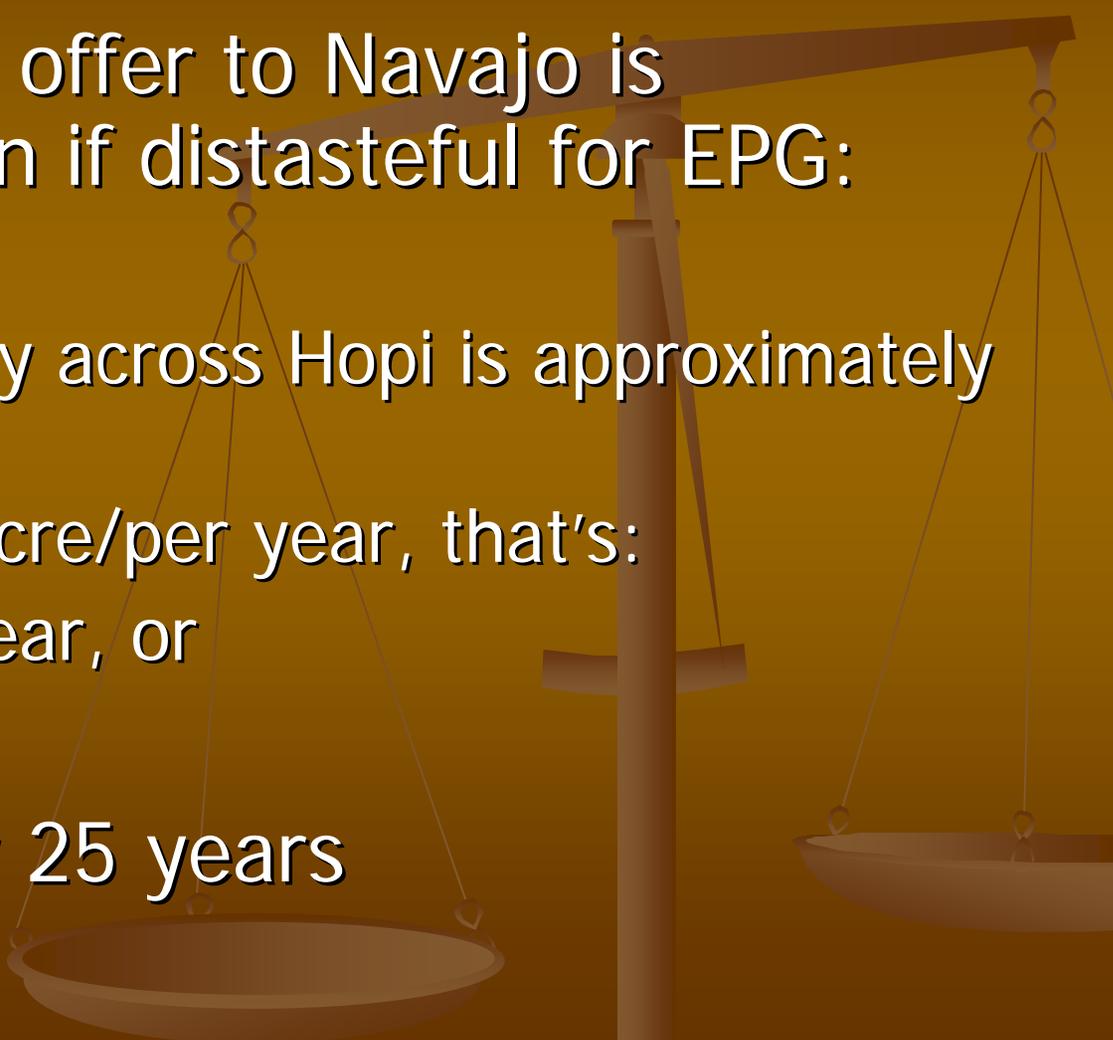


# El Paso Gas' – Value of Navajo Land



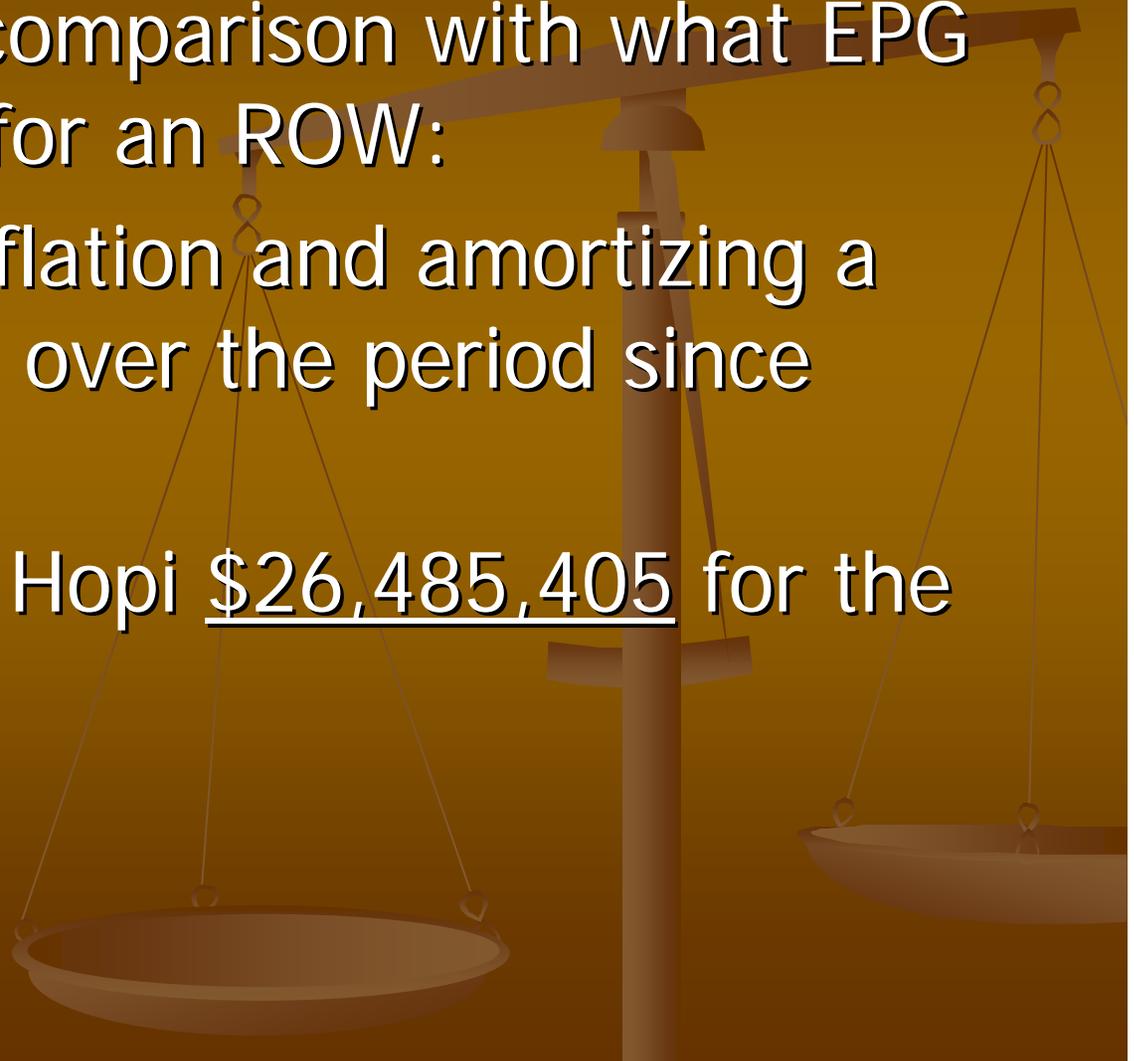
- EPG has offered Navajo \$22,500 per acre for a 20 year ROW
- That's \$1,125 per acre/per year
- \*\* These are approximates calculated from EPG statements & documents

# Comparative Value of Hopi Land

- Assuming EPG's offer to Navajo is reasonable, even if distasteful for EPG:
    - APS right-of-way across Hopi is approximately 751 acres
    - At \$1,125 per acre/per year, that's:
      - \$844,875 per year, or
  - \$21,121,875 for 25 years
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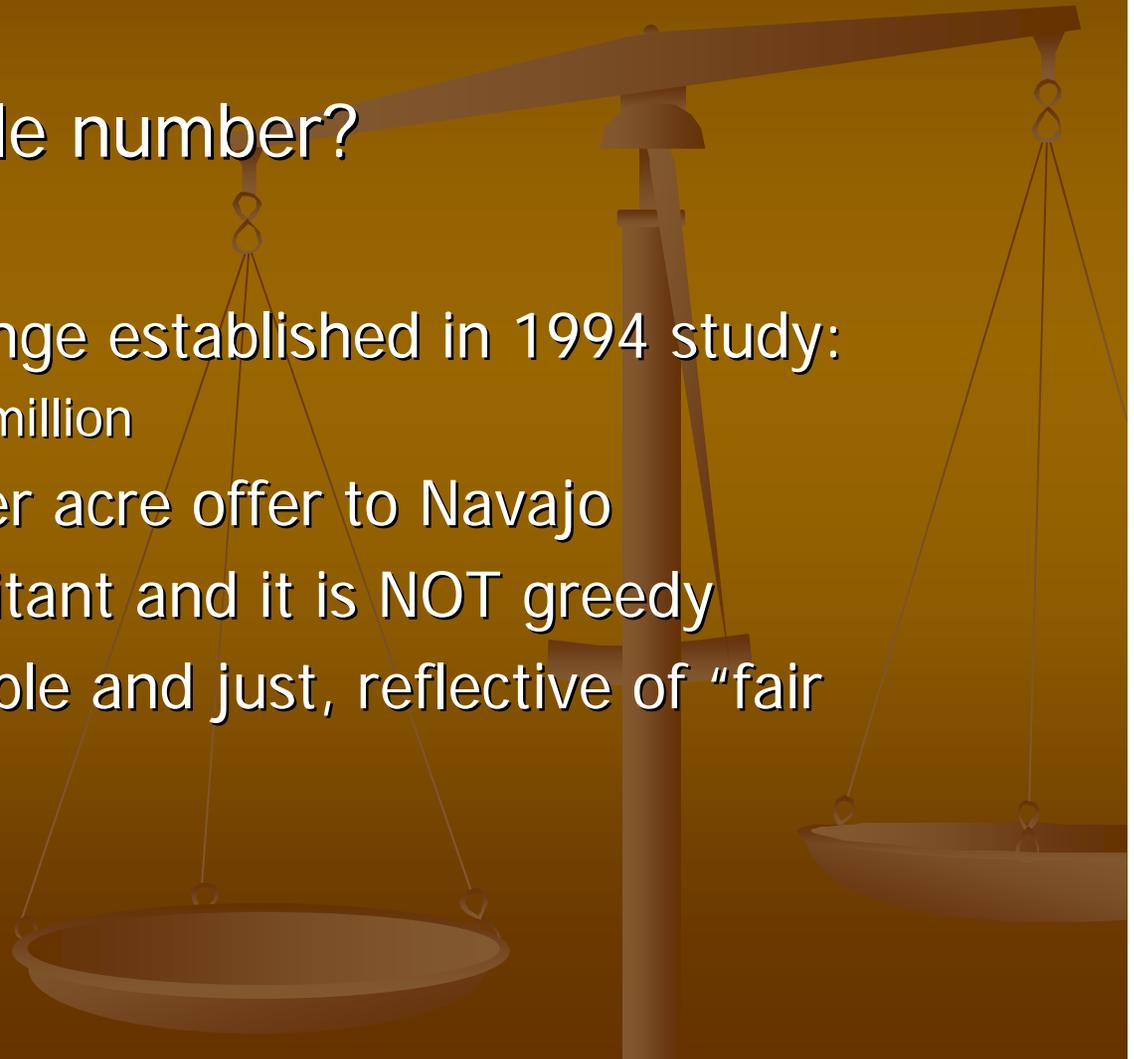
# Value of Hopi Land for ROW

- Using only the comparison with what EPG offered Navajo for an ROW:
- Corrected for inflation and amortizing a low 5% interest over the period since 1992,
- APS should pay Hopi \$26,485,405 for the 25-year ROW!



# \$26,485,405

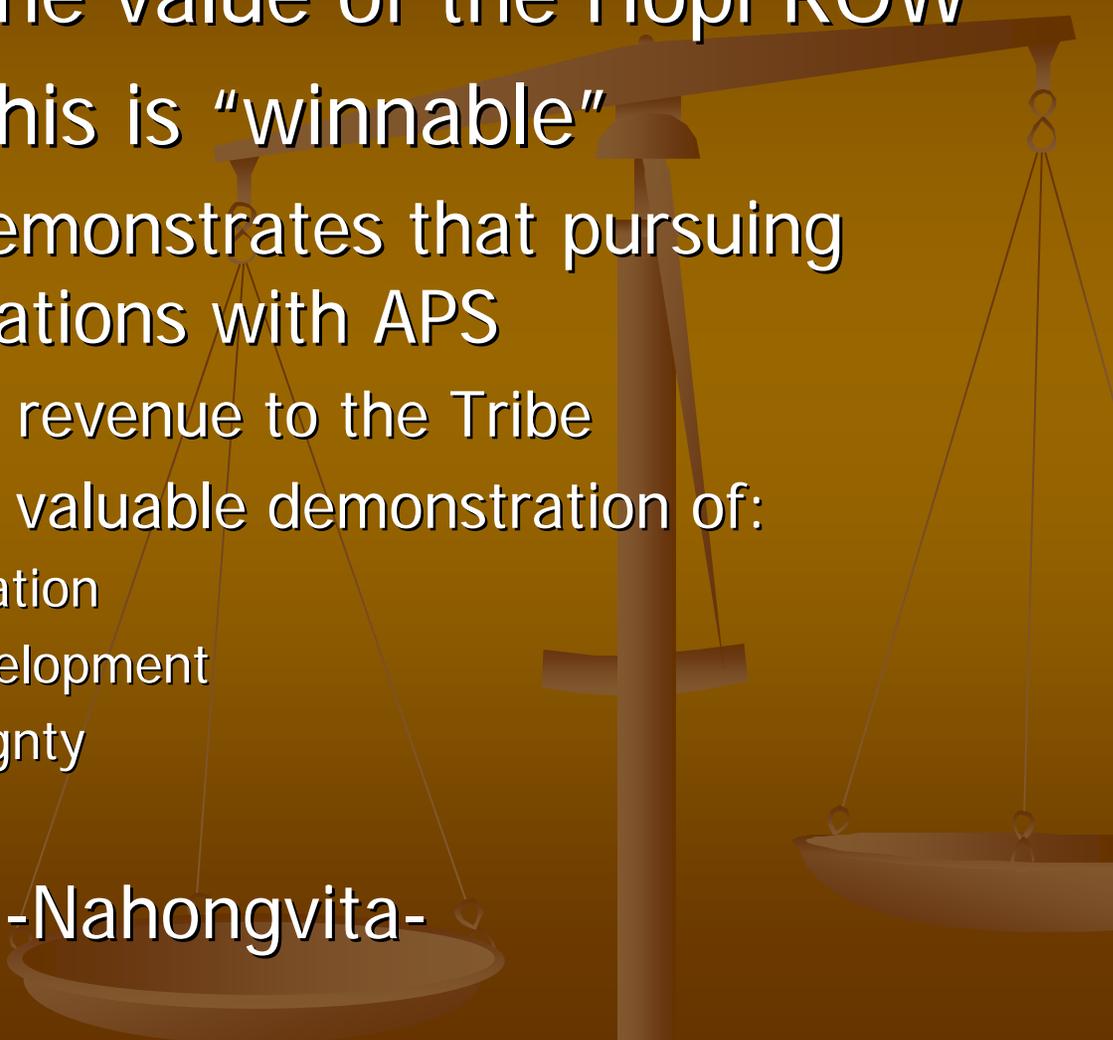
- Is this a reasonable number?
  - Well within the range established in 1994 study:
    - \$7 million to \$34 million
  - Based on EPG's per acre offer to Navajo
  - This is NOT exorbitant and it is NOT greedy
  - It is simply equitable and just, reflective of "fair market value"



# What All This Means

- May not prove the value of the Hopi ROW
- May not prove this is “winnable”
  - But, certainly demonstrates that pursuing renewed negotiations with APS
    - 1 – Could bring revenue to the Tribe
    - 2 – Would be a valuable demonstration of:
      - Self-Determination
      - Economic Development
      - Tribal Sovereignty

-Nahongvita-



# Conclusions

- This presentation demonstrates that, contrary to energy company claims:
  - Tribes have NOT been overpaid for rights-of-way.
  - Tribes are, in fact, frequently exploited by the unfair negotiating advantage of expensive corporate attorneys and the failure of the Department of Interior to fulfill its Trust Responsibility to assure tribes obtain fair market value for their rights-of-way.