



February 9, 2007

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Assistant Deputy Secretary  
U.S. Department of the Interior  
Office of the Secretary  
1849 C Street, NW  
Room 6125 (MS 7229)  
Washington, DC 20240

Attention: Section 1813 ROW Study  
Office of Indian Energy and Economic Development  
Room 20 – South Interior Building  
1951 Constitution Avenue, NW  
Washington, D.C. 20245

Submitted via e-mail to: [IEED@bia.edu](mailto:IEED@bia.edu)

Subject: Section 1813 Comments

Dear Assistant Deputy Secretary Haspel:

On behalf of the Fair Access to Energy Coalition (FAIR), Edison Electric Institute (EEI), and the Interstate Natural Gas Association of America (INGAA), we respectfully submit our joint redline of key sections of the Departments of Energy and the Interior’s (“Departments”) Draft Report to Congress regarding Section 1813 (“Draft Report”), issued on December 21, 2006.

We did not attempt to redline the entire Draft Report. Instead, we focused on key passages affected by some of the comments we individually submitted on February 5<sup>th</sup>, and compiled edits to reflect those separate and overlapping comments. If you accept our redlining in whole or in part, you may find that other sections of the Draft Report will need editing to comport with the redlining.

Thank you for your consideration.

Sincerely,

-signature-

Nancy Ives  
FAIR Coalition

-signature-

Meg Hunt  
EEI

-signature-

Joan Dreskin  
INGAA

cc: Daryl Francois  
Mark Whitemton  
Bob Middleton



7 **DRAFT**

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9 **REPORT TO CONGRESS**

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12 **ENERGY POLICY ACT OF 2005, SECTION 1813**

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14 **INDIAN LAND RIGHTS-OF-WAY STUDY**  
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22 **U.S. Department of Energy**

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24 **U.S. Department of the Interior**  
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30 **December 21, 2006**  
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## Notation

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

### Acronyms and Abbreviations

APS	Arizona Public Service
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BPA	Bonneville Power Association
CEPC	California Electric Power Company
C.F.R.	<i>Code of Federal Regulations</i>
Cong.	Congress, Congressional
CPI	consumer price index
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
EEI	Edison Electric Institute
EPAct	Energy Policy Act of 2005
EPNG	El Paso Natural Gas Company
Fed. Reg.	<i>Federal Register</i>
FERC	Federal Energy Regulatory Commission
FPC	Federal Power Commission
GRIC	Gila River Indian Community
HRA	Historical Research Associates
INGAA	Interstate Natural Gas Association of America
IRA	Indian Reorganization Act of 1934
NEPA	National Environmental Policy Act
MOU	memorandum of understanding
NOG	Navajo Nation Oil and Gas Company
OIWA	Oklahoma Indian Welfare Act
Pub. L.	Public Law
ROW	rights-of-way

1	SCE	Southern California Edison
2	SEC	Securities and Exchange Commission
3	S. Rep	Senate Report
4	Stat	<i>U.S. Statutes at Large</i>
5		
6	U.S.	United States
7	U.S.C	<i>United States Code</i>
8	USPAP	Uniform Standards of Professional Appraisal Practices
9		
10	ZR	zone rent

**Units of Measure**

11		
12		
13	kV	kilovolt(s)
14		
15	mcf	thousand cubic feet
16		
17	rod	16 and a half feet
18		

## Executive Summary

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

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

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

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

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

The Departments posted the transcripts of both meetings and all comments received on a website for public review (<http://1813.anl.gov>). The Departments then released a draft report in August 2006 and requested written comments about the draft report and also accepted verbal comments at one nationwide and several regional public meetings held between August 24 and 30, 2006. The Departments also held a series of government-to-government consultation meetings at a tribe’s request during this period.

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

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

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

7  
8 The Departments' intent was to address the core issues raised by Congress, and accordingly  
9 narrowed the scope to ROWs for electric transmission lines, and natural gas and oil pipelines  
10 associated with interstate transit and local distribution. The Departments selected these energy  
11 ROWs for study because of the number of interested parties that discussed these types of ROWs,  
12 the availability of information on them, and the nature of their role in delivering energy resources  
13 to consumers

14  
15 The following common themes surfaced in the course of the public discussion about the study:

- 16 • The United States Constitution empowers Congress to strike a balance between tribal  
17 sovereignty and the greater national interest. In some cases, this may mean the  
18 responsibility to the general American populace to provide reliable and affordable energy  
19 resources outweighs tribal sovereignty.
- 20 • Congress has plenary authority over tribes and tribal sovereignty is always subject to  
21 Congressional determination.
- 22 • Tribal sovereignty is manifested in the statutory and regulatory requirements of tribal  
23 consent in energy ROW matters
- 24 • Tribal self-determination policies are important in advancing oversight of energy ROWs  
25 and expanding energy production
- 26 • Uncertainty and lack of transparency in the valuation process is of concern
- 27 • Costs of energy ROW renewals on tribal land are rising, often substantially exceeding fair  
28 market value as determined by broadly accepted methodologies.
- 29 • Trends toward shorter term lengths (in years) for energy ROWs and longer negotiation  
30 periods are appearing.

31  
32  
33 The principle of tribal sovereignty is central to understanding the statutory and regulatory  
34 requirement of consent. Sovereignty is generally defined as the authority of a government to  
35 define its relationship with other governments, commercial entities, and others. A tribe's  
36 authority to confer or deny consent to an energy ROW across tribal land derives from its inherent  
37 sovereignty — the right to govern its people, resources, and lands. However, there is well-  
38 established statutory and decisional law which holds that Congress has *plenary* authority over  
39 Indian affairs.<sup>1</sup> “Plenary” has been defined as [f]ull, entire, complete, absolute, perfect,  
40 unqualified.” BLACK’S LAW DICTIONARY 1154 (6th ed. 1990). Thus, tribal sovereignty is always  
41 subject to Congressional will.<sup>2</sup> Given its plenary power over tribes, Congress may strike any

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<sup>1</sup> *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.”) (Internal citations omitted).

<sup>2</sup> See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

1 balance it chooses between tribal sovereignty and the national interest in reliable and affordable  
2 energy for *all* Americans.<sup>3</sup>  
3

4 The present right of tribes to govern their members and territories flows from a historical and  
5 preexisting independence and right to self-government that has survived, albeit in diminished  
6 form, through centuries of contact with other cultures and civilizations. Most treaties include  
7 clauses intended to preserve this right of self-governance, at least with regard to tribes' internal  
8 affairs. The implication of any reduction in the tribe's authority to make that determination is a  
9 reduction in the tribe's authority and control over its land and resources, with a corresponding  
10 reduction in its sovereignty and abilities for self-determination.  
11

12 The Departments find that the negotiation processes for establishing or renewing rights-of-way  
13 on tribal land could benefit from mutually agreed upon practices, procedures, and actions that  
14 would better the understanding and collaboration among the parties. These include:  
15

- 16 ▪ Develop comprehensive ROW inventories for tribal lands
  - 17 ▪ Develop model or standard business practices for energy ROW transactions
  - 18 ▪ Broaden the scope of energy ROW negotiations
- 19

20 In addition, the Departments identified a number of approaches for Congress to consider in  
21 developing appropriate standards and procedures for determining "fair and appropriate  
22 compensation" for energy ROWs on tribal lands. These are:  
23

- 24 a. Elect to make no changes - allow ROW negotiations to continue under current laws,  
25 regulations, practices, and procedures.
  - 26 b. Enact a legislative clarification of tribal consent.
  - 27 c. Authorize the federal government to determine just compensation using a variety of  
28 methods for calculating just compensation (appropriately adjusted to reflect unique tribal  
29 concerns).
  - 30 d. Require binding valuation for a particular impasse.
  - 31 e. Authorize *case-by-case* condemnation of tribal lands for public necessity.
  - 32 f. Specifically authorize condemnation of tribal lands for public necessity. (See Sec. 7.6)
  - 33 g. Direct the Agencies to establish a process to incentivize negotiations and backstop stalled  
34 negotiations similar to the process used by FERC for hydroelectric projects on tribal  
35 lands under the Federal Power Act. (See Sec. 7.7)
- 36  
37  
38

39 After careful consideration of the information presented and the alternative approaches  
40 identified, the Departments offer the following recommendations for the grant, expansion or  
41 renewal of rights-of-way in tribal lands. The Departments recommend that:  
42

- 43 ~~(1) Valuation of energy ROWs on tribal lands should continue to be based upon terms~~  
44 ~~negotiated between the parties.~~

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<sup>3</sup> See *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

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~~(2) In the event that a failure of negotiations regarding the grant, expansion, or renewal of an energy ROW has a significant regional or national effect on the supply, price, or reliability of energy resources, the Departments recommend that Congress consider resolving such a situation through specific legislation, rather than making broader changes that would affect tribal sovereignty or self-determination generally.~~

Congress should establish “standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROW on tribal land.” (EPA Act Sec. 1813(b)(2)). Recognizing the growing potential for impasses between utilities and tribes, the Departments recommend that Congress should adopt a process applicable to all impasses that comports with Section 7.6, Section 7.7, or, at a minimum, Section 7.4 whereby just compensation is defined by traditional notions of fair market value (FMV).

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# 1. Introduction

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

## 1.1. Statutory Language of Section 1813

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

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

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

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

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

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

In Section 3, the Departments set out the statutory and regulatory framework for granting, expanding, or renewing energy ROWs on tribal land. The Departments also assess the tribal

1 sovereignty and self-determination interests effected by granting, expanding, or renewing energy  
2 ROWs on tribal land  
3  
4 In Section 4, the Departments summarize the data and information collected regarding historic  
5 rates of compensation for energy ROWs on tribal land.  
6  
7 In Section 5, the Departments discuss standards and procedures for determining fair and  
8 appropriate compensation for energy ROWs on tribal lands.  
9  
10 In Section 6, the Departments discuss the common issues raised concerning the energy ROW  
11 negotiation process. The Departments' analyze and make findings regarding these concerns with  
12 the energy ROW negotiation process. The Departments also provide a variety of approaches for  
13 resolving negotiation concerns.  
14  
15 In Section 7, the Departments present a range of approaches for consideration by Congress  
16 regarding procedures for energy ROW negotiations and standards for determining "fair and  
17 appropriate" compensation for energy ROWs on tribal lands.  
18  
19 Then, in Section 8, based on all of the information gathered during the conduct of this study and  
20 a review of the alternatives available, the Departments present a summary of their findings and  
21 provide a recommendation to Congress regarding appropriate standards and procedures for  
22 determining fair and appropriate compensation for energy ROWs on tribal lands.  
23  
24 Finally, in Section 9, the Departments provide a more detailed description of case studies, survey  
25 information and data submitted by stakeholders regarding historic and current rates of  
26 compensation for energy ROWs on tribal land.  
27

## 28 **1.2. Public and Tribal Consultation Meetings and Comments**

29 The Departments began the study process by contacting interested tribes, energy companies, and  
30 associations in a series of telephone calls to determine the range of potential issues affected by  
31 the Section 1813 language and to gather information on how to structure the public consultation  
32 process. As time allowed, the Departments also met with a variety of tribes, energy companies,  
33 and associations that requested meetings.  
34

35 After this pre-scoping effort the Departments held two nationwide public meetings in March and  
36 April 2006 to solicit comments from interested participants on the scope of the study. The  
37 notices of these meetings were published in the Federal Register. In addition, the Departments  
38 communicated with tribes through letters sent directly to tribal leaders and through contact with  
39 the regional offices of the Bureau of Indian Affairs (BIA). The Departments posted the  
40 transcripts of both meetings and all comments received on a website for public review  
41 (<http://1813.anl.gov>).  
42

43 Following scoping, the Departments published a notice in the Federal Register seeking  
44 information and comments from interested participants regarding energy ROWs on tribal lands.  
45 Information and comments were due to the Departments by May 15, 2006. Upon receipt, the

1 Departments began reviewing the information and comments, and requested follow-up  
2 information as needed.

3  
4 On August 9, 2006, the Departments published a notice in the Federal Register that announced  
5 the release of a draft report and requested written comments about the draft report. The  
6 Departments also accepted verbal comment at one nationwide and several regional public  
7 meetings held between August 24 and 30, 2006. The Departments also held government-to-  
8 government consultation meetings with interested tribes during this period. The dates and times  
9 of the meetings were published in the Federal Register and announced to tribes in a letter sent to  
10 tribal leaders.

11  
12 Comments were due on the draft report by September 1, 2006. This deadline was extended to  
13 September 4, 2006, and the Departments continued to receive and review comments through the  
14 entire month of September.

15  
16 Through November 2006 the Departments met in government-to-government consultation with  
17 more than 18 tribes, in addition to extensive public testimony. The Departments also received  
18 approximately 208 sets of written comments from 120 commenters, including 60 tribes, 10 tribal  
19 associations, 15 energy companies, 4 energy trade associations, 9 state or local governments, 3  
20 interest groups, and 19 individuals or other commenters.

21  
22 In the course of the public meetings, government-to-government consultations, and through  
23 submission of written comments by interested groups and individuals, hundreds of study  
24 participants raised issues related to the Section 1813 study. The Departments appreciate the  
25 extensive efforts of these commenters to provide detailed ROW information and thoughtful  
26 comments during the study process and for this final report. The Departments relied extensively  
27 on these comments to help define the scope of the report and our analysis. A list of commenters  
28 is provided as an Appendix to the report.

### 30 **1.3. Scope of the Section 1813 Report**

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

37  
38 First, Section 1813 requires “an analysis of historic rates of compensation paid for energy rights-  
39 of-way on tribal land.” Given the limited time and resources available to conduct the study, as  
40 well as the confidential nature of energy ROW agreements, the Departments determined that the  
41 most feasible approach for an analysis of historic rates was to rely on case studies of energy  
42 ROWs, supplemented by voluntary surveys of tribal and energy groups conducted by others. The  
43 Departments received many comments on this approach. Tribes, tribal energy companies, and  
44 tribal associations (‘tribes’) commented that a case study approach would seriously limit the  
45 Departments’ ability to get a full understanding of energy ROWs on tribal lands, in particular,

1 historic practices for obtaining an energy ROWs. Tribes also noted that this approach would fail  
2 to account for numerous ROWs that lacked documentation or compensation agreements. Energy  
3 companies, trade associations, and interest groups ('industry') were generally comfortable with a  
4 study plan that relied on case studies. Industry also favored including information from a  
5 voluntary survey of companies as a way to capture trends and emerging issues that they see in  
6 the ROW negotiation process.

7  
8 After careful consideration, the Departments reaffirmed their decision to rely on voluntary case  
9 studies and survey information as the most feasible option for the timely gathering of  
10 information useful in outlining and providing insight into the core issues identified in the scoping  
11 process, while also respecting the confidentiality concerns of both tribes and private industry.  
12 The Departments acknowledge that the data included in this report do not constitute a  
13 comprehensive historical review of rates paid for energy ROWs on tribal lands. The Departments  
14 also acknowledge that the case studies and voluntary survey information may tend to focus on  
15 the more complicated or contentious examples of energy ROW negotiations. Moreover, as many  
16 tribes reported in their comments, the case studies and voluntary survey information can  
17 represent only a few of the thousands of energy ROWs on tribal lands, many of which were  
18 successfully granted, renewed, or expanded. Finally, the Departments recognize that case studies  
19 can not be statistically generalized but, nevertheless, do provide an indication as to the nature of  
20 historic compensation and the issues confronted by both tribes and industry.

21  
22 Second, as stated before, the definition of tribal lands provided by Section 1813 is defined by  
23 reference to EPCA, Title V, Section 503, which amends Section 2601 of the Energy Policy Act  
24 of 1992. In conducting this study, the Departments found that it was important to clarify that this  
25 definition does not include energy ROWs on tribal fee lands, individual Indian trust allotments,  
26 or individual Indian fee lands. Federal policy regarding Indian land holding has varied over the  
27 history of the federal-tribal relationship. The majority of Indian land is now held as tribal trust  
28 land and is the focus of this study. The General Allotment Act of 1887 created tribal and  
29 individual allotted lands, many of which are still present. Many tribes have also purchased lands  
30 in fee, sometimes to recover lands lost through allotment. These lands may be held in fee, or  
31 transferred to trust status through regulations at 25 C.F.R. Part 151.

32  
33 The Departments recognize that, despite limiting the definition of tribal land, the issues  
34 surrounding ROW negotiations have the potential to impact other landholders, including  
35 individual Indian allottees. However, the Departments' analyses are limited to 'tribal lands' as  
36 defined by Congress in Section 1813.

37  
38 Third, clarification of the term "energy rights-of-way" was also needed. This term is not defined  
39 in Section 1813, is very broad, and could encompass many different types of ROWs. Some of the  
40 types of energy ROWs that could potentially fall within the scope of this term and require a grant  
41 of access (in the form of a grant of business lease, a facilities lease, a surface use and access  
42 agreement or a surface damage agreement) in order to lawfully be on tribal include:

- 43  
44 • Local gas gathering pipelines from wells to transmission line tie-in points with  
45 the gas field,

- 1 • Intrastate gas transmission lines from gathering system tie-in points to  
2 processing plants,
- 3 • Intrastate and interstate gas transmission pipelines from gas processing plants  
4 to an industrial end user or gas distribution system,
- 5 • Local gas distribution system pipelines (the consumer delivery system),
- 6 • Local oil gathering lines from wells to transmission line tie-in points to a  
7 refinery,
- 8 • Intrastate oil transmission lines from gathering system tie-in points to a  
9 refinery,
- 10 • Intrastate and interstate refined products pipelines from a refinery to  
11 distribution terminals,
- 12 • Intrastate and interstate high-voltage electric power lines from a generating  
13 station to transformer stations,
- 14 • Local low-voltage electric power lines to consumers,
- 15 • Coal slurry pipelines,
- 16 • A variety of railroad lines carrying energy products across tribal lands,
- 17 • Roads that serve as corridors to energy sites and to oil and gas drilling  
18 locations,
- 19 • Roads for hauling oil from wellhead storage tanks to a refinery, and  
20 • Roads for hauling coal from a mine to a coal-burning facility.

21  
22 While all these types of ROWs pertain to energy, they are not necessarily comparable. As  
23 explained in Section 3, different types of ROWs may derive from different statutory authority. In  
24 addition, the economics, environmental impacts, tribal or federal oversight, and service  
25 requirements for each type of energy ROW are different. Because the range of energy ROWs on  
26 tribal lands is so extensive, the Departments determined that a more limited examination was  
27 required to successfully complete this report.

28  
29 The Departments therefore refined the scope of the Section 1813 study to electric transmission  
30 lines and natural gas and oil pipelines associated with interstate transit and local distribution. The  
31 Departments selected these energy ROWs for study because of the number of interested  
32 participants that discussed these types of ROWs, the availability of information on them, and the  
33 nature of their role in delivering energy resources to consumers.

34  
35 The Departments finally caution readers of this report that any conclusions or proposals made in  
36 this report should be understood in light of the focused study scope. Because the Departments'  
37 study focused on electric transmission, natural gas and oil pipelines, the assessments and analysis  
38 in this report were based on the law and facts surrounding these specific energy ROWs.  
39 Application of this report beyond ROWs for electric transmission, natural gas, and oil pipelines  
40 should be done with caution.  
41

## 2. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land

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

- the Administration’s National Energy Policy
- emergency authorities to ensure the transport of energy
- EAct provisions relating to transmission
- EAct Title V – Indian Energy (Title V)
- the Indian Right-of-Way Act of 1948 (1948 Act) and historical acts of Congress permitting ROWs across tribal lands

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

### 2.1. Public and Tribal Comments

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

Industry generally commented that the Departments should focus on the Administration’s National Energy Policy (NEP) and policies recently enacted as EAct. Industry commented that the NEP and EAct both find that the nation’s current transmission and distribution infrastructure is aging and requires expansion to meet growing demand in the United States.<sup>1</sup> Industry commented that EAct specifically addressed these issues and included provisions to encourage construction and expansions in infrastructure. An interest group commented that Congress intended Section 1221 to relieve transmission congestion and constraints that adversely affect consumers, and that Section 368 was intended to reduce siting obstacles faced by electric transmission line, natural gas pipelines, and other types of energy transportation infrastructure.<sup>2</sup> Specifically, discussing the policies promoted by Section 368, the interest group asserted that “siting constraints will be significantly constrained by current tribal ROW policy.”<sup>3</sup>

One trade association noted that its members are already responding to the need to build and expand transmission infrastructure. The trade association provided data that its “Western and Southwestern shareholder-owned utilities spent roughly \$6.8 billion (in 2005 dollars) on transmission between 2000 and 2005 and are planning to spend another \$5.4 billion on transmission between 2006 and 2008.”<sup>4</sup> The trade association also commented that “[b]eyond 2014, substantial additional transmission will likely be added as the nation’s transmission system is upgraded and expanded to provide capacity for the next several generations, including the ability to access clean coal and wind generation.”<sup>5</sup> However, the trade association asserted that the need to build such infrastructure, “highlights the importance of achieving tribal ROW fees that are reasonable and based on FMV [fair market value], and fee-setting processes that are efficient, prompt, predictable, and fair.”<sup>6</sup>

1  
2 Industry also commented that the underlying intent of policies to expand and improve energy  
3 transmission is to strengthen domestic energy sources.<sup>7</sup>

4  
5 Tribes commented that EPOA shows Congress chose to address energy issues on tribal lands  
6 through EPOA Title V. Tribes commented that “Title V is an important expression of national  
7 energy policy and is the only piece of recent federal legislation that directly addresses both  
8 energy transportation needs and the specific issue of energy rights-of-way on tribal lands.”<sup>8</sup>  
9 Tribes asserted that “any effort to limit tribal power to consent when companies seek to install or  
10 renew rights-of-way across tribal land would be directly contrary to the carefully crafted policy  
11 determinations made by Congress when it passed Title V.”<sup>9</sup>

12  
13 Tribes also commented that they already participate in energy policies such as helping domestic  
14 energy independence through the production and transmission of energy resources on tribal  
15 lands. One tribe commented that it “has been part of the energy-producing industry for over 50  
16 years.”<sup>10</sup> This tribe commented that the 2000 active natural gas wells on its reservation produce  
17 22 million MCF of natural gas every year for transport to consumers in the Western United  
18 States.<sup>11</sup> Another tribe stated more generally that “rather than being one part of an energy supply  
19 and infrastructure *challenge* facing the U.S., the story of historical tribal land energy resource  
20 development, and more significantly the prospects for continued development, is one of  
21 consistent and positive contribution to meeting the nation’s energy needs.”<sup>12</sup>

22  
23 Tribes commented that discussion of relevant national energy transportation policies should also  
24 address the lack of utility services to reservation communities. Tribes stated that a basic purpose  
25 of national energy transportation policies is to provide for the delivery of energy resources  
26 needed by communities across the country and, given that utility services to Indian households  
27 lags far behind those of non-Indian households, that these policies should be used to expand and  
28 improve utility service for reservation communities.<sup>13</sup> Specifically, Tribes presented data from  
29 DOE’s Energy Information Administration (EIA) showing that 14.2 Indian households lacked  
30 electric service compared to 1.4 percent of all U.S. households.<sup>14</sup> They also cited a United States  
31 Census study reporting that 16% of Indian households use utility gas to heat their homes,  
32 compared to 51% of all United States households.<sup>15</sup> Tribes concluded that energy policies  
33 maintaining tribal sovereignty and promoting self-determination, as reflected in current laws and  
34 processes for obtaining energy ROWs on tribal lands, were critical for improving energy service  
35 on reservations.<sup>16</sup>

## 38 **2.2. National Energy Transportation Policies Generally Relevant to Energy** 39 **Matters on Tribal Land**

### 40 **2.2.1. The National Energy Policy**

41 In May 2001, the Administration issued a National Energy Policy (NEP) which discussed many  
42 of the issues ultimately addressed by Congress in EPOA. The Administration’s NEP set forth a  
43 long-term strategy to promote reliable, affordable, and environmentally sound energy for

1 America's future.<sup>17</sup> The NEP proposed meeting these goals by increasing energy conservation,  
2 increasing domestic energy supplies, increasing use of renewable and alternative energy,  
3 ensuring a comprehensive energy delivery system, and enhancing national energy security.<sup>18</sup>  
4

5 Chapter 7 of the NEP specifically discussed policies and goals related to energy transmission.  
6 The NEP stated that, "One of the greatest energy challenges facing America is the need to use  
7 21st-century technology to improve America's aging energy infrastructure."<sup>19</sup> In particular, the  
8 NEP concludes that natural gas pipelines and electric transmission lines are constrained because  
9 infrastructure has not kept up with demand.<sup>20</sup> The NEP further discussed a variety of constraints  
10 in each of these industries and their impacts on consumer costs and energy reliability.  
11

12 The NEP described the nation's electricity transmission system as the highway system for  
13 interstate commerce in electricity. However, the NEP found that the electric transmission system  
14 is constrained because investment in transmission has "lagged dramatically" over the past  
15 decade, the siting process primarily occurs at the state level, and because of limited access to  
16 federal lands.<sup>21</sup> The NEP found that a constrained electric highway system cannot move energy  
17 where it is needed most and can lead to cost increases and reliability concerns.  
18

19 For example, the NEP described how transmission can be used as a substitute for local  
20 generation by moving power from distant areas with surplus generation to areas of demand.<sup>22</sup>  
21 However, when transmission constraints limit power flows to areas of high demand, consumers  
22 in those areas will have to rely on higher-cost local generation.<sup>23</sup> The NEP also observed that  
23 regional shortages of generating capacity and transmission constraints can combine to reduce the  
24 overall reliability of electric supply in the country.<sup>24</sup> To address these various constraint  
25 problems, the NEP encouraged incentives to promote sufficient investment in transmission  
26 infrastructure, changes to the siting process to reflect the interstate nature of the transmission  
27 system, and improving access to federal lands.<sup>25</sup>  
28

29 With respect to natural gas and oil pipelines, the NEP noted that the primary transmission  
30 infrastructure constraints were related to shortfalls in pipeline capacity, community resistance to  
31 pipeline construction, and obtaining ROW approvals from federal, state, and local governments.  
32 Summarizing regulatory burdens at different levels of government, the NEP stated, "currently it  
33 takes an average of four years to obtain approvals to construct a new natural gas pipeline."<sup>26</sup>  
34

35 The NEP, however, did not propose eliminating regulatory protections for pipelines. Instead the  
36 NEP proposed striking an appropriate balance between regulatory review and expediting  
37 approval. Citing three recent pipeline ruptures, NEP stressed that policies to ensure protection of  
38 people, environment, and the safety of the nation's energy infrastructure are an important part of  
39 the permitting process.<sup>27</sup> Thus, the NEP proposed legislation "to improve the safety of natural  
40 gas pipelines, protect the environment, strengthen emergency preparedness and inspections and  
41 bolster enforcement."<sup>28</sup> With these protections, the NEP also encouraged regulatory agencies,  
42 which includes tribal agencies, "to continue interagency efforts to improve pipeline safety and  
43 expedite pipeline permitting in an environmentally sound manner."<sup>29</sup>  
44

45 The NEP also noted the significant role of federal lands for energy corridors, particularly in the  
46 western United States. Federal lands discussed in the NEP include lands managed by the Bureau

1 of Land Management, the U.S. Forest Service, the National Park Service (NPS), the U.S. Fish  
2 and Wildlife Service (U.S. FWS), the Bureau of Reclamation (BOR), and the Bureau of Indian  
3 Affairs – including tribal lands and individual Indian lands. The NEP concluded that each of  
4 these federal entities deals with ROWs from a “unique perspective.”<sup>30</sup> The NEP noted that some  
5 of these agencies may encourage ROW development, and others like the NPS, the U.S. FWS,  
6 and the BOR may discourage ROW corridors or require that ROWs be compatible with  
7 authorized purposes.<sup>31</sup>

8  
9 The NEP mentioned tribal lands as lands managed by the Bureau of Indian Affairs. Like other  
10 federal land managers, the NEP stated that “the BIA and tribal governments are authorized to  
11 grant rights-of-way across . . . tribal lands” for energy resources electric transmission lines and  
12 natural gas and oil pipelines.<sup>32</sup>

### 14 **2.2.2. Principles of Eminent Domain**

15 Generally, most electric transmission and energy pipelines have been built in the United States at  
16 the initiative of the private sector and are under rate regulation of the FERC. Pursuant to the  
17 Section 7 of the Natural Gas Act, most large natural gas pipeline projects are subject to FERC  
18 jurisdiction for siting, as well as for rate regulation. After a NEPA analysis, FERC may grant the  
19 pipeline developers a certificate, which may include eminent domain authority. Should  
20 negotiations fail to secure rights-of-way on private or state lands, the natural gas pipeline project  
21 can use this eminent domain authority to condemn enough land for a right of way. Section 7 of  
22 the Natural Gas Act's eminent domain authority does not ~~specifically mention~~ ~~apply to~~ federal  
23 lands or tribal lands. By contrast, for electric transmission projects, it historically has been the  
24 states that have been the siting authorities, including the ability to grant eminent domain  
25 authority to oil pipeline and electricity project permit holders. However, with the passage of  
26 EPAct, Congress granted FERC very limited authority to grant transmission construction permits  
27 for projects that are located in any national interest electricity transmission corridors that may be  
28 designated by the Secretary of Energy pursuant to Section 1221(a). This limited federal  
29 transmission facility permitting authority includes the authority to grant permittees to acquire  
30 rights-of-way through the right of eminent domain. However, the eminent domain authority  
31 given to FERC for these transmission projects cannot be used by a permit holder to acquire  
32 "property owned by the United States or a State." [1221(e)(1)]. This exclusion ~~includes~~ ~~is silent~~  
33 ~~as to~~ tribal lands, which are lands owned by the United States in trust for the beneficial use of the  
34 tribes. Accordingly, ~~neither section 7 of the Natural Gas Act nor the~~ new EPAct Section 1221(a)  
35 ~~did not~~ give FERC ~~the express~~ authority to grant the right of eminent domain to acquire energy  
36 ROW on tribal lands.

### 37 **2.2.3. Emergency Authorities**

38 While the Departments found no evidence that negotiation between parties for obtaining an  
39 energy ROW on tribal land contributed to an emergency situation, an analysis of emergency  
40 authorities addresses the system integrity and security issues raised by some industry parties in  
41 the Section 1813 study. The Departments examined emergency authorities of the Secretary of  
42 Energy pursuant to the Natural Gas Policy Act and the Federal Power Act. Although these  
43 authorities are used only in times of national emergencies, they can be used to mandate transfers

1 of needed energy supplies. In an emergency situation, these generally applicable statutes could  
2 apply to tribes.  
3

4 A number of tribal parties commented that while no tribe has exercised its consent authority in a  
5 manner that created an emergency situation, the issues raised by Section 1813 force tribes into  
6 the untenable position of having to prove a negative, i.e., that no tribe will ever use its consent  
7 authority in this manner, or that no tribe will interfere with supplying energy resources in an  
8 emergency. Rather than forcing this exercise on the tribes, the Departments' analysis finds that  
9 emergency authorities could provide a means of rectifying such a situation if it did occur.  
10

#### 11 **2.2.4. The Energy Policy Act of 2005**

12 In addition to the provisions passed in EAct Title V, discussed in Section 2.3.1 below, a number  
13 of other EAct provisions address the nation's energy infrastructure, in particular the electric  
14 transmission system, and may have some general application to tribal lands. EAct promotes  
15 improving and expanding the nation's energy infrastructure to meet the needs of a growing U.S.  
16 economy. Specifically, Sections 1221 and 368 of EAct provide administrative tools for  
17 facilitating the siting and construction of needed energy transmission.  
18

19 EAct Section 1221 (a) amended the FPA by adding a new Section 216 (a). This new section  
20 directs the Secretary of Energy to conduct a nationwide study of electric transmission congestion  
21 by August 8, 2006.<sup>33</sup> Based upon the congestion study, comments thereon, and considerations  
22 that include economics, reliability, fuel diversity, national energy policy, and national security,  
23 the Secretary may designate "any geographic area experiencing electric energy transmission  
24 capacity constraints or congestion that adversely affects customers as a national interest electric  
25 transmission corridor."<sup>34</sup> The national congestion study is to be updated every three years.  
26

27 Section 368 of EAct applies to transmission corridors for electric, natural gas, and oil. Section  
28 368 directs the Secretaries of Agriculture, Commerce, Defense, Energy, and Interior to  
29 incorporate into land use plans energy ROW corridors for oil, gas and hydrogen pipelines and  
30 electricity transmission and distribution facilities on federal land in eleven Western states within  
31 two years of the passage of EAct.<sup>35</sup> Within four years of the passage of EAct, these  
32 Secretaries are to identify corridors within federal lands in the remaining states.<sup>36</sup> These energy  
33 corridors will take into account reliability, congestion, and overall infrastructure capacity.<sup>37</sup>  
34

35 In Sections 1221 and 368, Congress enacted authorities and processes intended to promote the  
36 siting of generation and transmission to help resolve congestion and improve reliability, but did  
37 not make these provisions applicable to tribal lands. Section 1221 gives FERC transmission  
38 siting authority under certain conditions, and this authority includes the power to grant eminent  
39 domain. However, this authority specifically excludes property owned by a state or the United  
40 States, ~~and remains silent on these electric transmission corridors crossing which includes~~ tribal  
41 lands.<sup>38</sup> Similarly, Section 368 applies to federal lands, for example BLM, Forest Service, or  
42 Department of Defense lands, ~~but not tribal lands. Pursuant to Section 368, but is silent as to~~  
43 ~~tribal lands. In the face of this silence,~~ the Secretaries listed above are consulting with tribes  
44 interested in the Section 368 process. Some tribes have sought inclusion of portions of their land  
45 in the Section 368 process, while others have requested not to participate. Future tribal

1 involvement may include participating in NEPA review of a proposed energy corridor under  
2 Section 368. Industry has raised concerns about their ability to negotiate reasonable  
3 compensation agreements for ROW across tribal lands necessary to use an energy corridor across  
4 federal lands under the current negotiating framework where there is no third party to resolve an  
5 impasse between the tribes and an applicant.

6  
7 Accordingly, Sections 1221 and 368 did not ~~alter~~ address the framework for negotiating energy  
8 ROWs on tribal lands as established under current law, including EAct Title V. The fact that  
9 the explicit authority for federal energy corridors stops at the borders of tribal lands ignores the  
10 dramatic impact that the current ROW policy could have on easing siting constraints. For  
11 example, using the current per mile tribal ROW rates, industry representatives have estimated  
12 that a corridor crossing the Navajo Nation could cost as much as \$1 billion per year. The  
13 alternative would be to bypass tribal lands when designating 368 corridors, assuming an  
14 alternative bypass route is available. The Departments note that provisions of Title V, promote  
15 tribal energy resource development, energy related governing capacity, and encourage tribes'  
16 participation in resolving congestion issues.  
17

### 18 **2.3. National Energy Transportation Policies Specifically for Energy ROWs** 19 **on Tribal Land**

#### 20 **2.3.1. Energy Policy Act of 2005, Section 503, Indian Energy**

21 The most recent statement of national energy transportation policy specifically regarding energy  
22 ROWs on tribal lands recognizes the importance of improving national energy independence,  
23 reliability and access for all Americans, including Indian tribes. ~~strongly supports tribal~~  
24 ~~decision-making and management of energy resources and facilities while correspondingly~~  
25 ~~reducing federal oversight.~~ EAct Title V cannot be viewed in isolation. While it furthers the  
26 federal policy of tribal self-determination by encouraging tribes to develop procedures and  
27 safeguards for tribal management of every aspect of energy production and delivery on tribal  
28 lands, it also recognizes one of the basic purposes of the Energy Policy Act itself: to reduce the  
29 cost of energy for all Americans and underscores Congress' accommodation of tribal economic  
30 development with sensible fiscal accountability. ~~As expressed generally in provisions of Title V,~~  
31 ~~the overarching goal is to "assist Indian tribes in the development of energy resources and further~~  
32 ~~the goal of Indian self-determination."~~<sup>39</sup>  
33

34 Provisions of Title V specifically relating to energy ROWs are entitled "Leases, Business  
35 Agreements, and Rights-of-Way Involving Energy Development or Transmission" and codified  
36 at 25 U.S.C. § 3504. These provisions set out a substantial program for governing energy  
37 facilities, including energy ROWs, through the development of Tribal Energy Resource  
38 Agreements (TERA).<sup>40</sup> Upon approval of a tribe's TERA by the Secretary of the Interior, "[a]n  
39 Indian tribe may grant a right-of-way over tribal land for a pipeline or an electric transmission or  
40 distribution line without review or approval by the Secretary of the Interior and [in accordance  
41 with certain terms set out in the statute]...."<sup>41</sup> These provisions require that the energy ROW  
42 must be issued in accordance with the tribe's TERA, cannot exceed 30 years, and must serve an  
43 electric generation, transmission, or distribution facility located on tribal land, or a facility on

1 tribal land that processes or refines energy resources developed on tribal land.<sup>42</sup> Regulations to  
2 implement this statute were published by DOI in the Federal Register on August 21, 2006.<sup>43</sup>

3  
4 These provisions also specifically address renewal of energy ROWs on tribal lands. Renewal of  
5 energy ROWs that have been approved according to the substantial process set out in 25 U.S.C.  
6 § 3504 will be “at the discretion of the Indian tribe.”<sup>44</sup>

7  
8 While Title V establishes new provisions to further and support tribal management of energy  
9 ROWs, Congress did not repeal existing authorities for energy ROWs on tribal lands. This is  
10 appropriate because it may not be in the interest of all tribes to invest the time and resources to  
11 develop a TERA pursuant to which energy ROWs can be approved without direct Secretarial  
12 oversight. Consequently, in addition to the policies set out by Title V, national energy  
13 transportation policies expressed by Congress in prior enactments are still relevant to energy  
14 ROWs on tribal lands.

### 15 **2.3.2. Indian Right-of-Way Act of 1948, Implementing Regulations, and Historical** 16 **Statutes**

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

21  
22 In the years leading up to the 1948 Act, from the 1880s to 1940s, national energy transportation  
23 policy relating to energy ROWs on tribal lands took a variety of approaches. Of course, the  
24 Departments recognize that federal Indian policy during this time was also shifting from the era  
25 of allotment – which was intended to remove tribal control of Indian lands – to reorganization of  
26 tribal governments, and finally to restoration of tribal land status.<sup>46</sup> Energy transportation  
27 policies on tribal lands ranged from individual acts of Congress for each ROW to broad statutes  
28 authorizing administrative processes for requesting a ROW. As explained in more detail in  
29 Section 3.2, the requirement for obtaining a tribe’s consent for an energy ROW was also  
30 expressed in a variety of ways.<sup>47</sup>

### 31 **2.4. Departmental Findings**

32 Recent national energy transportation policy generally stresses the need to invest in aging  
33 transmission infrastructure and expand transmission to relieve congestion and improve  
34 reliability. Much of this policy was recently enacted into law in August 2005 as EAct. These  
35 general energy transportation policies and enactments, ~~however,~~ recognize **the Administration’s**  
36 **policies that are designed to improve national energy independence, reliability and access for all**  
37 **Americans, including Indian tribes.** ~~the unique laws that apply to tribal lands and do not alter~~  
38 ~~existing laws and regulations for obtaining an energy ROW on tribal lands.~~

39  
40 For the past 60 years, national energy transportation laws and policies specifically applicable to  
41 tribal lands have sought tribal consent for the grant, expansion, or renewal of energy ROWs on  
42 tribal lands. These laws and policies also promoted tribal involvement in determining energy

1 ROW routes, protections for cultural and natural resources, and emergency matters. However,  
2 the following points should be noted:  
3

4 First, the present system for procuring and renewing energy ROW across tribal lands can  
5 undermine the Administration's goal of establishing the "dependable, affordable and  
6 environmentally sound production and distribution of energy." In 2001, President Bush  
7 established the National Energy Policy Development Group, directing it to "develop a national  
8 energy policy designed to help the private sector, and, as necessary and appropriate, State and  
9 local governments, promote dependable, affordable and environmentally sound production and  
10 distribution of energy for the future." (NEP, viii.)  
11

12 Second, there is a potential conflict between the current tribal right-of-way policy and the  
13 President's profound commitment to reduce America's dependence on foreign energy sources.  
14 For example, every cost, fee, tax, risk and uncertainty imposed on the U.S. natural gas  
15 transportation network can make foreign sources of energy more attractive, because the ROW  
16 fee increases will tend to impact domestically produced supplies disproportionately due to the  
17 likely geographic location of many ROW impasses. Hence, an impasse in a tribal ROW  
18 negotiation in California or New Mexico or a multi-million dollar increase in right-of-way fees  
19 passed through to a utility in Arizona may only serve to increase demand for liquefied natural  
20 gas from Indonesia, Algeria, Russia or other countries unburdened by current tribal ROW policy.  
21

22 Third, as previously mentioned, Title V of EPAAct cannot be viewed in a vacuum, ignoring  
23 numerous other provisions of the Act which seek to strengthen existing laws that aim to protect  
24 U.S. consumers from unreasonable practices which could raise the price of natural gas and  
25 electricity.<sup>4</sup>  
26

27 Fourth, while Title V of EPAAct creates a number of incentives for increased development of  
28 energy resources on tribal lands, this Title also provides important standards to ensure  
29 accountability for these incentives to protect the American consumer. For example, in an effort  
30 to strengthen and grow tribally-owned energy businesses, the Act allows federal agencies, when  
31 purchasing electricity or any other energy products or byproducts, to give preference to  
32 corporations or other business organizations in which a majority interest is tribally-owned or  
33 controlled.<sup>5</sup> However, when giving preference to such tribally-owned businesses, the agency is  
34 prohibited from either "(a) pay[ing] more than the prevailing market price for an energy product  
35 or byproduct; or (b) obtain[ing] less than the prevailing market terms and conditions."<sup>6</sup>  
36

37 Fifth, regarding the establishment of energy corridors to facilitate the siting of new energy  
38 infrastructure under Section 368 of EPAAct 2005, if and when the Secretaries designate a corridor  
39 across federal land that abuts or surrounds an Indian reservation, the status quo for negotiating  
40 rights-of-way and related compensation across tribal lands present unique challenges that if

---

<sup>4</sup> See, e.g., Sections 315 and 1283 (prohibiting the manipulation of natural gas and electricity prices); Sections 316 and 1282 (directing FERC to prescribe rules facilitating greater transparency in reported natural gas and electricity prices); Section 1286 (expanding the authority of the Federal Energy Regulatory Commission to order refunds of unjust and unreasonable electric prices).

<sup>5</sup> EPAAct § 2602(d); 25 U.S.C. § 3502(d).

<sup>6</sup> 25 U.S.C. § 3502(d)(2).

1 unaddressed could defeat the purpose of the corridor designation. They will need to determine  
2 whether to obtain tribal consent to extend the corridor across tribal lands and consider  
3 negotiating in advance with the affected tribe the rules that will govern the actual siting of  
4 facilities within the corridor, including the application and renewal process, the process for  
5 negotiating compensation, and the management of the corridor and facilities located therein.  
6 Without such agreements, energy companies may lack the incentive to use a federally designated  
7 Section 368 corridor given the uncertainties associated with how to approach siting facilities on  
8 any tribal land that intersects with the designated federal land. As the Bonneville Power  
9 Administration case study in Section 9.5.1 shows, there is precedent for the federal government  
10 to negotiate such frameworks with tribes.

11  
12 The expected impact of current tribal ROW fee policy on these corridor costs can be determined  
13 by considering the impact of current tribal ROW fee policy on the price that companies would  
14 pay to use a new U.S. government energy corridor across the Navajo Nation. By applying the  
15 current Navajo ROW rate of \$24,000 per mile (over an assumed 100 foot easement width) to a  
16 corridor that is 800 miles long and one-mile wide.<sup>7</sup> Using these figures, the Departments would  
17 find that the total cost of a corridor that traverses the Navajo Nation would amount to more than  
18 \$1 billion per year. Even if the FMV for a perpetual easement on this land cost \$1 billion, the  
19 calculated corridor figure is still many billions of dollars greater because it represents a fee that  
20 must be paid every year for decades to come. Moreover, this \$1 billion annual figure could well  
21 be a conservative estimate of the cost because the current tribal ROW demands do not yet appear  
22 to fully reflect energy transporters' build-around costs.

23  
24 Accordingly, in enacting Title V of the EPAct, Congress recognized the importance of  
25 establishing standards to protect America's taxpayers at the same time as it encouraged the  
26 development and sale of tribally-produced energy resources. Federal agencies are directed to not  
27 pay more than "prevailing market prices" for energy products purchased from tribal-owned  
28 business entities. It would be incongruous for American energy consumers to pay more than  
29 FMV for energy products that traverse tribal lands.

30  
31  

---

<sup>7</sup> This calculation was based on the current Navajo ROW rate of \$24,000 per mile annually over an assumed 100 foot easement width. Assuming a corridor that is 800 miles in length and one-mile wide, the total cost of the corridor would be over \$1 billion annually. The one-mile corridor width was the minimum width suggested by commenters for a mixed-use corridor and was discussed on pg. 7, "Summary of Public Scoping Comments for the Programmatic Environmental Impact Statement, Designation of Energy Corridors on Federal Land in the 11 Western States (DOE/EIS=0386)", DOE/DOE, February 2006.

1 **3. The statutory and regulatory framework for granting,**  
2 **expanding, or renewing energy ROWs on tribal land and the**  
3 **associated tribal sovereignty and self-determination interests**

4  
5 In Section 1813, Congress instructed the Departments to present information on the statutory and  
6 regulatory framework that guides the placement of energy ROWs on tribal lands and to provide  
7 Congress with information on the related tribal sovereignty and self-determination issues.

8 **3.1. Public and Tribal Comments**

9 As an overarching issue, nearly all parties from all perspectives recognized the inherent  
10 sovereignty of Indian tribes and supported federal policies of tribal self-determination. Tribes  
11 emphasized the federal government's acknowledgement of their inherent sovereignty through  
12 treaties, legislation, Supreme Court decisions, Executive Orders, and ongoing interactions  
13 between the federal government and tribes. Paraphrasing COHEN'S HANDBOOK OF FEDERAL  
14 INDIAN LAW,<sup>48</sup> one tribe noted the "long-standing principle of federal Indian law that Indian  
15 tribes possess inherent sovereignty." Other tribes stated that inherent tribal sovereignty "exists in  
16 the tribe itself" and "does not derive from the federal government."<sup>49</sup> Referring to the tribal  
17 consent provisions in energy ROW statutes and regulations, many tribes commented that tribal  
18 consent to the use of tribal lands is a manifestation of tribes' sovereign authority to determine the  
19 terms of access to tribal lands.<sup>50</sup> Tribes commented on the interrelatedness of sovereignty, the  
20 federal policy of tribal self-determination, and tribal governmental functions.<sup>51</sup> Industry also  
21 voiced their recognition of tribal sovereignty, but also noted their view that this was not an  
22 unbounded authority and is instead an authority that has been judicially limited in specific  
23 cases.<sup>52</sup>

24  
25 Several tribes noted that tribal governments fulfill their responsibilities as sovereigns by  
26 providing services such as education, health care, environmental protection, sanitation, and law  
27 enforcement. Tribes also cited to federal programs in which tribes have governmental  
28 responsibilities or have assumed the responsibility of implementing the program, including: the  
29 Clean Water Act, the Clean Air Act, the National Historic Preservation Act, the Comprehensive  
30 Environmental Response, Compensation and Liability Act, Emergency Planning and Community  
31 Right-to-Know Act, Oil Pollution Act, and the Native American Graves Protection and  
32 Repatriation Act.<sup>53</sup> Even with these government obligations, however, tribes noted that the  
33 inherent authority of tribes to tax activities on reservation lands to raise governmental revenues  
34 can be complicated by possible overlaps with the taxing authorities of neighboring  
35 jurisdictions.<sup>54</sup>

36  
37 Tribes also described the responsibility to develop governing capacity necessary for overseeing  
38 energy ROWs. Often these functions are supported by energy ROW fees. Several tribes stated  
39 that energy ROW management activities require high levels of staff time and tribal resources.<sup>55</sup>  
40 In one example, the need for tribal governmental capacity to deal with energy ROWs was  
41 evident when a natural gas pipeline exploded on the Confederated Tribes of the Umatilla  
42 Reservation in 1999. The Tribe's police, fire, and emergency response personnel responded to  
43 the blast and assisted in containing the damage and investigating the cause of the explosion.<sup>56</sup> In

1 another example, a tribe cited an oil pipeline that sprang a leak and spilled several thousand  
2 gallons of oil across Pueblo lands.<sup>57</sup>

3  
4 Tribes also commented that tribal governmental involvement is necessary to prevent harm to  
5 reservation resources. In particular, tribes noted that sovereignty and governmental capacity were  
6 critical to protecting tribal natural and cultural resources, and tribal sacred sites.<sup>58</sup> Tribes noted  
7 that relatively recent federal statutes and their implementing regulations provide a legal  
8 framework that a tribe can use to prevent damage to sacred places and cultural resources, if the  
9 tribal government has the financial and human resources to use this legal framework and to insist  
10 that federal agencies comply with the law. While many tribes have cultural resources programs  
11 and some have Tribal Historic Preservation Officers such tribal programs typically place many  
12 demands on limited staff. The National Historic Preservation Act and Native American Graves  
13 Protection and Repatriation Act recognize tribal sovereign authority in the general subject matter  
14 of cultural resources management. However, the relatively recent passage of these acts means  
15 that there are many existing energy ROWs that will be up for renewal that may not have been  
16 approved or would have been relocated if the current legal framework had been in place when  
17 the ROW was originally granted, because the governing tribe would have either denied consent  
18 or insisted on the ROW being relocated to avoid sacred places or other cultural resources.<sup>59</sup>

## 21 **3.2. Laws, Regulations, and Federal Policies with Implications for Tribal** 22 **Sovereignty**

### 23 **3.2.1. Statutory Background**

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

31  
32 During the first phase, the last two decades of the 19th century, Congress passed more than 100  
33 separate laws granting specific ROWs on Indian reservations. These early statutes primarily  
34 involved easements for railroads and telegraph and telephone lines. Generally they required the  
35 company obtaining the ROW to pay damages or compensation as determined by the Secretary of  
36 the Interior. The acts also sometimes required that Indian consent be obtained for the ROW or  
37 the amount of ROW compensation.<sup>61</sup>

38  
39 In 1899, in the second phase, Congress ended the practice of passing a separate statute for each  
40 ROW over Indian land and instead gave the Secretary of the Interior general authority to grant  
41 ROWs for railroads and telegraph and telephone lines.<sup>62</sup> Companies needing ROWs across  
42 Indian land no longer had to seek Congressional authorization but rather applied directly to the  
43 Secretary of the Interior, who could approve the ROW if the company complied with the terms

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

3  
4 On March 11, 1904, Congress gave the Secretary of the Interior authority to grant ROWs for oil  
5 and gas pipelines traversing Indian reservations and allotments:

6  
7 The Secretary of the Interior is authorized and empowered to grant a right-of-way  
8 in the nature of an easement for the construction . . . of pipe lines for the  
9 conveyance of oil and gas through any Indian reservation . . . or through any lands  
10 which have been allotted.<sup>64</sup>

11  
12 This statute is silent with regard to obtaining tribal consent for the ROW. However, the statute  
13 was interpreted by DOI to ~~gave~~ give the Secretary the discretion to establish “such terms and  
14 conditions as he may deem proper” on renewals of ROWs.<sup>65</sup> ~~Thus, this statute authorized tribal~~  
15 ~~consent as one such term or condition, at least with regard to renewals, should the Secretary, in~~  
16 ~~his discretion, so desire.~~

17  
18 On March 4, 1911, Congress gave “head of the department having jurisdiction over the lands”  
19 authority to grant ROWs for electric transmission lines across Indian reservations.<sup>66</sup> This statute  
20 also is silent with regard to obtaining tribal consent for the ROW, requiring only the approval of  
21 the “chief officer of the department under whose supervision or control such reservation falls.”<sup>67</sup>

22  
23 The current phase began with the 1948 Act, enacted on February 5, 1948, which expressly  
24 requires the consent of certain tribes. It provides, in pertinent part:

25  
26 The Secretary of the Interior . . . is empowered to grant rights-of-way for all  
27 purposes, subject to such conditions as he may prescribe, over and across any  
28 lands now or hereafter held in trust by the United States for individual Indians or  
29 Indian tribes. . .<sup>68</sup>

30  
31 No grant of a right-of-way over and across any lands belonging to a tribe  
32 organized under [the Indian Reorganization Act (IRA) and the Oklahoma Indian  
33 Welfare Act (OIWA)]<sup>69</sup> shall be made without the consent of the proper tribal  
34 officials. . .<sup>70</sup>

35  
36 Sections 323 to 328 of this title shall not in any manner amend or repeal  
37 provisions of the Federal Water Power Act. . . nor shall any existing statutory  
38 authority empowering the Secretary of the Interior to grant rights-of-way over  
39 Indian lands be repealed.<sup>71</sup>

40  
41 The consent provision in the 1948 Act is consistent with the tribal organization statutes, which  
42 confer on tribes organized under those statutes the power to prevent the sale, disposition, lease,  
43 or encumbrance of tribal lands, interests in lands, or other tribal assets without their consent.<sup>72</sup>  
44 Including the consent requirement in the 1948 Act prevents implied supercession of the consent  
45 provisions of the tribal organization acts.<sup>73</sup> The 1948 Act also includes authority to impose  
46 conditions at the discretion of the Secretary.

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

### 3.2.2. Regulatory Background

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

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

The tribal consent provision in the regulations is unambiguous: “No right-of-way shall be granted over and across any restricted lands belonging to a tribe . . . without the prior written consent of the tribal council.”<sup>77</sup> No distinction exists in this regulation between tribes organized under the tribal organization statutes and other tribes. The regulation requires the consent of all tribes.<sup>78</sup> ~~However, given the silence in the 1904 and 1911 Acts regarding tribal consent for ROW across tribal lands, DOI retains the discretion to modify its present regulations to require tribal consent only for tribes organized under the IRA and OIWA.~~

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

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

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

Other policy expressions relevant to energy matters on tribal lands are contained in general tribal policies that provide direction to federal agencies on maintaining appropriate government-to-

1 government relationships with tribal governments. These policies have been expressed in  
2 Executive Orders and Presidential Proclamations.

3  
4 On November 12, 2001, President Bush issued a proclamation stating that “we will protect and  
5 honor tribal sovereignty and help stimulate economic development in reservation  
6 communities.”<sup>83</sup> More recently, the Administration focused on tribal energy issues. On  
7 November 7, 2005, President Bush recognized defining principles of tribal sovereignty and self-  
8 determination and noted EPCA provisions to enhance energy opportunities and strengthen tribal  
9 economies.<sup>84</sup>

10  
11 Previous administrations articulated on-going government-to-government consultation policies  
12 in Executive Orders. Most recently, in Executive Order No. 13175, “Consultation and  
13 Coordination with Indian Tribal Governments” executive agencies are instructed to consult with  
14 Indian tribes. The Executive Order states:

15  
16 [w]hen undertaking to formulate and implement policies that have tribal  
17 implications, agencies shall:

- 18  
19 (1) encourage Indian tribes to develop their own policies to achieve program  
20 objectives;  
21 (2) where possible, defer to Indian tribes to establish standards; and  
22 (3) in determining whether to establish Federal standards, consult with tribal  
23 officials as to the need for Federal standards and any alternatives that would  
24 limit the scope of Federal standards or otherwise preserve the prerogatives  
25 and authority of Indian tribes.<sup>85</sup>

26  
27 Most agencies, including FERC, DOE and DOI, have comparable policy statements and orders  
28 calling for consultation with Indian tribes and Alaska Native tribal governments.  
29

### 30 **3.3. Departmental Analysis**

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

41  
42 This history of tribal sovereignty forms the basis for the exercise of tribal powers today.<sup>87</sup>  
43 Although the United States has long recognized the sovereignty of Indian tribes as “distinct,  
44 independent, political communities” exercising the authority of self-governance,<sup>88</sup> the  
45 relationships between federal, state, and tribal governments are complicated.

1  
2 Many different authorities define the contours of this relationship, including treaties, the  
3 Constitution, legislation, Supreme Court and other federal court decisions, regulations, and  
4 Executive Orders. “The Constitution is the primary source of federal power to regulate Indian  
5 affairs. By enumerating powers exercised by the constituent branches of the national  
6 government, the Constitution both defines and limits national powers, and, as interpreted by the  
7 Supreme Court, provides ample support for regulation of Indian affairs . . . .”<sup>89</sup> The earliest  
8 authorities — treaties — continue to constitute a major source of federal Indian law, and almost  
9 universally include provisions in which the United States agreed to protect Indian property from  
10 predation. Legislation reflects the power granted to Congress under the Constitution, and has  
11 been held to abrogate treaty provisions where the legislative statement is clear.<sup>90</sup>

12  
13 Congress has legislated extensively in regard to Indian property, providing for the grant of leases  
14 and rights-of-way and even disposal of Indian property without consent.<sup>91</sup> Federal court  
15 decisions provide many general principles of Indian law but also address and resolve particular  
16 fact situations. All of these authorities have an important role to play in the analysis of the  
17 relationship in general, and in evaluation of individual consent issues in specific cases.

18  
19 Writing in the late 1930’s to 1941, Felix Cohen, then with DOI’s Solicitor’s Office, described the  
20 federal government’s policy for obtaining tribal consent to ROWs in the seminal *Handbook of*  
21 *Federal Indian Law*. Cohen wrote:

22  
23 Congress . . . has conferred upon administrative authorities various statutory powers  
24 to alienate interests in tribal land less than fee, particularly easements and rights-of-  
25 way. Generally these statutes do not make tribal consent a condition to the validity of  
26 the alienation, but as a practical administrative matter tribal consent is frequently  
27 made a condition of the grant.<sup>92</sup>

28  
29 One important aspect of this complex relationship is that under certain circumstances, the federal  
30 government becomes the trustee of Indian property.<sup>93</sup> There is no doubt that the trust  
31 relationship exists with regard to land held in trust for tribes. Trustees must act in the best  
32 interests of the beneficiary of the trust by protecting and preserving the corpus. DOI, as the  
33 trustee-delegate, is strongly committed to high standards for managing Indian trust land. In the  
34 context of ROWs over tribal lands, the regulations set forth a fairly detailed process, including  
35 some specific responsibilities of DOI. In performing those specific responsibilities, DOI fulfills  
36 its trust duties. While there may be differences of opinion as the appropriate consideration for  
37 any particular ROW, the regulation is clear that it shall be “not less than but not limited to fair  
38 market value of the rights granted, plus severance damages, if any . . .” unless otherwise  
39 approved by the Secretary.<sup>94</sup> Disagreement about what constitutes “fair market value” is  
40 inevitable, but does not indicate that DOI has not performed its trust duty in this regard.

41  
42

### 43 **3.4. Departmental Finding**

44 The Departments encourage tribal economic development and have a duty to assure that  
45 management of trust assets is in accordance with the best interest of tribes and tribal members.

1 In addition, the proper discharge of the federal responsibility to manage Indian trust assets also  
2 includes deference to and promotion of tribal control and self-determination.  
3

4 Tribes have become increasingly involved in the process for approving the grant, expansion, or  
5 renewal energy ROWs on tribal lands. As described to the Departments in comments, tribes  
6 currently negotiate ROW issues such as route, compensation, term, and environmental, cultural,  
7 and emergency protections pursuant to the 1948 Act and its implementing regulations.  
8

9 A tribe's determination of whether to consent to an energy ROW across its land is an exercise of  
10 its sovereignty and an expression of self-determination. Any reduction in the tribe's authority to  
11 make that determination is a reduction in the tribe's authority and control over its land and  
12 resources, with a corresponding reduction in its sovereignty and abilities for self-determination  
13 ~~Granting a ROW on tribal land only with the consent of a tribe is in accordance with the federal~~  
14 ~~policy promoting tribal self-determination and self-governance. The tribal consent requirement~~  
15 ~~has been virtually unchanged since 1951. It reflects a longstanding interpretation of the pertinent~~  
16 ~~statutes by the agency charged with their administration.~~  
17

18 There is a history of congressional involvement in establishing standards and regulations to  
19 govern certain types of business arrangements on tribal lands. For example, Congress has  
20 exercised its plenary authority over tribes in other areas by enacting statutes such as the Indian  
21 Gaming Regulatory Act ("IGRA") and the Indian Mineral Development Act ("IMDA") which  
22 impose modest limitations on tribal sovereignty to enhance the contracting parties' economic  
23 relationship.

## 4. Analyses of Historical Compensation Paid for Energy ROWs on Tribal Land

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

### 4.1. Background

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

The Departments recognize that a case study approach ~~only provides a “snapshot in time” that~~ may not fully represent the context within which an energy ROW was granted, renewed, or expanded. In addition, the Departments recognize that these case studies represent a very small subset of the entire dataset of energy ROWs crossing tribal lands. The exact number of energy ROWs on tribal land has not been calculated, however, the following examples illustrate in brief the extensive dataset that would be necessary to analyze to do a comprehensive historical analysis.

The Confederated Salish and Kootenai Tribes reservation hosts 325 miles of ROWs for 11 regional electrical transmission lines, 150 miles for local electrical transmission lines, more than 2,000 miles for local electrical distribution lines, and 56 miles for a regional refined fuels pipeline.<sup>95</sup> The Shoshone-Bannock Tribes of the Fort Hall Reservation have 22 energy ROWs: 19 for electric transmission lines and 3 for natural gas lines.<sup>96</sup> Similar statistics are available for other tribes

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

### 4.2. Case Study and Survey Processes

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

At follow-up meetings with industry trade associations the Departments ~~discussed~~ further industry participation in the case studies. ~~Southern California Edison officials expressed interest~~

1 ~~in participation, but after follow-up calls were made by the Departments and HRA they declined~~  
2 ~~to participate.~~  
3

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

11  
12 HRA prepared a memorandum requesting access to records needed for the study, listing the  
13 types of potentially relevant records pertaining to ROWs for oil and gas pipelines and electric  
14 transmission lines. The types of records to which they sought access included:

- 15
- 16 • Leases or contracts for the energy ROW
- 17 • Records of negotiations and determination of compensation, including transcripts of  
18 negotiations or meetings involving BIA, tribal, and energy company representatives
- 19 • Correspondence surrounding negotiations (between all parties)
- 20 • Appraisals of the BIA and/or DOI Office of Special Trustee, company, and tribal);
- 21 • Applications for energy ROWs
- 22 • Tribal authorizations of energy ROWs such as tribal council resolutions and meeting  
23 minutes
- 24 • Any modifications to agreements
- 25

26 DOI circulated this memorandum to tribal officials and BIA superintendents for the four tribal  
27 volunteers.<sup>97</sup> During the site visits, HRA reviewed records made available by tribal  
28 representatives and reviewed ROW files maintained by the BIA. HRA identified potentially  
29 relevant records by carefully reviewing these files and obtained copies of those records. During  
30 site visits, HRA also met with tribal and BIA representatives to ask questions about how  
31 easements for energy ROW have been administered on the reservations.

32  
33 These case study reports are summarized in Section 9.1 to 9.4. The complete HRA report is  
34 included as an appendix to this report.  
35

### 36 **4.3. Case Study Results**

37  
38 The history of energy rights-of-way on the Uintah and Ouray, Southern Ute, Morongo, and  
39 Navajo Indian Reservations reveals ~~general~~ trends in the negotiation and management of  
40 easements over ~~the~~ Indian lands ~~that were studied~~. In particular, negotiations on these  
41 reservations shed light on changes in amount and types of compensation, and on the role of tribal  
42 consent in the negotiation process.  
43

1 Compensation in the 1950s and 1960s generally consisted of damages calculated on a per-rod or  
2 per-acre basis. In 1968, the revised federal regulations specified that consideration “shall be not  
3 less than the appraised fair market value of the rights granted, plus severance damages, if any, to  
4 the remaining estate.”<sup>98</sup> Appraisals had been used in the ROW approval process before 1968,  
5 but the language of the new regulation may have changed the methods used to appraise ROW.  
6 Appraisers (hired by energy companies) developed various methods for determining “fair market  
7 value of the rights granted,” but generally they calculated the fee value of the land using sales of  
8 comparable lands, and then they discounted that amount by some percentage because the lands  
9 involved were being used, not sold. The BIA usually either reviewed the company’s appraisals  
10 or conducted its own. In these reviews, BIA appraisers determined fair market value through  
11 using comparable easements as a standard and through determinations of the land’s sale value  
12 based on its highest and best use. Some tribes, such as the Southern Ute Tribe, do not require  
13 appraisals for tribal lands, mainly because the tribe itself has determined what the compensation  
14 rates should be. Currently, tribes such as the Morongo Band favor appraisal methods that take  
15 the revenue-generating potential of the land into account, rather than considering only the sale  
16 value of the land.

17  
18 Starting in the 1970s and 1980s, types of consideration for energy ROW began to vary. Per-rod  
19 or per-acre rates were replaced with annual lump payments, or compensation based on  
20 throughput, and/or tribal ownership interests (particularly for pipelines). Compensation  
21 packages have also included donations to tribal scholarship funds and options to purchase service  
22 from the energy companies. One ROW on the Navajo Reservation involved a land exchange as  
23 compensation, while the Southern Ute Tribe sometimes negotiated for joint ventures or for  
24 outright ownership in pipelines. Types of consideration have depended upon the particular tribe  
25 and companies involved in the negotiations.

26  
27 The 1948 Act, required tribes to be involved in the approval process by granting their consent to  
28 easements if they were organized under a [specific](#) Federal statute. Interior regulations that  
29 followed the 1948 Act required consent of all tribes, not just those organized by statute. The  
30 examples above involve two tribes organized under the Indian Reorganization Act of 1934 (the  
31 Ute Indian Tribe and the Southern Ute Tribe) and two that are not organized (the Morongo Band  
32 and the Navajo Nation). The case studies indicate that, [consistent with BIA regulations but  
33 contrary to the 1948 Act](#), the BIA has had one administrative approach to all tribes, regardless of  
34 whether or not they are organized under the IRA.

35  
36 In providing their consent to energy ROW, the four tribes involved in these case studies have  
37 participated in negotiations to varying degrees. The Navajo Nation began asserting its interests  
38 in the 1950s or earlier, as did the Morongo Band (albeit with limited success), while the Southern  
39 Ute Tribe and the Ute Indian Tribe made that move in the 1970s and 1990s, respectively. All  
40 four of the tribes now negotiate ROW directly with the energy company involved, while also  
41 continuing to ratify agreements through the passage of tribal resolutions. The BIA retains an  
42 oversight role and the ultimate authority to approve or reject the ROW.

#### 43 **4.4. Departmental Analysis**

44

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

9  
10 Other factors that complicate an across-the-board analysis are the financial and environmental  
11 risks associated with specific energy ROWs, additional facilities built on or related to the energy  
12 ROW, and land use. The impacts of the energy ROW on cultural resources and areas of  
13 significance can also affect energy ROW costs. Energy ROW compensation will also differ on  
14 the basis of agreements as to who is responsible for security and emergency responses and  
15 whether the energy ROW includes tribal energy development or provision of energy services.

16  
17 Undertaking a historical analysis of energy ROWs is also complicated by the fact that ROW data  
18 may be confidential business information, subject to confidentiality agreements in some cases.  
19 Energy companies also expressed concern that their participation in the study could negatively  
20 affect ongoing or future tribal relationships.

21  
22 As stated before, the Departments recognize that the case studies are “snapshots in time” that  
23 may not fully represent the context within which the energy ROWs discussed in this Section  
24 were granted or renewed. In addition, the Departments recognize that because these case studies  
25 represent a very small subset of the entire dataset of energy ROWs crossing tribal lands the  
26 results cannot be used to statistically extrapolate to the entire suite of energy ROWs on tribal  
27 lands and the discussion of the negotiation process cannot be generalized to that dataset.

28  
29 However, the Departments do believe that the cases presented illustrate the situation that is  
30 testified to by all parties involved in this study process. Namely that the nature of the process  
31 has evolved significantly over time into one in which tribes are more fully involved in bilateral  
32 negotiations with energy companies and in setting the terms and conditions under which energy  
33 ROWs are authorized

#### 34 35 **4.5. Departmental Findings**

36  
37 In these case studies, in addition to using standard market valuation analysis as a base for  
38 compensation, some tribes have successfully negotiated for alternative forms of compensation,  
39 such as throughput charges or partial ownership of the lines. These examples demonstrate that  
40 mutually satisfactory outcomes are possible, although they do not necessarily reveal a standard  
41 recipe for success.

## 5. Standards and Procedures for Determining Compensation for Energy ROWs on Tribal Land

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

### 5.1. Public and Tribal Comments

Overall, most industry representatives contended that valuation of tribal lands for energy ROWs should be based on market value principles.<sup>99</sup> Tribal representatives rejected those principles as inappropriate for tribal lands. In addition, some energy companies commented that limiting energy ROW negotiations to market value would restrict creative arrangements that promote development of energy resources on tribal lands.

Industry stated that concerns about the impacts of energy ROWs on infrastructure reliability and consumer energy costs could be alleviated through use of “objective, consistent, transparent, and uniform standard for valuing” energy ROWs on tribal land.<sup>100</sup> One trade association suggested that compensation on tribal lands should be based on objective assessments of the value of comparable nearby land, the nature of the land’s existing use, and the location of the energy ROW.<sup>101</sup> An interest group suggested that market value would be an appropriate standard for valuing energy ROWs on tribal land citing it as the nationally recognized standard for determining just compensation for interests in land required for the public good.<sup>102</sup>

These suggested standards are similar to those used in eminent domain proceedings when the federal government and other governments acquire land for public purposes. One utility company stated that without an eminent domain alternative there are few, if any, limits to the amount of compensation that could be discussed in negotiations between tribes and utilities.<sup>103</sup> One interest group described market value principles in depth, noting that market value does not typically reflect the proposed use of the ROW or the value of the ROW to the acquiring government.<sup>104</sup> Industry frequently commented, however, [supported by the survey results](#), that current valuation of many energy ROWs on tribal lands far exceeds the market value of those lands and appears to include the added value of the energy development.<sup>105</sup>

Industry pointed out that market value is the standard within the federal government for valuing property generally. An interest group cited the prevalence of market value principles in regulations used by DOI and the United States Department of Agriculture’s Forest Service for determining land values for a variety of purposes, including energy ROWs.<sup>106</sup> This same group also referenced recent DOI Secretarial Orders and a departmental memorandum requiring use of market value principles, with some exceptions, for all DOI appraisals.<sup>107</sup>

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

1 objective standard for determining value.<sup>108</sup> The desire for an objective standard was particularly  
2 emphasized by industry in the case of energy ROW renewals.

3  
4 Industry commented that, in renewal situations, energy companies have existing physical assets  
5 and investments on tribal lands, and some in industry expressed concern that, without an  
6 enforceable standard, an energy ROW negotiation would automatically escalate to a company's  
7 cost to build around the tribal lands containing the company's assets.<sup>109</sup> In such cases, they  
8 commented that build-around costs could include lost revenue stream, new construction, and new  
9 ROW fees. Industry also commented that they could be faced with selling their existing facilities  
10 on tribal land at a reduced value if energy ROWs are not renewed.<sup>110</sup> Industry stated that the  
11 threat of incurring build-around costs causes uncertainty for existing projects and discourages  
12 future investment in tribal lands.

13  
14 Tribes observed that imposing any standard valuation method and mandating its acceptance  
15 would constitute an exercise of eminent domain that is not applicable to lands owned by the  
16 United States and reserved for tribal use. Tribes asserted that condemning tribal lands for private  
17 energy purposes violates the "exclusive use" provision of many treaties, the federal  
18 government's trust responsibility to the tribes and the promise that tribal lands and tribal  
19 reservations will remain under the control and beneficial ownership of Indian tribes.<sup>111</sup>

20  
21 Tribes rejected market value principles as being inappropriate and inapplicable to tribal lands,  
22 although industry pointed out that many tribes use market value principles themselves when  
23 acquiring land. They noted that tribal lands are not bought and sold on open markets therefore  
24 traditional land appraisal techniques are not applicable.<sup>112</sup> Furthermore, they pointed out that  
25 tribal lands are held in trust by the federal government and are protected against alienation  
26 through treaties and other agreements which recognize tribal sovereignty over tribal lands and  
27 federal obligations to tribal property.<sup>113</sup> Industry saw more parallels between tribal and federal  
28 lands inasmuch as federal lands likewise cannot be bought or sold, unless approved by Congress,  
29 and yet fair market value principles are required when developing the fee schedule for rights-of-  
30 way on federal lands.

31  
32 Tribes commented that one of the most vital components of their tribal sovereignty is their  
33 authority to determine access to and use of tribal lands and resources.<sup>114</sup> They cited history of  
34 the federal-tribal relationship as set out in long-standing treaties, statutes, Supreme Court  
35 opinions, and Executive Orders, for confirmation of this authority.<sup>115</sup>

36  
37 Citing the uniqueness of tribal lands and the governmental responsibilities of tribes, tribes  
38 supported maintaining the present negotiating process. Tribes stated that negotiation between a  
39 tribe and an energy company is the most appropriate basis for determining energy ROW  
40 valuation because, like other governments, a tribe has sovereign responsibilities and must  
41 appropriately manage its resources for the benefit of its people.<sup>116</sup> Tribes commented that a  
42 uniform valuation system could not account for all the difference among tribes, tribal  
43 governments, and tribal lands. For example, at least one tribe noted that its leasing authority was  
44 separately recognized by Congress and unique from the statutory and regulatory process used by  
45 most tribes to approve energy ROWs.<sup>117</sup> In contrast to the unique circumstances recognized in

1 modern tribal policies, tribes stated that proposals for uniform valuation techniques were  
2 regressive and similar to discredited federal Indian policies.<sup>118</sup>

3  
4 Tribes also stated that tribal lands have value tied to tribal histories and oral traditions and for the  
5 resources that may be used in tribal cultural practices. Tribal lands may have graves of ancestors  
6 located on them, or sites that are used in religious ceremonies. Tribal members may regard a  
7 particular place as significant simply because it is part of all they have left of their aboriginal  
8 territory, or because their ancestors fought and died to keep it.<sup>119</sup> Therefore standard valuation  
9 methods used for non-tribal lands can not account for this unique factor as they are the only  
10 lands possessed by descendants of the aboriginal peoples.

11  
12 Several tribes indicated that valuation of tribal lands could be comparable to valuation methods  
13 used by municipalities because both have jurisdiction and responsibilities for providing services  
14 to members or citizens. As reported in a study prepared for one tribal party, cities such as  
15 Houston and Laredo, Texas; and Atlanta, Georgia value ROWs by linear foot.<sup>120</sup> The study also  
16 noted that franchise fees received from the use of public rights-of-way may represent a  
17 significant percentage of a city's general budget.<sup>121</sup> The valuation methods used by  
18 municipalities were reported to depend upon the purpose of the ROW and whether the ROW  
19 could accommodate other uses.<sup>122</sup> Tribes further noted that energy ROW fees provide tribes  
20 with governmental revenue and the inherent authority of tribes to tax activities on reservation  
21 lands can be complicated by taxing authorities of neighboring jurisdictions.<sup>123</sup>

22  
23 Tribes also rejected the application of any single standard for determining energy ROW  
24 compensation. They contended that a single standard could not be appropriately used to  
25 determine compensation given the variety of energy ROWs and the variety of mineral, natural,  
26 cultural, and sensitive environmental resources under their jurisdiction.<sup>124</sup> Without the flexibility  
27 to address these different factors, tribes and some energy companies commented that a single  
28 valuation method based on standard market valuation methodology would reduce participation  
29 by tribes in energy partnerships and decrease energy production and transportation on tribal  
30 lands.

31  
32 Finally, tribes commented that calls for requiring energy ROW valuation according to only  
33 standard market valuation methodology were disingenuous for several reasons. First, they  
34 pointed out that energy companies entered into existing ROW agreements with the knowledge  
35 that these were limited-term agreements and that renewal of the agreements would require  
36 renegotiation.<sup>125</sup> Second, they asserted that some energy ROWs were originally obtained for  
37 little or no compensation and that past compensation rates are relevant to the current study.<sup>126</sup>  
38 The tribes maintain that some in industry are essentially complaining about a change in the  
39 business environment, a change not to their benefit.<sup>127</sup>

## 41 **5.2. Departmental Analysis**

42 Recent writings about the negotiation process say that, ultimately, a successful negotiation result  
43 is not about outwitting or taking advantage of others. It is about arriving at a shared solution to a  
44 problem – a solution that benefits all parties involved. It is also about more than just getting the

1 best possible price on the deal. The most effective negotiation will result in a mutually  
2 beneficial, enduring relationship in which the parties trust one another and share expectations  
3 about how their deals will work out in practice as well as on paper.<sup>128</sup>

4 This is especially true in an agreement between a private company and a tribal government.  
5 Because unlike an individual property owner who may sell their land or whose descendants may  
6 not necessarily maintain an interest in the property at the end of the agreement's term, a tribal  
7 government whose interests are the well being of its people in perpetuity will maintain its  
8 interest well past the terms of the agreement -- and the tribe will then bring to the bargaining  
9 table its past history of negotiations with private industry. [In this regard, it is useful to consider  
10 how other sovereigns, such as states, treat such negotiations with private entities given that these  
11 governments also have a responsibility to consider how such transactions will impact their  
12 present and future citizens.](#)

13 Further, efforts of negotiation parties to achieve a win-win solution are enhanced with increasing  
14 amounts of transparency in the process and decreasing chances that the factors to consider during  
15 the negotiation can change unexpectedly.

16 To arrive at what is agreed to be "fair and appropriate" compensation for an energy ROW the  
17 interested parties, through negotiation, seek to resolve disputes, agree upon courses of action,  
18 bargain for individual or collective advantage, and/or attempt to craft outcomes which serve their  
19 mutual interests. The outcome of the negotiating conference may be a compromise satisfactory  
20 to all sides, a standoff (failure to reach a satisfactory compromise) or a standoff with an  
21 agreement to try again at a later time. As with any negotiation, considerable uncertainty can enter  
22 process when the negotiations are drawn out because of factors unrelated to the economic  
23 context of the situation.  
24

25 In more general situations – not involving tribal lands – market value principles derive from the  
26 constitutional concept of "just compensation", i.e., what the federal government pays when  
27 acquiring private or state-owned property for public purposes by voluntary purchase, exchange,  
28 or eminent domain. The federal government also uses market value principles to determine  
29 compensation for the use of federal lands. The market value that satisfies "just compensation" is  
30 defined by a number of court cases and summarized in the Federal Land Acquisition Standards  
31 as:

32 the amount in cash, or on terms reasonably equivalent to cash, for which in all  
33 probability the property would have sold on the effective date of the appraisal,  
34 after a reasonable exposure time on the open competitive market, from a willing  
35 and reasonably knowledgeable seller to a willing and reasonably knowledgeable  
36 buyer, with neither acting under any compulsion to buy or sell, giving due  
37 consideration to all available economic uses of the property at the time of the  
38 appraisal.<sup>129</sup>  
39

40 These market value principles are supported by the USPAP for use in real estate transactions  
41 generally.<sup>130</sup>  
42

1 A market based standard or “fair market value” (“FMV”) is also universally employed by all  
2 other government entities as the best practice for compensating landowners for the use of their  
3 lands dedicated to the public interest. For example, the states containing the majority of tribal  
4 land in the western United States – California, Arizona, New Mexico, Colorado, Utah,  
5 Wyoming, and Idaho—all use FMV-based standards for valuing ROW within their borders.  
6 Likewise, tribes themselves use a FMV methodology when determining what compensation is  
7 due their own tribal members for property taken pursuant to the tribes’ domestic eminent domain  
8 statutes. Finally, Congress established FMV as the accepted standard of compensation for Indian  
9 lands under the Indian Claims Commission Act and other pertinent statutes.<sup>8</sup>

10  
11 Energy ROWs across tribal lands are acquired through an arms-length negotiation process with a  
12 tribe, although industry has legitimately challenged whether the renewal of a right-of-way is or  
13 can ever be an arms-length transaction. Valuation methods used in these negotiations often use  
14 the Uniform Appraisal Standards for Federal Land Acquisition and the USPAP, Typically, these  
15 are Case-by-case estimates of land value and are well-known and well-understood  
16 methodologies. Other methods include, but are not limited to:

- 17 • methods used by municipalities
- 18 • methods used for public lands
- 19 • comparison to sales of similar lands
- 20 • valuation of land “over the fence” from the proposed ROW
- 21 • sharing of net benefits or other partnership arrangements
- 22 • cost of alternative routes
- 23 • opportunity cost
- 24 • percentage of energy throughput
- 25 • value of the land before and after the ROW
- 26 • cost of government services

27  
28  
29 For example, in the federal land appraisal process, DOI establishes a market value for the land  
30 under consideration. The market value is the amount in cash, or terms reasonably equivalent to  
31 cash, for which, in reasonable probability, the property would have sold on the effective date of  
32 the appraisal, after a reasonable exposure time on the open competitive market, from a willing  
33 and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with  
34 neither acting under any compulsion to buy or sell. This market value gives due consideration to  
35 all available economic uses of the property at the time of appraisal. However, the estimate of  
36 highest and best use must be an economic use. A non-economic highest and best use, such as  
37 conservation, natural lands, preservation, or any use that requires the property to be withheld  
38 from economic production in perpetuity, is not a valid use upon which to estimate market value  
39 under these standards.

40  
41 A key consideration in establishing market value is the highest and most profitable use for which  
42 the property is adaptable and needed (or likely to be needed) in the reasonably near future.

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<sup>8</sup> The Indian Claims Commission Act (“ICCA”) is the major vehicle by which tribes have received compensation for the Federal government’s use or taking of their lands. Although not specified in Act itself, the Indian Claims Commission and the United States courts decided on fair market value as the appropriate standard of compensation. See, e.g., *Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 450, 175 F. Supp. 926, 943 (1959).

1 Federal agencies must show that the land is both physically adaptable for such use and that there  
2 is a need or demand for such use in the near future. The proposed use for the ROW is not a  
3 consideration.

4  
5 It should be noted that the trust nature of the tribal lands under discussion here limits the number  
6 of comparable sales that would be appropriate for valuation use applying standard techniques.

7  
8 However, there are also various additional methods available for calculating “fair and  
9 appropriate” compensation. These examples include, but are not limited to, the following:

- 10  
11 a. The BLM compensation schedule, which sets a market rent for all ROWs, eliminating  
12 the need for real estate appraisals for each ROW, as well as avoiding the costs, delays,  
13 and unpredictability of the appraisal process.

14  
15 The BLM rental schedule defines fee zones by county in every state except Alaska. A  
16 county is assigned a “zone value” based on land values in the county. Lower-value  
17 counties are assigned lower-numbered zone values. A county’s zone value is translated  
18 into a per-acre “zone rent” (ZR) by use of the adjustment formula described below. To  
19 calculate the annual ROW rental payment, the ZR is multiplied by the total acreage  
20 within the ROW.

21  
22 For example, the BLM has determined that Duchesne and Uintah Counties in Utah fall  
23 into Zone 2 of the ROW Rent Schedule with a Zone Value of \$100 per acre. Wasatch  
24 County, also in Utah, falls into Zone 4, with a Zone Value of \$300 per acre. For 2006,  
25 the ZR for energy pipeline ROWs given these values is \$8.01 per acre in Duchesne and  
26 Uintah Counties and \$24.06 per acre in Wasatch County.

27  
28 If this method is used for tribal lands, different values would have to be determined and  
29 applied.

- 30  
31 b. Determination of market value using a net benefits approach. Section 10(e) of the  
32 Federal Power Act requires the Federal Energy Regulatory Commission (FERC) to set  
33 a “reasonable” annual charge for the use of Indian lands by FERC –licensed  
34 hydroelectric projects, [an authority used by FERC only when there is an impasse](#)  
35 [between a tribe and licensee. ~~The charge is subject to the approval of the Tribe whose~~  
36 ~~land is used.~~ If a tribe and a licensee cannot come to an agreement regarding payments  
37 for the use of the tribe’s land for a hydroelectric project, FERC has authority to fix a  
38 charge for such payments regardless of whether it has been agreed to by the tribe with  
39 jurisdiction. 16 U.S.C. § 803\(e\); 18 C.F.R. § 11.4\(a\); \*Montana Power Co. v. Federal\*  
40 \*Power Comm’n\*, 459 F.2d 863 \(D.C. Cir. 1972\). Section 10\(e\) does not require that  
41 FERC use any particular method to set the annual charge, and FERC’s regulations  
42 allow making this determination on a case-by-case basis.<sup>9</sup> ~~In recent years, however,~~](#)

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<sup>9</sup> See, e.g., *Wisconsin Power & Light Co.*, 97 FERC ¶ 61,054 (2001). The Commission explained that, “the concern here is not with the method used so much as with the end result, which must be reasonable.” *Portland Gen. Elec.*, 12 FERC ¶ 63,055, at 65,216 (1980).

1 FERC has, however, on occasion in the distant past used ~~with some consistency~~ a  
2 method based on the net benefits approach.

3  
4 The net benefits approach compares the cost of generating power at a particular hydroelectric  
5 project with the cost of generating the same amount of power from a hypothetical alternative  
6 generation resource. The delta between hydroelectric project costs and the costs of an alternative  
7 generation resource is the "net benefit." ~~from the next best alternative source, which is typically~~  
8 ~~more expensive. The difference equals the net benefit of generating the powers from the~~  
9 ~~hydroelectric project.~~ While the net benefit may be allocated in various ways, ~~the most~~  
10 ~~straightforward allocation is to determine the portion of the net benefit that accrues to Indian~~  
11 ~~lands by multiplying the net benefit by the percentage of Indian land used by the project.~~ in some  
12 cases, a 50/50 split of the net benefit is used as a starting point for allocating the net benefits.  
13 However, there is no definitive approach to this issue. In addition, the net benefit must be  
14 allocated in a manner that takes into account the percentage of the land used by the Project that is  
15 comprised of Indian lands.

16  
17 FERC uses a variation of this approach, allocating (or sharing) the net benefit on a 50/50 basis  
18 between the project owner and the various landowners. It should be emphasized, however, that  
19 FERC has never utilized an allocation methodology whereby the portion of the net benefit  
20 accruing to Indian lands would be calculated by multiplying the overall net benefit by the  
21 percentage of Indian lands used for the project. Such a methodology would result in tribal  
22 landowners receiving 100 percent of the net benefit of projects located entirely on tribal lands,  
23 thus precluding the licensee's customers and shareholders from receiving any benefit from their  
24 investment and assumption of risk associated with the project.

25  
26  
27 Whatever method is used to determine market value for land, it should represent the baseline  
28 value. A process for adjusting the value up or down could be specified. Reasons for adjustment  
29 could include:

- 30  
31 a. Adjustment for tribal government oversight of safety, cultural, and environmental  
32 issues associated with the energy ROW. Calculations would be based on the costs to the  
33 tribal government for providing these services on tribal lands.  
34  
35 b. Adjustment for tribal benefits that may be derived from an energy ROW, such as access  
36 to energy resources for tribal members or tribal businesses, improvements to roads or  
37 other infrastructure, job opportunities, or training.  
38  
39 c. Adjustment for the value associated with establishing an energy ROW across a large  
40 section of land in a single agreement, compared to a more piecemeal approach on non-  
41 tribal land.

42  
43 Indian tribes and energy companies have used ~~may use~~ any combination of these valuation  
44 methods, and others, in their negotiations for appropriate compensation for energy ROWs on  
45 tribal lands. This open negotiation process enables tribes to determine the terms for access to  
46 tribal lands and resources, but has proven problematic for industry as the compensation figure

1 has become untethered from traditional notions of “just compensation”. In some cases, this  
2 negotiation process could lead to an agreed on compensation amount that is more than what  
3 would be calculated as market value when using valuation standards usually practiced on non-  
4 tribal lands.

5  
6 The Departments note that the negotiation and valuation process can also vary for the same type  
7 of energy transmission system depending on whether the transaction is for a new ROW, or for a  
8 ROW related to a permit for renewal of existing facilities, or if the ROW is for new facilities on  
9 tribal land where there is no available route for a bypass, or if the ROW is for the renewal or new  
10 facilities directly related to the production of energy resources on tribal land.

### 13 5.3. Departmental Findings

14 The Departments find that negotiations between the interested parties are an appropriate method  
15 for determining compensation. During the primary terms of many of these energy ROWs, the  
16 self governance of tribes has evolved, based on existing treaties, laws, regulations, and Executive  
17 Orders, tribes have become more involved in the day-to-day decision making and management  
18 of activities on tribal lands. This includes decisions on renewing energy ROWs that may have  
19 been put into place 3, 4, or even 5 decades ago.

20  
21 Over this time, the responsibilities of tribal governments have also evolved. Many tribes have  
22 developed government structures to manage the increased responsibilities assumed by the tribes,  
23 such as cultural resource management and health, safety, and environmental protections. Unlike  
24 private property owners along a particular right-of-way, sovereign tribes do not rely on local or  
25 State governments to oversee the health, safety, and environmental reviews, permits, and  
26 requirements associated with the placement and monitoring of energy facilities. The individual  
27 tribes must bear the responsibility and costs associated with operating these governmental  
28 functions.

29  
30 In the past, compensation for rights-of-way could reflect valuation for “highest and best use”  
31 because much of the management of Indian lands was being performed by the federal  
32 government. However, today, many tribes must stand up their own government bodies to  
33 perform these tasks for the general well being of their members. But, unlike federal, local and  
34 state governments, tribes can not rely primarily on taxation to provide the fiscal support for these  
35 governmental bodies and ~~must~~ some tribes may attempt to capture the associated costs of  
36 running tribal government from contracts and compacts with the federal government, right-of-  
37 way fees, and other economic development activities, such as resource development and gaming.  
38 Tribes have then asserted that ROW fees ~~therefore are~~ are akin to tax rates on assessed real estate  
39 by local government to fund budgets to provide local services. One industry association  
40 provided comment, however, that it is not unusual for its member companies to pay taxes to a  
41 tribe that is over and above the fee for the right-of-way grant. It identified 4 types of taxes, one,  
42 more or all of which must be paid and which can run into the millions of dollars: a possessory  
43 interest tax, a license and use tax, a business activity tax, and a gross receipts tax. This treatment  
44 of the energy ROW fee as a tax, however, carries with it considerable difficulties.

1 Based on the Supreme Court's decision in *Montana v. United States*<sup>10</sup>, lower courts have  
2 subsequently held that tribes do not have the power to tax federally authorized ROW because  
3 those ROW are equivalent to non-Indian fee land, the existence of the ROW does not create a  
4 consensual relationship between the ROW holder and the tribe, and the ROW does not threaten  
5 the political or economic integrity of the tribe. Following this established Supreme Court  
6 precedent, courts have struck down tribal possessory interest taxes on ROWs<sup>11</sup> and tribal ad  
7 valorem taxes on rights-of-way.<sup>12</sup>

8  
9 Moreover, in similar circumstances where a governmental entity (such as a municipality) has  
10 sought to impose a disproportionate tax on a utility, regulators have required the utility to recover  
11 the cost of the tax by imposing a surcharge on the ratepayers within that taxing authority, thus  
12 effectively flowing the tax back to that governmental entity's constituents, and barring the utility  
13 from spreading the cost of the tax across all utility ratepayers.<sup>13</sup> These rulings are based on the  
14 fundamental ratemaking principle that it would be inequitable to require all ratepayers to bear  
15 such costs and thereby cross-subsidize the specific ratepayers in the governmental area which  
16 imposed the tax.

17  
18 The Departments find that the negotiation processes could benefit from mutually agreed upon  
19 practices, procedures, and actions that would better the understanding and collaboration among  
20 the parties. These include alternatives set out in the following subsection.  
21

### 22 **5.3.1. Develop comprehensive ROW inventories for tribal lands**

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

29  
30 Some tribes and companies have already taken steps to collect this information, but it appears  
31 from the amount of uncertainty present in negotiations that both parties need to prioritize  
32 gathering such basic information. Access to information of this type would facilitate better  
33 oversight, increase understanding of issues considered in ROW negotiations, and potentially  
34 streamline future negotiations. Such information could also bring undocumented energy ROWs  
35 to light, help to avoid trespass situations, and reduce overall uncertainty for future energy ROW  
36 negotiations.

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<sup>10</sup> 450 U.S. 544 (1981).

<sup>11</sup> *Reservation Telephone Cooperative v. Henry*, 278 F. Supp. 2d 1015 (D. N.D. 2003).

<sup>12</sup> *Big Horn County Electric Cooperative Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000).

<sup>13</sup> See, e.g., Investigation on the [California Public Utilities] Commission's Own Motion To Establish Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities, Decision No. 89-05-063, Investigation No. 84-05-002, 1989 Cal. PUC LEXIS 890, at LEXIS page 10 (May 26, 1989); see also *National Fuel Gas Supply Corp.*, 7 FERC ¶ 61,317 (1979) (stating FERC would consider the direct assignment of certain state taxes to ratepayers located in that state if a state's taxes became "disproportionately large" compared with taxes in other states).

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### **5.3.2. Develop model or standard business practices for energy ROW transactions**

Indian tribes, energy companies, or other entities could develop model or standard business practices for energy ROW negotiations generally and for recurrent energy ROW situations. Similar to the need for basic energy ROW information described above, uncertainty in negotiations also derives from a lack of organized information regarding business practices for energy ROWs on tribal lands. Developing model or standard business practices would help to normalize and guide negotiations. Even if parties decide to depart from standards or models for some reason, the foundation provided by such guides would assist parties in negotiating their individual terms.

Again, some tribal parties and some industry parties have taken steps to develop information along these lines. However, it appears from the level of uncertainty still present in energy ROW negotiations that development of model or standard business practices deserves greater priority.

Model and standard business practices could be developed around specific energy ROW situations. For example, there are practical differences between negotiations for a new energy ROW and those for renewal or expansion of an existing energy ROW. Negotiations for new energy ROWs are made in the planning process of a project, when capital expenditures have not been made. Whereas negotiations for renewed or expanded energy ROWs can be constrained by existing infrastructure investments, the service needs of existing energy markets, or the history of the energy ROW in question. While the statutory and regulatory context for negotiating a new, renewed, or expanded energy ROW is the same, models and standard business practices could reflect these practical differences.

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

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

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

1 Finally, model or standard business practices for all types of energy ROW transactions could  
2 include developing dispute resolution, mediation, or arbitration tools suited for energy ROW  
3 issues.  
4

### 5 **5.3.3. Broaden the scope of energy ROW negotiations**

6 Another way to address the uncertainty and lack of shared objectives that tribes and energy  
7 companies may face in energy ROW negotiations is to recognize more explicitly the variety of  
8 concerns that may motivate each party. Depending on the tribe and company involved,  
9 negotiation techniques can be developed to address business and tribal concerns. For example,  
10 companies may be concerned not only with shareholder return, but also with maintaining  
11 standing in existing markets, increasing market share, exploring for new resources, or  
12 diversifying resources. Similarly, tribes may have concerns beyond economic development.  
13 Tribes may be interested in comprehensive reservation development, increasing governmental  
14 oversight of energy ROW impacts, or protecting reservation resources.  
15

16 The significance of implementing such negotiating practices can be seen in the tribes and  
17 companies that have developed successful relationships. The Departments found that energy  
18 ROW negotiations in these situations do not get stalled on valuation issues. This appears to be  
19 true whether the relationship is a full energy development partnership or merely one between a  
20 ROW grantor and ROW user. Through partnerships, acceptance of alternative valuation  
21 methods, creative approaches to energy exploration, and recognition of the parties various  
22 responsibilities, some tribes and energy companies have shown that it is possible to leverage  
23 their respective resources and objectives to their mutual benefit.  
24

## 1 **6. Issues Raised During the Study**

### 2 **6.1. Increasing Costs of Energy ROWs and Costs to Consumers**

#### 3 **6.1.1. Public and Tribal Comments**

4 Industry expressed concern that escalating energy ROW fees and negotiation costs will raise  
5 customers' energy costs. An energy company, noting that 70 percent of its natural gas comes  
6 from two major supply companies with infrastructure on tribal lands, indicated that its natural  
7 gas ratepayers could be negatively impacted by unreasonable energy ROW fees paid by  
8 interstate pipeline companies.<sup>131</sup> A trade association also contended that energy ROW renewals  
9 resulted in tens of millions of dollars in additional costs to its member utilities and their  
10 customers.

11  
12 Industry also commented that consumer energy prices could increase because of increased  
13 negotiation costs with tribes, in particular, if potential trespass damages were levied against  
14 utilities. A trade association commented that such trespass penalties could add hundreds of  
15 thousands, or even millions, of dollars in additional costs to the utility and its customers but  
16 provided no specific data or actual instances of such penalties.<sup>132</sup>

17  
18 Several energy industry representatives indicated that the costs for energy ROWs on tribal lands  
19 have tended to increase, including administrative costs associated with longer negotiation  
20 periods.<sup>133</sup> Industry expressed concern about the increasing cost of energy ROWs and the  
21 implications of those rising costs for energy companies and consumers both today and into the  
22 future. In the public meetings, industry commented that electric utilities are facing upward cost  
23 pressure on multiple fronts. They noted that the cost of fuels, such as coal and natural gas, has  
24 risen substantially in recent years for utilities. They also noted that the cost of siting, operating,  
25 and maintaining generation, transmission, and distribution facilities has gone up, in particular in  
26 areas of the country where the need for new facilities is straining available resources. And,  
27 finally, they comment that environmental costs also are increasing as federal and state  
28 governments demand additional reductions in emissions. In such a setting, industry asserts that  
29 each and every cost needs to be kept at a reasonable level.<sup>134</sup>

30  
31 For example, Edison Electric Institute (EEI) and the Interstate Natural Gas Association of  
32 America (INGAA) conducted member surveys and provided case studies including data showing  
33 increased fees for energy ROW renewals, [fees that substantially exceed fair market value  
34 calculated using generally accepted methodologies](#).<sup>135</sup> Industry was particularly concerned about  
35 the increasing costs of energy ROW renewals, as opposed to grants or expansions, because of  
36 existing investments in facilities on tribal lands and potential obstacles to abandoning or moving  
37 an energy ROW.<sup>136</sup> Further, industry asserted in the public meetings, that hundreds of ROW  
38 renewals will need to be negotiated over the next 10 to 15 years.

39  
40 [A graphic example of rising costs to consumers can be found in Sempra Energy's \("Sempra"\)  
41 submission explaining how the activities of the Pechanga Band of Luiseno Indians blocked San  
42 Diego Gas & Electric's \("SDG&E", a regulated public utility subsidiary of Sempra\), Valley-  
43 Rainbow Interconnect project, a \\$360 million dollar, 31-mile, 500 KV electric transmission line](#)

1 that Sempra proposed in 2000 to maintain reliability and serve the future energy needs of San  
2 Diego County residents.<sup>14</sup> SDG&E studied more than 80 routes to determine the corridors for  
3 its Valley-Rainbow Interconnect project that would have the least impact on the residents,  
4 businesses and environment in Riverside and San Diego Counties. Of these 80 routes, the  
5 preferred route was located on the southern and eastern boundary of the Pechanga Reservation.

6  
7 The Pechanga tribe opposed the first route and refused to grant the right of way at any price.  
8 Additionally, the California Public Utilities Commission (“CPUC”) did not approve the project  
9 because the CPUC has a policy of not considering projects beyond the next five years and the  
10 Rainbow Valley Interconnect did not fall within that timeframe.<sup>15</sup> As a result of a failure of this  
11 project to proceed, customers in southern California will experience over \$500 million in  
12 additional congestion<sup>16</sup> and reliability-related costs until such time as an alternative transmission  
13 project can be placed in service.<sup>17</sup>

14  
15 As discussed in a recent Department of Energy study, Southern California still needs new  
16 transmission capacity to access lower cost generation outside the region, improve reliability, and  
17 comply with California’s renewable energy portfolio standard.<sup>18</sup> To help meet these needs,  
18 Sempra initiated the Sunrise Power Link project in 2005. The Sunrise Power Link will cost an  
19 estimated \$1.25 billion, *over nine hundred million dollars more* than the Valley Rainbow  
20 Interconnect would have cost and will traverse almost 110 additional miles.<sup>19</sup> In addition,  
21 Sempra is routing the Sunrise Power Link through the Anza-Borrego Desert State Park, a path  
22 that is opposed by several environmental groups. Current tribal ROW pricing policy has led  
23 Sempra to route around the Santa Ysabel Reservation, which will add approximately \$4 million  
24 in costs and five miles of length to the project.  
25

---

<sup>14</sup> See Sempra Submission, May 15, 2006, at pg. 2.

<sup>15</sup> See Sempra’s June 9, 2006 supplemental submission to the Departments, pg. 13.

<sup>16</sup> Congestion on an electric transmission line prevents customers in a given area from accessing the cheapest possible generation; instead these customers must be served by more expensive local sources. Congestion can be alleviated by adding new transmission infrastructure or new generation capacity in strategic areas.

<sup>17</sup> Sempra’s analysis of these costs is available for review by the Departments.

<sup>18</sup> See, e.g., National Electric Transmission Congestion (NETC) Study, U.S. DOE, (August 2006) at p. 45. As explained by DOE, “[t]he state of California is the sixth largest economy in the world and had an estimated population in 2005 of over 36 million persons. About two-thirds of California residents live in Southern California, which faces rapidly growing electric demand. The area contains important economic, manufacturing, military and communications centers—in total, an infrastructure that affects the economic health of the U.S. and the world.” DOE proceeds to note that “[e]lectrically, this is the area south of WECC transmission path 26 or SP26. . . . According to the California Independent System Operation (ISO), various combinations of extreme peak demand, high generation unavailability, or critical transmission losses could cause the SP26 area to be short on local generation and require the ISO to cut non-firm and firm loads to maintain grid reliability.” In this same study, DOE designated Southern California as one of the two areas in the country in which it is “critically important to remedy existing or growing [transmission] congestion problems because the current and/or projected effects of the congestion are severe.” (See NETC Study at p. viii.).

<sup>19</sup> The Sunrise Power Link project does achieve some benefits that were not available from the Rainbow Valley Interconnect project; in particular, the Sunrise Power Link allows SDG&E to access some remotely located renewable resources.

1 Another example of rising costs raised by Industry is exhibited below in Table 1. It shows that if  
 2 all natural gas pipeline ROW on tribal lands are renewed at a rate of \$24,000 per-mile per-year  
 3 and all electric transmission ROW on tribal lands are renewed at a rate of \$34,000 per mile per  
 4 year, tribes will collect over \$700 million annually from the nation's energy transporters and  
 5 their customers.<sup>20</sup>  
 6

Table 1  
 Potential Annual ROW Fees for Existing Facilities on Tribal Land  
 Estimated using total miles of natural gas pipeline and electric transmission  
 lines on tribal lands and current ROW fees of some tribes

---

		Natural Gas Pipelines
	7468	Miles of natural gas pipeline on Native American lands
X	80%	Percent of Native American lands which are Trust lands
X	\$24,000	Dollars per mile per year ROW charge on Trust lands
<hr/>		
=	\$144,025,714	Dollars per year in ROW fees
		Electric Transmission Lines
	21225	Miles of electric transmission lines on Native American lands
X	80%	Percent of Native American lands which are Trust lands
X	\$34,000	Dollars per mile per year ROW charge on Trust lands
<hr/>		
=	\$579,897,321	Dollars per year in ROW fees
		Total
<hr/>		
	<u>\$723,923,036</u>	Total annual ROW fees for pipelines plus transmission lines

---

Notes/Sources

Total miles of natural gas pipelines and electric transmission lines are estimates based on currently available maps. Miles of pipeline does not include midstream or gathering facilities. Loop lines may also be excluded.

Percent of Native American lands which are trust lands is from DOI trust report 2003 which reports 56 million acres of tribal land, 45 million of which are trust land.

Annual ROW charge for natural gas pipeline is from Navajo Nation submission to 1813 study (\$22 million per year for 900 miles of pipeline = approximately \$24,000 per year.)

Annual ROW charge for electric transmission lines are from EEI study results submitted to 1813 study. Their survey results indicated a mean of \$1.7 million per mile for a 50 year ROW = approximately \$34,000 per year.

7  
 8 Acknowledging cost increases over historic levels, tribal parties commented that increases in  
 9 energy ROW fees reflected historically low energy ROW valuations, increasing tribal

---

<sup>20</sup> Under the assumption that the pipelines and transmission lines in this analysis were installed many years ago and have produced no further diminution in the value of the property they traverse, this figure of \$700 million in annual costs provides a rough estimate of the excess amount that would be paid to tribes, in the absence of FMV-based fees on tribal lands.

1 involvement in ensuring economic return for the use of tribal lands, benefits from obtaining a  
2 ROW across large tracts of land from a tribal single owner, and increasing tribal government  
3 costs while federal economic support is decreasing.<sup>137</sup> With regard to the governing capacity  
4 required, one tribe commented that ROW activities “demand a high level of personnel, time,  
5 attention and use of the Tribe’s governmental funds” such that they employ “94 personnel  
6 positions” dedicated to various aspects of ROW management.<sup>138</sup>

7  
8 Tribes also commented that costs on private lands do not provide an accurate comparison to  
9 tribal lands because there is no market for tribal lands to appropriately define cost parameters.  
10 One tribe contrasted private lands with tribal lands, saying, “Unlike private lands, Tribal trust  
11 land can’t be sold. [And u]nlike private landowners, Tribes provide essential governmental  
12 services to people.”<sup>139</sup>

13  
14 Tribes also asserted that rising energy costs are not the result of increases in energy ROW fees  
15 across tribal lands. Studies were commissioned by three tribes to measure the consumer cost of  
16 energy ROW fees across tribal lands.

17  
18 Using the Altos North American Regional Gas model, an energy analyst found that energy ROW  
19 costs on tribal lands would have no impact on downstream markets. The analyst stated that  
20 energy ROW charges on pipelines traversing tribal lands in the southwestern United States  
21 would induce a volumetric tariff difference of \$0.02/mcf (thousand cubic feet) for all pipelines  
22 emanating from or traversing the greater San Juan/Four Corners area and have zero discernible  
23 effect on market prices.<sup>140</sup> The analyst concluded that the tribal energy ROW costs are such a  
24 small part of the overall energy market that they could not have an impact downstream markets  
25 at all.<sup>141</sup>

26  
27 A second tribally commissioned study, using published reports of the Navajo Nation’s proposed  
28 ROW fee for the El Paso Natural Gas (EPNG) network, determined that the potential impact on  
29 downstream consumers in Arizona, California, and Nevada would be between \$0.40 and \$0.60  
30 per year for the average residential user if the ROW fee is spread over EPNG’s total pipeline  
31 system. The cost per user would be between \$0.58 and \$0.85 per year if the Tribe’s ROW cost is  
32 passed directly to the consumers in these downstream states.<sup>142</sup>

33  
34 A third tribally commissioned study sought to determine what percentage of a consumer’s bill is  
35 attributable to energy ROW costs for electric transmission lines and natural gas pipelines on  
36 tribal lands. The study first determined the percentage of energy costs that are attributable to  
37 ROW fees generally, and then estimated the portion of these costs attributable to ROWs on tribal  
38 lands. The study concluded that for the average homeowner tribal ROW costs amounted to  
39 between \$0.01 and \$0.06 per month for electricity on monthly bills averaging between \$50 to  
40 \$200, and between \$0.001 and \$0.016 per month for natural gas on monthly bills averaging  
41 \$47.<sup>143</sup> Additionally, this tribe further quantified the impacts of its throughput fee charged for use  
42 of a ROW on its land, and found that at 5 cents/mcf, the throughput fee was a small fraction of  
43 the delivered gas in California (\$13.27 per mcf during the public comment period) and in Utah  
44 (\$11.75 per mcf during the public comment period, with the fee equivalent to 0.4% of delivered  
45 natural gas price to Utah consumers.).<sup>144</sup>

46

1 An economic analysis of energy ROW compensation presented by an interest group, however,  
2 stated that if the residential customers of one gas and electric utility in New Mexico fully bear  
3 the cost increases associated with approximately 95 energy ROW renewals over the next 15  
4 years, then, those customers could see their electric rates increase as much as 5 percent, i.e., \$5  
5 for every \$100 of a bill.<sup>145</sup> As explained in the analysis, this estimate is dependent upon the  
6 utility seeking and being approved for “rate recovery,” and all 95 energy ROWs are assumed to  
7 be renewed at a value reported in the Navajo Nation and EPNG’s on-going energy ROW  
8 negotiations. This estimate does not account for valuation differences in negotiations concerning  
9 energy distribution ROWs and energy ROWs that do not provide local service.

10  
11 One tribe sought to gauge energy companies’ perceptions of business risk that is related to  
12 interactions with tribes by reviewing Security and Exchange Commission (SEC) filings and  
13 notations of risk in those filings.<sup>146</sup> Among the 18 western companies studied from 2001 to  
14 2005, the tribe found that in most years all of these energy companies described challenges  
15 associated with energy infrastructure construction and/or operation. However, the tribe found  
16 that over the five-year period, only three companies characterized the negotiation – or  
17 renegotiation – of tribal ROWs as a material concern in annual reports to the SEC.

### 19 **6.1.2. Departmental Analysis**

20 The Chairman of the Federal Energy Regulatory Commission (FERC) recently testified before  
21 Congress that transportation costs for natural gas and crude oil petroleum products are relatively  
22 small – the transportation component for natural gas is approximately 6 percent of its delivered  
23 cost and approximately 1 percent of the delivered cost for petroleum products.<sup>147</sup> As with  
24 delivered natural gas and oil, the cost of electric transmission is a small portion of a consumers’  
25 electric bill. This year DOE’s Energy Information Administration found that transmission costs  
26 for electricity are in the range of 10 percent of total delivered electricity costs.<sup>148</sup>

27  
28 These federal government statistics are in keeping with data from the energy industry.  
29 Testifying at the same hearing as the FERC Chairman, Williams Pipeline Company testified that  
30 “[pipeline transportation and storage is the smallest part of the cost of natural gas delivered to  
31 residential and commercial customers - typically about 10 percent of the total retail cost of  
32 natural gas.”<sup>149</sup> In addition, consistent with these consumer statistics, a report prepared for EEI,  
33 “Why are Electricity Prices Increasing?,” found that transmission and distribution costs  
34 accounted for about 4 and 8 percent, respectively, of electric utility operation and maintenance  
35 costs, and remained relatively flat from 2002 to 2005.<sup>150</sup>

36  
37  
38 Although some commenters indicated that some tribes require compensation for energy ROWs  
39 on their lands in excess of the lands’ “market value” for other purposes, [other commenters](#)  
40 [argued that](#) the effects do not appear to be large enough to have a significant effect on overall  
41 energy transportation costs and the total cost of delivered energy paid by consumers.

42  
43 [In closely analogous situations, however, Congress has decided even small adverse impacts on](#)  
44 [consumers resulting from monopoly pricing are not to be tolerated. For example, under the](#)  
45 [Natural Gas Act \(“NGA”\) and Federal Power Act \(“FPA”\), it is irrelevant whether the impact of](#)

1 the tribes' actions on energy costs is small or large. Under the NGA and FPA, Congress has  
2 charged FERC with preventing natural gas and electric transmission owners from extracting  
3 monopoly rents, regardless of the scope of the impact of such rent extraction on the actual rates  
4 paid by consumers. Tribes that make monopolistic ROW demands should be treated no  
5 differently, and in fact cannot be treated differently without undermining the fundamental  
6 consumer protection goals of the NGA and FPA.

7  
8 ~~These first two results are supported by~~ The Departments also conducted a review of filings with  
9 FERC requesting increases in oil, natural gas or electric rates that a FERC regulated utility can  
10 charge consumers. Although hundreds of cases have been filed for increases in rates over the last  
11 five years, a survey of these cases and consultation with FERC trial staff produced only three  
12 instances where tribal ROW costs were cited in the case as a reason for requesting a rate  
13 increase. One of these cases is still pending. The remaining two cases resulted in some rate  
14 increases, however, tribal ROW fees were not always, or not entirely, passed on to consumers,  
15 the increases included non-tribal factors, and the overall rate increase was not deemed significant  
16 by the parties or the Commission. In one of these cases the tribal energy ROW fees are  
17 considered a regulatory asset that will be depreciated, and in the other the tribal ROW fees were  
18 not fully passed on to consumers or directly raised by the company filing for the rate increase.  
19 Although these are complicated matters, these cases provide examples that fees for ROWs on  
20 tribal lands do not always result or have not yet resulted in increases in overall costs to  
21 consumer. It should be noted, however, that survey results summarized in Section 6.5.1, indicate  
22 that in the transition from long term to shorter term right-of-way grants, over 90 percent have yet  
23 to be renewed and therefore the trend in recent renewals have not yet been fully realized in terms  
24 of their cost impacts or in filings before FERC and the Securities and Exchange Commission.  
25 ~~Moreover, the lack of rate case filings that cite to fees for ROWs on tribal lands supports the~~  
26 ~~Departments' analysis that energy ROWs on tribal lands represent a very small portion of energy~~  
27 ~~costs and infrastructure.~~

28  
29 ~~There is no evidence to date that any of the difficulties associated with ROW negotiations have~~  
30 ~~led to adverse impacts on the reliability or security of energy supplies to consumers. The~~  
31 ~~conditions cited above concerning the relatively small economic impacts of existing or potential~~  
32 ~~disputes over energy ROWs on tribal lands also imply that, except in unusual geographic~~  
33 ~~circumstances, the effects of any future potential ROW disputes on the reliability or security of~~  
34 ~~energy supplies to consumers are also likely to be small.~~

35  
36 However, it is important to note that more serious consequences to consumers may well occur if  
37 appropriate standards for ROW compensation are not established. Tribes may increasingly  
38 resort to trespass actions in tribal court seeking, among other remedies, massive penalties for a  
39 purported violation of tribal trespass laws. On the other hand, if, to avoid such penalties, a  
40 pipeline were to abandon its facilities and services without prior FERC authorization, it would be  
41 in violation of the NGA, which also provides for significant penalties in furtherance of the  
42 NGA's consumer protection goals. This places pipelines in an untenable "Catch 22". Moreover,  
43 any forced abandonment of pipeline facilities in the wake of tribal court decisions upholding  
44 trespass actions would result in severe service disruptions.

45

1 Any continuing absence of appropriate standards for ROW compensation could also embolden  
2 tribes simply to attempt to take over the specific transportation or transmission facilities at issue.  
3 This could have extremely negative implications for the ultimate consumers of natural gas and  
4 electricity. For example, consumers could be forced to pay an additional charge to obtain their  
5 gas or electricity by an unregulated tribe. The imposition of such “rate stacking” on consumers  
6 would contravene the public interest protections Congress has included in the NGA and the FPA.  
7

### 8 **6.1.3. Departmental Findings**

9 There is reason to believe that difficulties associated with ROW negotiations may become more  
10 serious in the fairly near future given the high number of ROW renewals which are scheduled to  
11 occur in the next few years. Moreover, the current system of procuring and renewing ROW  
12 across tribal lands lacks any of the protections afforded consumers in other settings against even  
13 small adverse impacts related to the imposition of monopoly rents.  
14

15 Industry has warned that the latest example of the pressing problem that exists today and which  
16 will only increase without fundamental changes to the process for procuring and renewing  
17 energy ROWs across tribal lands can be found in California’s *Imperial Valley Press* (12/24/06).  
18 The article details a ROW impasse resulting in a trespass situation in the Imperial Valley that  
19 threatens a key power corridor and will likely impact consumer prices. ~~As a result of our  
20 analysis, the Departments find that total energy transportation costs are a small component of  
21 overall consumer energy costs, that as a general matter a relatively small percentage the fraction  
22 of energy transportation infrastructure is on tribal lands, and that, as of now, no difficulties  
23 associated with ROW negotiations have led to security or reliability impacts that affect consumer  
24 cost.~~

## 25 **6.2. Decreasing Energy ROW Term of Years and Increasing Negotiation Periods**

### 26 **6.2.1. Public and Tribal Comments**

27 Industry generally noted that the term of years for energy ROWs are decreasing and that the  
28 negotiation times are increasing. Industry parties pointed out that shorter energy ROW terms and  
29 longer negotiation periods increase the ROW-related administrative costs to both industry and  
30 tribes. Some from industry voiced concern that in cases where there is a transition in a tribe’s  
31 leadership, the lack of a consistently applied valuation methodology and negotiation process can  
32 also result in prolonged or delayed ROW negotiations. Industry also commented that these  
33 factors either individually or taken together “add to the uncertainty which utilities must consider  
34 in their investment and planning processes.”<sup>151</sup> This uncertainty is cited as a growing cause for  
35 concern by industry, especially when they consider that there will be an increase in the number  
36 of ROW negotiations in the next decade.  
37

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

- 1
- 2 • the length of the ROW and diversity or continuity of the affected land area or land
- 3 owners
- 4 • impacts on lands of cultural or religious significance
- 5 • impacts on agricultural lands
- 6 • provision of utility services to reservation residents and access to tribal natural resources
- 7 • number of individual landowners affected
- 8 • requirements associated with an environmental assessment<sup>152</sup>
- 9

10 Industry commented that projects that are forced to build around tribal lands will traverse less  
11 advantageous routes, consume more resources, and/or impose a greater burden on the  
12 environment than would otherwise have been the case. Several industry submissions point to  
13 costly examples of build-around that have already taken place and more can be expected as new  
14 infrastructure is constructed in regions that contain tribal lands.<sup>21</sup> For example, as stated in 6.1.1,  
15 Sempra is routing an electric transmission line project through the Anza-Borrego Desert State  
16 Park, a path that is opposed by several environmental groups, to avoid the Santa Ysabel  
17 reservation and the uncertainties associated with ROW fee renewals once the project has been  
18 installed. Thus, the impact of tribal activities on this one project alone will likely cost Southern  
19 California ratepayers over \$1.5 billion in increased construction and congestion costs, as well as  
20 greater environmental impacts associated with the longer and less geographically and  
21 environmentally advantageous route. Industry stated that not only will the new route raise  
22 consumer rates, it will prevent the tribes from reaping any economic benefits from the ROW  
23 crossing their land and it will disproportionately impact the surrounding environment. Both of  
24 these outcomes could have been avoided had a sensible ROW acquisition policy been in place,  
25 Industry commented.

### 27 6.2.2. Departmental Analysis

28 There is basic agreement that **renewal** negotiations are taking longer and that the term of the  
29 agreement is shorter. This is due to a number of factors including complexity of modern  
30 negotiations, new tribal responsibilities, ~~and~~ approval processes in the federal government, **and**  
31 **the differing views of the tribes and industry regarding the appropriate methodologies for valuing**  
32 **ROWs and which result in greater divergence between the parties on the appropriate**  
33 **compensation figure.** However, the Departments also note that some companies **involved with**  
34 **the production of oil and gas resources on tribal land**, in particular those that entered into  
35 business partnerships with Indian tribes, found that **their** energy ROW agreements on tribal lands  
36 ~~are~~ **were** completed more efficiently than with other land owners.

### 37 6.2.3. Departmental Findings

38 The longer times for successful negotiation and decreased term of the ROW have impacts on  
39 cost for both industry and the tribes, with the potential to increase overall costs. The  
40 Departments find that developing comprehensive information about energy ROWs on tribal

---

<sup>21</sup> See, e.g., Supplemental comments behalf of San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas), June 9, 2006 at 3-4.

1 lands allows parties to enter into negotiations on stronger footing and could help to reduce  
2 negotiation periods.

3

## 4 **6.3. Uncertainty in Energy ROW Negotiations**

### 5 **6.3.1. Public and Tribal Comments**

6 Some in industry commented that the exercise of tribal sovereignty through tribal consent to  
7 energy ROWs - with no uniform and measurable standard for valuing ROWs - creates a high  
8 degree of uncertainty for the nation's energy infrastructure and consumer's energy costs.<sup>153</sup> One  
9 energy company commented that "the long-term security of these [transmission] lines must be  
10 more definitively guaranteed to protect the reliability and availability of the national power  
11 grid."<sup>154</sup> A trade association noted that due to uncertainty, "necessary infrastructure may not be  
12 built."<sup>155</sup>

13

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

19

20 Some from industry expressed concern about the possibility that energy ROW agreements could  
21 expire, leaving energy facilities in trespass. A trade association raised concerns that members  
22 found in trespass could have access to their facilities curtailed or blocked, thereby limiting their  
23 ability to use or conduct maintenance on lines and other facilities.<sup>156</sup> This trade association also  
24 noted, however, that the Administrative Procedure Act and three federal court rulings protect a  
25 timely ROW renewal applicant from actual trespass.<sup>157</sup> *It further noted, however, that timely  
26 filing has not protected companies from being compelled through negotiations with tribes to pay  
27 something akin to "trespass damages" in order to finalize ROW agreements.*

28

29 Tribes stated that industry parties pointed to no specific instances in which the statutory and  
30 regulatory requirements for tribal consent or delays in energy ROW renewals resulted in  
31 disruptions to energy delivery or threatened the reliability of the system.<sup>158</sup> Tribes noted that  
32 they have never evicted an energy company with an expired ROW or required a company to  
33 remove its energy infrastructure from tribal lands. Instead, tribes commented that tribes should  
34 be fully compensated for trespass situations. Many tribes also commented that they viewed  
35 trespass situations as an opportunity to create opportunities for improved long-term business  
36 relationships.<sup>159</sup>

37

### 38 **6.3.2. Departmental Analysis**

39 The fundamental issues ~~is a~~ are (a) a negotiating climate often marked by uncertainty and ~~lack of~~  
40 ~~shared objectives — as opposed to~~ (b) divergent views on the methodology and standards for  
41 valuing a particular energy ROW. Indeed, at least one industry representative commented in

1 response to the draft report that uncertainty, as opposed to cost increases, was their primary  
2 concern.<sup>160</sup> The Departments find that uncertainties abound in the energy ROW negotiation  
3 process when:

- 4
- 5 • energy ROWs with limited terms require renewal, but past valuation methods are
- 6 unclear, undocumented, or were developed with little involvement of the tribe
- 7 • information about the energy ROW in question may be limited
- 8 • new valuation methods lack transparency
- 9 • the parties have widely differing cultural values
- 10 • the parties do not have comparable resources to commit to the negotiations
- 11 • either party considers the existing relationship to have been unproductive
- 12 • the parties lack shared goals for the future of an energy ROW
- 13

14 The significance of these factors ~~—as compared to the use of some predetermined valuation~~  
15 ~~method~~—is made clear by the comments of some energy companies who stated that they had  
16 encountered no problems using the current process for obtaining an energy ROW on tribal lands  
17 when the ROWs were of a non-interstate nature. Some energy companies commented that they  
18 had built productive relationships and partnerships with tribes and that they find tribes to be fair  
19 negotiators for energy ROW valuation on tribal lands.<sup>161</sup>

20  
21 The Departments also note that uncertainty occurs at all levels within the energy industry and is  
22 not primarily caused by negotiations with Indian tribes. Two reports published in June 2006,  
23 “Why are Electricity Prices Increasing?,”<sup>162</sup> and “Siting Critical Energy Infrastructure,”<sup>163</sup> stress  
24 that energy ROW uncertainty stems from increased costs throughout the energy industry, needed  
25 infrastructure investment, and siting challenges at all levels of government and public  
26 involvement. These recent reports do not expressly mention energy ROW negotiations with  
27 Indian tribes as a source of uncertainty. Moreover, despite the forward looking nature of these  
28 reports, the cost of energy ROWs on tribal lands is also not expressly mentioned as a future or an  
29 upcoming issue; [although steps increasingly being taken by companies to explore siting options](#)  
30 [where available to bypass tribal reservation land is strong evidence that industry perceives an](#)  
31 [uncontrolled risk that must be addressed](#)

32  
33 “Why are Electricity Prices Increasing?” finds that “[f]uel and purchased power expense growth  
34 essentially explains all of the 22-percent increase in utilities expenses from 2002 to 2005.”<sup>164</sup>  
35 Over this period, the report notes that fuel and purchased power increased from 66 to 71 percent  
36 of all operation and maintenance costs, while transmission and distribution costs were essentially  
37 flat and represented a small percentage of operation and maintenance costs.<sup>165</sup>

38  
39 “Why are Electricity Prices Increasing?” also discusses challenges associated with upgrading an  
40 aging transmission system. The report states that the “power delivery system is characterized by  
41 an aging infrastructure and largely reflects technology developed in the 1950’s or earlier.”<sup>166</sup> The  
42 report notes that the strain on the system is beginning to show and that utilities have plans to  
43 reverse a 25 year old trend of declining investments in transmission infrastructure.<sup>167</sup> The report  
44 also notes that costs can be imposed by local governments. In discussing the electric industries’  
45 plans to upgrade distribution networks, the report cites local government requirements related to  
46 aesthetics and local land use as potentially increasing costs. In particular, the report notes that

1 requirements to put existing distribution lines underground costs approximately one million  
2 dollars per mile, which is a five to ten-fold increase over the cost of a new overhead power  
3 line.<sup>168</sup>

4  
5 Siting challenges are discussed at length in, “Siting Critical Energy Infrastructure.” The report  
6 states that large transmission projects must demonstrate, typically to state public utility  
7 commissions, that a new transmission line is the best option for addressing electric reliability and  
8 is also the most economic solution.<sup>169</sup> Transmission lines must also comply with environmental  
9 reviews and competing land uses.<sup>170</sup> The report finally notes that concerns about private property  
10 and property values must also be addressed.<sup>171</sup> To effectively overcome these uncertainties, the  
11 report suggests that “high-capacity interstate transmission projects should be designed to provide  
12 local benefits that can help justify their value to local constituencies. . . .”<sup>172</sup>

13  
14 Finally, as mentioned in Section 2, EPAct includes a number of tax incentives intended to  
15 encourage investments in energy infrastructure and may help reduce investment uncertainty.  
16

### 17 **6.3.3. Departmental Findings**

18 Where uncertainty becomes a factor, negotiations can take longer, the parties may feel  
19 constrained by prior practices that limit creative business solutions, or the parties may lack the  
20 common ground needed to explore potential solutions. Nevertheless, the Departments note, even  
21 with these uncertainty factors, that the vast majority of energy ROW negotiations are completed  
22 ~~to mutually agreeable terms and conditions~~. This is true even if the negotiations are protracted  
23 and the method for determining the value of the energy ROW results in compensation that  
24 sometimes greatly exceeds what is perceived to be the market value of the tribal lands involved.  
25

## 26 **6.4. Risk to Investments in Infrastructure**

### 27 **6.4.1. Public and Tribal Comments**

28 Industry commented that financial institutions and rating agencies could view a pattern of shorter  
29 energy ROW terms, longer negotiation periods, and escalating energy ROW rates as a source of  
30 risk to the industry. The perception of such a risk by financial institutions could “adversely  
31 affect the cost of the capital needed to build new generation and transmission  
32 infrastructure. . . .”<sup>173</sup> Moreover, industry noted that excessive energy ROW fees and other access  
33 costs associated with tribal lands generally discourage expansion of, and investment in, existing  
34 facilities on those lands thereby reducing job-creation and development opportunities for  
35 tribes.<sup>174</sup>

36  
37 Some from industry stated that the difficulty of companies in renewing ROWs on tribal lands are  
38 leading to proactive decisions by companies to bypass tribal land, and that the failure to adopt a  
39 reasonable process for ROW renewals will only serve to increase Indian country’s energy  
40 isolation, discourage job creation and investment, and postpone long overdue economic  
41 development and national economic participation of Indian tribes.<sup>175</sup>  
42

1 One industry representative noted, however, that risks in the energy industry were widespread  
2 and could come from financial markets and national and international policies, in addition to  
3 fluctuating prices, supply, and demand which all contribute to the volatile nature of the  
4 industry.<sup>176</sup> Another energy company also noted that the Section 1813 study itself, and concern  
5 about changes in the law, create uncertainty for development of energy resources on tribal  
6 lands.<sup>177</sup>

7  
8 Tribes generally commented that energy production and the number of energy ROWs granted on  
9 tribal lands are increasing or consistent with earlier levels and do not reflect a reduction in  
10 investment. One tribe presented data on the number of natural gas pipeline and electric  
11 transmission ROWs granted on their lands since 1980 to illustrate that the granting of energy  
12 ROWs continued at earlier rates or grew with some fluctuation depending on economic cycles.<sup>178</sup>  
13 Another tribe commented that over the last twenty years they have successfully concluded  
14 negotiations for grants or renewals of interstate pipelines with a number of major pipeline  
15 companies.<sup>179</sup>

16  
17 Tribes also noted that innovative energy ROW agreements have led to expansion of energy  
18 investment and resources on their reservations. In one case, such agreements added about 1.7  
19 trillion cubic feet to the nation's supply of natural gas.<sup>180</sup>

## 21 **6.4.2. Departmental Analysis**

22 Energy transport companies must make ROW siting decisions that are in their (and their  
23 shareholders') best interest. This may lead to a decision to "build around" a reservation. There  
24 is likely an additional economic cost to the company, as well as lost opportunity costs to the tribe  
25 and, potentially, less access to energy resources.

## 26 **6.4.3. Findings**

27 Most tribes need additional revenue sources and have reasons to seek economic development  
28 opportunities, including productive relationships with energy companies. Energy companies are  
29 looking to develop cost effective options for transport of energy resources across the country. To  
30 date these mutual interests have allowed the development of energy ROWs across Indian lands  
31 without disruption of energy resources or undue costs to the consumer. However, reasonable  
32 certainty in the current and future negotiation process will be needed to assure that these mutual  
33 benefits can be obtained and to minimize risk to infrastructure investment.

## 35 **6.5. Differences Among Grants, Expansions, and Renewals of Rights-of- 36 Way**

### 37 **6.5.1. Public Comments**

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

1  
2 Industry contends that “where new, non-geographically constrained facilities would be sited on  
3 tribal lands, either party can walk away from the transaction if the terms are not mutually  
4 acceptable. However, where the only practical or possible route for a new facility is across tribal  
5 land or where the term of an existing facility is being renewed, there is little constraint on what a  
6 tribe can demand for that renewal.”<sup>181</sup> ” Furthermore, industry states that a build-around option  
7 is an unlikely and expensive scenario for companies that have already “invested hundreds of  
8 millions, if not billions, of dollars on existing infrastructure located on tribal lands.”<sup>182</sup> Industry  
9 also states that “. . . If Congress were to provide a backstop mechanism” in the form of eminent  
10 domain authority to be exercised by a federal authority “. . . there would be an increased  
11 incentive for tribes to negotiate energy rights-of-way renewals for terms and conditions that  
12 more accurately reflect the current market situations.”<sup>183</sup>

13  
14 Further industry stated that the issue is one that will most likely become increasingly contentious  
15 in the future as according to their information about 90 percent of the outstanding renewals for  
16 companies are yet to occur.

17  
18 In comments made at public meetings, tribes contend that company investments in already  
19 installed infrastructure, in the case of a renewal, have been largely depreciated and that  
20 companies are seeking to obtain value in negotiations for something for which they have already  
21 realized a benefit. Additionally, one tribe noted that renewals of energy ROW on tribal lands are  
22 “no different than other types of contract renewals that the [energy industry] routinely face in  
23 other settings when they come to the end of a contract and which require forward analysis of  
24 investment options and cost alternatives that ignore sunk cost and consider the renewals in the  
25 context of current market conditions.”<sup>184</sup>

26  
27 Industry asserts that most interstate natural gas pipelines still have a large amount of  
28 undepreciated investment and point to the annual reports filed by each pipeline with FERC.  
29 These commenters state that, in general, most pipelines (including older pipeline systems) have  
30 not been fully depreciated because they are continually investing in new infrastructure, and  
31 because FERC typically requires a pipeline to depreciate its facilities in accordance with the  
32 expected life of the natural gas reserves attached to its pipeline system, which often is a period of  
33 30-40 years or more for major onshore pipelines.<sup>185</sup>

34  
35 Tribes further state that industry entered into these contracts knowing that they had finite terms  
36 and would have to be renegotiated at a later date and should not have expected that the same  
37 terms and conditions settled on decades before would continue without significant modification  
38 to account for present-day conditions and tribal funding needs.

## 39 40 **6.5.2. Departmental Analysis**

41 The Departments verified with FERC that most companies continually reinvest in their pipeline  
42 systems in many ways either upgrading systems to enhance production capacity or increase  
43 safety or simply as routine maintenance of aging equipment. In many cases a pipeline system  
44 that was permitted 20 years prior may still have hundreds of millions of dollars in undepreciated  
45 investment. Thus it would be a daunting proposition for a company to face a decision of selling

1 or abandoning a pipeline that is not fully depreciated. For example, Williams Four Corners, LLC,  
2 is faced with the termination of its business and assets on the Jicarilla Apache Nation lands by  
3 the unilateral exercise of tribal authority. The company's situation highlights the difficulty,  
4 frustration and inequity that it has experienced in its dealings with tribal ROW after decades of  
5 mutual respect and business dealings.

6  
7 ~~However,~~ These contracts were entered into with the full knowledge that they were for a fixed  
8 term and that the company would have to enter into a renewal negotiation at some time in the  
9 future. ~~Companies that made additional infrastructure investments should have been fully aware~~  
10 ~~that they would be faced with this situation. At the same time, they~~ It is possible that some  
11 companies could have included clauses in these older contracts to deal with this situation or they  
12 could have asked to renew the ROW contract prior to making any additional investment. One  
13 industry trade association has indicated that in practice, few of its member companies were able  
14 to negotiate for more than one single renewal of like term; and in renewals completed in the past  
15 five years, the best they have been able to obtain is an agreement for one renewal of like term so  
16 long as an agreement can be reached about compensation at the time of that renewal.<sup>22</sup>

17  
18 The Departments do recognize, however, that the negotiation posture of tribes vis-à-vis the  
19 government has changed over time, so that the governmental role has increasingly evolved from  
20 direct involvement in the negotiation to the review and approval or disapproval of terms arrived  
21 at by direct interaction between tribes and the energy industry. ~~However, tribal sovereignty is a~~  
22 ~~known and familiar part of the business landscape in parts of the U.S. and should be recognized~~  
23 ~~in any prudent business practice—especially over the last 25 years. Companies can not expect~~  
24 ~~that terms of contracts would remain static over time or would remain the same for contract~~  
25 ~~renewals.~~ The Departments also acknowledge that the business and governmental policy  
26 environment within which tribes and companies operate has shifted dramatically since  
27 companies and tribes entered into the original ROW agreements. Tribes now withhold ROW  
28 agreements to extract "consent" payments that approximate the avoided costs of build-around  
29 infrastructure (referred to herein as "replacement cost"). That was certainly not the approach to  
30 valuation when the first ROW agreements – attendant to the original installation of energy  
31 infrastructure certificated in the public interest by the United States government itself – were first  
32 entered into. Then, as should be the case now, valuation was more clearly rooted in traditional  
33 notions of fair market value, which still govern throughout America.

34  
35 Federal regulations also lead to confusion and ambiguity regarding the tenure of energy ROW on  
36 tribal land. For example, even though the regulations implementing the 1948 Act provide that  
37 ROW for both electric transmission lines and oil and gas pipelines "may be without limitation as  
38 to term of years", 25 C.F.R. § 169.18, Bureau of Indian Affairs offices often take the position  
39 that ROW may only be granted for a 20-year term or less. This practice, which deviates from the  
40 agency's own regulations, introduces unnecessary confusion and uncertainty into the negotiation  
41 process and often frustrates the desire of energy providers for longer-term ROW.  
42

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<sup>22</sup> EEI 2-05-07 comment.

### 1 6.5.3. Departmental Findings

2 Companies continue to make significant investments in energy transmission systems over time  
3 and in many cases still have significant undepreciated investments in infrastructure when the  
4 renewal of an energy ROW is due. ~~However, this situation is a result of a full and open prior  
5 contract negotiation that the company should have anticipated when it entered into the initial  
6 contract and made additional and subsequent investments.~~

7  
8 However, it strains credulity that energy providers should have somehow anticipated that the  
9 long and broadly applicable FMV approach – which is *itself* grounded in the Just Compensation  
10 Clause of the Fifth Amendment to the United States Constitution and the teaching of courts over  
11 nearly two centuries – would devolve into the current ROW policy cacophony that governs tribal  
12 lands.

13  
14 In sum, reasonable expectations are a function both of experience and foreseeable facts.  
15 An energy transporter could not have possibly foreseen the present state of affairs (typified by  
16 exponential, standard-less and unrestrained increases in tribal ROW demands) when much  
17 of America’s energy infrastructure was first installed along with the Eisenhower  
18 Administration’s build-out of the national highway system in the 1950s. Then, tribal ROW  
19 payments approximated the same fair-market-value outcomes that were achieved everywhere  
20 else in America. That was consistent with energy transporters’ experience. That was the  
21 foreseeable approach. The ensuing hyper-inflationary history – involving some companies being  
22 required by tribes to pay \$1600 per rod in 2006 for pipeline rights-of-way originally obtained for  
23 \$2 per rod in 1950 based on FMV appraisals (an 80,000% increase) – is not a history based on  
24 reasonable expectancies. It is a history driven by a massive public policy abdication: a failure to  
25 reconcile important policy choices made by the United States government in the late 1960s and  
26 early 1970s concerning tribal sovereignty with the growing challenges of modernizing America’s  
27 20th-century energy infrastructure to meet America’s 21st-century energy needs.

28  
29 The ROW compensation levels paid by energy transporters to other “sovereigns” (federal  
30 agencies as well as state and local governments) have increased, but at rates much more in line  
31 with inflationary expectations and the objective appreciation in real property values. The science  
32 of property valuation and competing appraisals based on uniform and widely understood  
33 standards and methods formed the basis for negotiated outcomes. The budgetary wants and  
34 needs of the relevant sovereigns were not considered legitimate factors in determining just  
35 compensation.  
36  
37  
38

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

2 Under existing law and regulations, difficulties arise from time to time in negotiations for energy  
3 ROWs across tribal lands that are sometimes very significant to the parties. With that  
4 perspective in mind, the Departments list below a range of approaches that Congress could  
5 consider if it concludes that a particular impasse merits a legislative solution. These approaches  
6 range from no federal intervention to major changes to the long-standing relationship between  
7 the tribes and the federal government concerning tribal sovereignty and the federal policy of  
8 tribal self-determination.

9  
10 Because of the time and fiscal constraints on this study, the Departments have not conducted  
11 individual benefit-cost analysis for each approach. Should Congress choose to consider any of  
12 these approaches, the Department's recommend that the first step, prior to enactment, be a  
13 benefit-cost analysis of the selected options(s) by an independent entity to determine that the  
14 overall benefits exceed the projected costs.  
15

### 16 **7.1. No Action -- Congress could elect no change, allowing ROW** 17 **negotiations to continue under current laws, regulations, practices, and** 18 **procedures**

19 **Many** **Some** comments from tribal parties and energy companies indicate that, to date, current  
20 policies for granting and renewing energy ROWs are, in general, working. This approach would  
21 continue the present practice, which allows tribes and energy companies to use their own  
22 methods for valuing a ROW and to conduct negotiations on their own terms.  
23

### 24 **7.2. Congress could establish a legislative mandate for tribal consent**

25 As described in Section 3.2.1, part of the status quo is an existing statute that only requires the  
26 consent of tribes organized under the Indian Reorganization Act and the Oklahoma Indian  
27 Welfare Act before an energy ROW is authorized on tribal lands. The other part of the status  
28 quo is a DOI regulation in effect since 1951 which is applicable to all tribes and requires the  
29 consent of a tribe before an energy ROW is authorized. Congress could emphasize the  
30 importance of the concept of tribal consent for energy ROWs by enacting a new statute  
31 applicable to all tribes that would require that the consent of a tribe be obtained as a condition to  
32 the authorization of an energy ROW.

### 33 **7.3. Congress could either choose a valuation methodology itself or** 34 **authorize the federal government to determine "fair and appropriate"** 35 **compensation**

36 Under this approach, Congress could either choose from one of the valuation methodologies  
37 suggested in Section 5.3 or direct the executive branch to establish a federal entity to determine  
38 "fair and appropriate" compensation for *all* energy ROWs across tribal land. This entity, rather  
39 than Congress, would be responsible for developing a valuation methodology (and the attendant

1 regulations) to calculate just compensation for the use of the land. However, each party (tribes or  
2 industry) would reserve the right to accept or reject the calculated value.  
3

#### 4 **7.4. Congress could require binding valuation**

5 Congress could modify the current process for energy ROW agreements by establishing binding  
6 procedures to resolve any impasse that may result in negotiations. Such binding procedures  
7 might include the following:  
8

- 9 1) Requiring the parties to enter into binding arbitration conducted by a mutually  
10 approved third party. The decision of the third party would not be subject to appeal.  
11 Either party could petition to invoke this procedure.  
12
- 13 2) Requiring the parties to enter into binding arbitration conducted by a third party  
14 selected by Congress. This decision by the arbiter would not be subject to  
15 administrative appeal. Either party could petition to invoke this procedure.  
16
- 17 3) Requiring the parties to accept just compensation as determined by a federal entity  
18 using one of the strategies outlined in Section 5.3.  
19

#### 20 **7.5. Congress could on a case-by-case basis authorize condemnation of tribal 21 lands for public necessity**

22 A condemnation proceeding involves the exercise of eminent domain by the government. It is a  
23 taking of land against the will of its owner, and requires a judicial proceeding in which a public  
24 purpose or necessity is established and just compensation is awarded to the land owner.  
25

26 The United States Supreme Court consistently has affirmed that the United States Constitution  
27 vests Congress with plenary power over Indian affairs.<sup>186</sup> As recognized *supra* in Section 3.2.1,  
28 Congress has exercised this power in a variety of circumstances in the past to achieve various  
29 goals, including energy ROWs for transportation projects on a case-by-case basis [in the late  
30 1800's](#).<sup>187</sup> Consistent with this practice, Congress would be able, if it so chose, to remedy a  
31 threatened or actual energy supply interruption arising out of an energy ROW negotiation  
32 through a grant of condemnation or eminent domain authority. [This option was exercised by  
33 Congress in the late 1800's and achieved some attention in Congress in the 1960's](#). However,  
34 in recognition of tribal sovereignty and the United States' trust responsibility under existing  
35 treaties with Indian tribes, legislation granting such authority has been clear in expressing the  
36 intent of Congress to do so.<sup>188</sup>  
37

38 [In addition, in order to provide Congress and the negotiating parties with greater transparency in  
39 valuation decisions, tribes could be directed to keep an inventory of all ROW agreements which  
40 would be reinventoried every three years. This option could also include the naming of a federal  
41 agency to act as an arbitrator in the event of an impasse between the negotiating parties.](#)  
42  
43

1  
2 **7.6. Congress could specifically authorize condemnation of tribal lands for**  
3 **public necessity**  
4

5 In its essence, a condemnation proceeding involves the exercise of eminent domain by the  
6 government. It is a taking of land against the will of its owner or without the owner’s consent.  
7 Condemnation usually requires a judicial proceeding in which some degree of public purpose or  
8 necessity is established to the satisfaction of the tribunal, thereby overcoming the property rights  
9 of the landowner.  
10

11 The Supreme Court has recognized that, as a sovereign government, the United States must have  
12 the power of eminent domain.<sup>23</sup> Eminent domain allows the United States the right to take lands  
13 that it determines are necessary for some public use.<sup>24</sup>  
14

15 The right is recognized in 25 U.S.C. § 341, which states:

16       Nothing in this act [The Indian General Allotment Act of 1887] contained shall be  
17 so construed as to affect the right and power of Congress to grant the right of way  
18 through any lands granted to an Indian, or a tribe of Indians...for the public use,  
19 or to condemn such lands to public uses, upon making just compensation.  
20  
21

22 It is important to note that no legislation authorizes the condemnation of Indian tribal lands in  
23 specific terms.  
24

25 Congress may exercise its plenary power over Indian affairs and manifest its intent to impose  
26 projects on Indian lands thereby effectuating a condemnation. Numerous district court decisions  
27 prior to the Indian Civil Rights Act and the Indian Self Determination Act have held that an  
28 appropriation act that appropriates money for a specific project will manifest a clear intent to  
29 engage in that project.<sup>25</sup> The clear and precise intent expressed by Congress in an appropriations  
30 act, when considered with the General Condemnation Act, may furnish authority for taking land  
31 within an Indian Reservation.<sup>26</sup>  
32

33 **7.7. Congress could direct the Agencies to establish a process to incentivize**  
34 **negotiations and backstop stalled negotiations similar to the process used by**  
35 **FERC for hydroelectric projects on tribal lands under the Federal Power Act**  
36

37 Congress could look to the Federal Power Act (FPA) model as an option to consider in  
38 addressing the problem of resolving energy ROW disputes across tribal lands involving renewal  
39 of right-of-way agreements or the siting of new facilities that are geographically constrained.  
40

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<sup>23</sup> United States v. Carmack, 329 U.S. 230 (1946).

<sup>24</sup> Id.

<sup>25</sup> United States v. 40 Acres of Land, 163 F.Supp. 939, 940 (D. Alaska 1958); United States v. 5,677.94 Acres of Land, 162 F. Supp. 108, 110-111 (D. Mont. 1958).

<sup>26</sup> United States v. 5,677.94 Acres of Land, 162 F. Supp. 108, 110-111 (D. Mont. 1958).

1 Indian Tribes do not have a veto over the use of tribal lands by a Federal Energy Regulatory  
2 Commission (FERC) licensed hydroelectric project. Instead, under Section 4(e) of the Federal  
3 Power Act (FPA) federal “reservations,” including tribal reservations, can be occupied by a  
4 hydroelectric project “after a finding by the Commission that the license will not interfere or be  
5 inconsistent with the purpose for which the reservation was created...” 16 U.S.C. 797(e). In  
6 addition, Section 4(e) authorizes the Secretary of Interior to impose conditions on the project  
7 necessary for the “adequate protection” of tribal reservation lands used for a hydroelectric  
8 project.”*Id.*

9  
10 The mechanism for determining the charges paid by a hydroelectric licensee for its use of tribal  
11 lands is Section 10(e) of the FPA. 16 U.S.C. 803(e). It provides that “the Commission  
12 shall...subject to the approval of the Indian tribe having jurisdiction of such lands...fix a  
13 reasonable annual charge for the use thereof...” *Id.* Such charges may be readjusted by the  
14 Commission every 20 years. *Id.*

15  
16 Section 10(e) has been interpreted and applied to mean that the Commission has authority to fix  
17 a charge for the use of tribal lands by a licensed project regardless of whether it has been agreed  
18 to by the Indian tribe with jurisdiction. *Montana Power Company v. Federal Power Commission*,  
19 459 F.2d 863 (D.C. Cir. 1972) If a tribe or the Department of the Interior seek to contest FERC’s  
20 determination of 10(e) charges they may do so by petitioning for judicial review of the  
21 Commission’s order setting such charges. *Id.* at 874,  
22

23 FERC regulations provide that “The Commission will determine on a case-by-case basis under  
24 Section 10(e) of the Federal Power Act the annual charges...for any project using tribal lands  
25 within Indian Reservations.” 18 C.F.R. 11.4(a). However, it is the Commission’s strong  
26 preference that these issues be negotiated between the licensee and the relevant Indian tribe,  
27 rather than being resolved by the Commission. “The Commission becomes directly involved in  
28 establishing annual charges on Indian lands only where it must, because the parties are unable to  
29 reach a reasonable accommodation.” *Public Utility District No. 1 of Pend Oreille County* 77  
30 FERC 61,146 at 61,553 (1996). In many cases if annual charges cannot be agreed upon by the  
31 licensee and the Tribe, the Commission sets the issue for hearing before an administrative law  
32 judge. *See, for example, Wisconsin Valley Improvement Company*, 83 FERC 61,127 (1998).  
33

34 The Commission does not delay issuance of a license for a new project or a license renewal until  
35 disputes regarding Section 10(e) charges are resolved. Instead, the Commission typically issues a  
36 license that includes an article directing “the licensee to negotiate with the Tribe, and submit for  
37 Commission approval, a reasonable annual charge for the project’s use of tribal lands.”  
38 *Wisconsin Power and Light Company*, 97 FERC 61,054 (2001) When this approach has not  
39 yielded an agreement, the Commission has set the annual charge issue for hearing before a  
40 FERC Administrative Law Judge. In the vast majority of cases, a settlement is reached, although  
41 this often takes years. *Wisconsin Power and Light Company*, 96 FERC 62,216 (2001).  
42  
43  
44  
45  
46

## 1 8. Recommendation of the Departments

### 2 8.1. Departmental Observations

3 The principal observations from the Departments' analysis are:

- 4
- 5 1) The current policy is to rely on negotiations between Indian tribes and energy companies
- 6 to arrive at terms for the grant, expansion, or renewal of energy rights-of-way on tribal
- 7 land. This is in keeping with long-standing federal policies against the alienation of tribal
- 8 lands without tribal consent and support for tribal self-determination.
- 9
- 10 2) Current methods of valuing energy rights-of-way – through negotiations between tribes
- 11 and energy companies – are guided by and in keeping with existing federal tribal and
- 12 energy policies. In addition, recent energy legislation (EPAAct 2005) supports greater
- 13 independence and control by tribes over their tribal land and resources.
- 14
- 15 3) The issues concerning energy rights-of-way on tribal lands are most acute in the context
- 16 of negotiations for renewals. Recently, some renewal negotiations have become more
- 17 protracted and the fees paid to the tribes for the use of their lands, with some exceptions,
- 18 have risen. However, fees paid to Indian tribes for the grant, expansion, or renewal of
- 19 energy rights-of-way on tribal lands are a small component of overall consumer costs for
- 20 electricity or natural gas.
- 21
- 22 4) ~~Negotiations between Indian tribes and energy companies for the grant, expansion, or~~
- 23 ~~renewal of energy rights of way across tribal lands have had no demonstrable effect on~~
- 24 ~~energy costs for consumers, energy reliability, or energy supplies to date. Therefore,~~
- 25 ~~broad~~As noted in our recommendations, changes to the current federal policy of self-
- 26 determination and self-governance for tribes ~~—or the existing right of consent—~~are not
- 27 may be warranted at this time.
- 28
- 29 5) Future unresolved conflicts over energy rights-of-way across tribal land could have a
- 30 significant regional or national effect on the availability, reliability, or consumer costs of
- 31 energy resources. Failure to secure tribal consent for the siting of an energy right-of-way
- 32 on tribal lands, especially in geographically constrained areas, could result in a
- 33 heightened regional or national energy concern. In such circumstances, the United States
- 34 Constitution empowers Congress to strike a balance between tribal sovereignty and the
- 35 greater national interest. In some cases, this may mean the responsibility to the general
- 36 American populace to provide reliable and affordable energy resources outweighs tribal
- 37 sovereignty.
- 38
- 39 6) Increasing right-of-way costs to energy transmission companies may also have a
- 40 detrimental effect on some tribes. Decreasing term duration, increasing costs, and future
- 41 uncertainty may make rights-of-way across tribal land less desirable for many companies.
- 42 This is particularly likely if companies also face the uncertainty of a right-of-way renewal
- 43 in 20 or 25 years with tribes holding virtual veto power over the renewal. If companies
- 44 choose to build around tribal land where they can, tribes run the risk of losing economic
- 45 opportunities as well as possible interconnects to the energy transmission facilities.

1  
 2 7) In most cases, initial rights-of-way agreements are term contracts and no guarantee or  
 3 indication of renewal was given by the tribes or the federal government. Therefore, any  
 4 renewals represent, in essence, new contracts.  
 5

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6 **8.2 Recommendation -- ~~Status Quo with Congressional Case-by-Case~~**  
 7 **~~Intervention~~**

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

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

18 Accordingly, the Departments recommend:

19  
 20  
 21  
 22 ~~(1) Valuation of energy rights-of-way on tribal lands should continue to be based upon terms~~  
 23 ~~negotiated between the parties.~~

24  
 25 ~~(2) In the event that a failure of negotiations regarding the grant, expansion, or renewal of an~~  
 26 ~~energy right-of-way has a significant regional or national effect on the supply, price, or~~  
 27 ~~reliability of energy resources, the Departments recommend that Congress consider~~  
 28 ~~resolving such a situation on a case-by-case basis through legislation targeted at the~~  
 29 ~~specific impasse, rather than making broader changes that would affect tribal sovereignty~~  
 30 ~~or self-determination generally.~~

31 Congress should establish “standards and procedures for determining fair and appropriate  
 32 compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on  
 33 tribal land.” (EPA Act Sec. 1813(b)(2)) Recognizing the growing potential for impasses between  
 34 utilities and tribes, the Departments recommend that Congress should adopt a process applicable  
 35 to all impasses that comports with Section 7.6, Section 7.7, or, at a minimum, Section 7.4  
 36 whereby just compensation is defined by traditional notions of fair market value.  
 37  
 38

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

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

Several commenters on the August 2006 draft version of the Section 1813 report provided details that expanded upon the information in the HRA case studies. Those details are included in the summaries below and are so noted.

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

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

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

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

The Northern Ute received its first oil royalties in 1949. The Tribe functioned in the 1960s as an approver of ROW fees that were negotiated by the BIA. It assumed a more active role in negotiating ROW compensation in the following decades. By 2005, the Tribe established its own energy company, Ute Energy, to develop tribal oil and gas resources. As illustrated in the following examples, ROW compensation increased as the Tribe became more actively involved in negotiations. Other examples of the Tribe's increasing participation in negotiations and its

1 business model are presented in Section 8.6.6. These examples of the Tribe's involvement in  
2 energy ROW renewals were not included in the HRA analysis.

3  
4 **a. ROW No. H62-1989-070**

5  
6 In 1960, the Tribal Business Committee approved a 2.4-mile-long, 100-foot-wide ROW for a  
7 138-kV line. ROW compensation was a damage fee of \$764. The term of years for the ROW is  
8 unknown, and records do not indicate whether a real estate appraisal was made.

9  
10 **b. ROW No. H62-1978-005**

11  
12 In 1978, a utility company offered the Tribe \$100 per acre to construct a 69-kV line over  
13 3.78 acres of tribal land. An appraisal conducted by the BIA determined that \$378 was just  
14 compensation for the ROW, since the highest and best use of the land was dry grazing and since  
15 other land used for that purpose sold for between \$50 and \$200 per acre a year earlier. The  
16 appraiser determined that compensation should be less than the full fee simple value of the land  
17 since the land surface was minimally disturbed and the landowners retained the bulk of their  
18 rights. The BIA collected the \$378 in May 1978, and the power line was completed in June 1978.  
19 The grant of easement was executed in January 1980, with a 50-year term beginning in  
20 April 1978.

21  
22 **c. ROW No. H62-1983-18**

23  
24 In November 1982, the Tribe was offered \$500 per acre for 8.55 acres of tribal land for a 12-inch  
25 natural gas transmission line. The Tribal Business Committee authorized the 20-year ROW on  
26 the condition that the \$500-per-acre offer actually met or exceeded market value. The committee  
27 also directed that the grant of easement include five-year reviews to determine if damage  
28 payments should increase, and it indicated that increases would depend on compliance with  
29 ROW stipulations or current economic conditions.

30  
31 The land appraisal, completed a year after the ROW was authorized and the pipeline was  
32 constructed, found that the \$500-per-acre offer was appropriate given real estate values in the  
33 area and that the bulk of the rights would be retained by the landowners. In 2003, the company  
34 applied for ROW renewal offering to pay damages and compensation as determined by DOI. No  
35 further information is available on the ROW renewal or compensation, but the pipeline is  
36 included on a 2006 tribal map showing FERC-regulated pipelines.

37  
38 **d. ROW No. H62-1992-80**

39  
40 In 1991, a company wished to cross four miles of tribal lands with two 10-inch interstate natural  
41 gas pipelines and construct a compressor station and four natural gas gathering lines for a total of  
42 28.5 acres. The company suggested a 30-year ROW but did not offer a compensation rate. It later  
43 offered \$2,000 per acre for a 25-acre easement and \$4,500 for a five-year business lease for the  
44 compressor site, in addition to the \$250 it had earlier given the tribal scholarship fund.

45

1 The Tribal Business Committee proposed basing the ROW fee on throughput. The company  
2 declined for the reasons that it had never provided compensation on such a basis before, only 2%  
3 of the pipeline crossed tribal lands, and it would be impossible to finalize contracts in the two  
4 weeks remaining before construction started. The company countered with an offer of \$2,500 per  
5 acre, an additional contribution to the scholarship fund, and a joint venture with the Tribe on the  
6 gathering lines. The Tribe refused and again suggested a throughput fee or a joint venture as an  
7 alternative.

8  
9 The company again rejected the throughput proposal, stating that it had already established fixed  
10 transportation and gathering rates for its consumers and would not be able to adjust them to  
11 recover the additional throughput costs. The company indicated its interest in a joint venture in  
12 the future but not at the present time because of time constraints. It offered \$3,000 per acre for  
13 the pipeline and compressor station with a 20-year term, \$1,325 per acre for the gathering lines,  
14 and a \$25,000 contribution to the scholarship fund. The company also stated it would ask its  
15 contractors to employ 35 to 40 members of the Tribe on construction projects. Complete terms of  
16 the ROW agreement are not available, but the Tribe received \$238,537 as payment for the  
17 pipeline, compressor station, and gathering lines for a 20-year ROW.

## 18 **9.2. Southern Ute Indian Tribe**

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

22  
23 In the 1950s and 1960s, the Tribe generally accepted the BIA's recommendations on the  
24 adequacy of compensation for energy ROWs. Compensation in those decades usually consisted  
25 of appraisals of surface damage fees on a per-acre or per-rod basis. In the 1970s, the Tribe  
26 became more involved in oil and gas leasing, and in 1980, the Tribal Council formed an Energy  
27 Resource Office to facilitate gathering information on the Tribe's energy potential and  
28 monitoring compliance with existing leases. The forms of ROW compensation became more  
29 varied and included contributions to scholarship funds, annual rental fees, land trades,  
30 throughput fees, and investment opportunities.

31  
32 In the 1990s, the Tribe formed the Red Willow Production Company<sup>189</sup> to operate oil and gas  
33 wells and leases and the Red Cedar Gathering Company to pursue coal-bed methane gas  
34 production. By this point in time, compensation negotiations were conducted between the Tribe  
35 and energy companies and the Tribal Council would accept or reject ROW proposals. The BIA  
36 would then approve the ROWs to which the council consented. Appraisals were seldom done,  
37 since the Tribe established general compensation rates for particular types of ROWs.

38  
39 Red Willow Production Company and Red Cedar Gathering Company are managed by the  
40 Southern Ute Growth Fund, which estimated its investment value at more than \$2 billion in  
41 2006. The following four cases studies demonstrate the movement the Tribe made in managing  
42 its energy resources from the 1950s to the present day.

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

1 In 1961, the Western Slope Gas Company offered damages of either \$1 per rod or \$320 per  
2 lineal mile for a 50-year, 50-foot-wide ROW for a natural gas transmission pipeline and  
3 gathering system. Subsequent applications that year for additions to the gathering system were  
4 also for a 50-year term at the \$1-per-rod rate. The Tribal Council consented to the applications at  
5 the \$1-per-rod rate.

6  
7 **b. Mid-American Pipeline Company**

8  
9 By the late 1970s, the Tribe became directly involved in ROW compensation negotiations. The  
10 Mid-America Pipeline Company offered \$15.60 per rod for a 10-inch liquefied petroleum gas  
11 pipeline crossing almost seven miles of tribal land. Total compensation under the offer was  
12 \$33,571. After the Tribe rejected the offer, Mid-America proposed \$15 per rod and donations to  
13 the scholarship fund, for a total compensation package of \$56,203. The Tribal Council eventually  
14 approved a 10-year easement for payment of \$32,280 and other considerations, which totaled  
15 \$50,000 in contributions to the scholarship fund.

16  
17 By the mid-1980s, Mid-America and the Tribe were involved in renewal negotiations. The Tribe  
18 rejected the Mid-America proposals for either a permanent easement at \$28 per rod or \$140,000  
19 for a 20-year term with an option to pay \$20,000 annually thereafter for as long as the company  
20 chose to renew the ROW. Mid-America noted that it had paid from \$5 to \$20 per rod for  
21 permanent ROWs on non-Indian land in the vicinity.

22  
23 The Tribe countered with offers based on a rate-based tariff fee. Under this valuation method,  
24 compensation could be up to \$236,200 for a 10-year term and \$497,000 for a 25-year term. Mid-  
25 America instead proposed a perpetual easement for a lump sum and annual contributions to the  
26 scholarship fund; the amounts offered are not contained in available records. The Tribe  
27 suggested compensation of \$374,810 for a 25-year term, which was based on Mid-America's  
28 expected profits, but paid as an annual rental based on the pipeline's projected throughput.

29  
30 Negotiations for a renewal began in 1985, five years before the expiration of the grant of  
31 easement. No agreement had been reached by the time the ROW expired in October 1990, and  
32 the Tribe declared it would not hold Mid-America in trespass as long as negotiations were  
33 conducted in a good-faith manner. In late 1991, the two parties agreed to \$425,000 for a 10-year  
34 ROW, plus the guarantee of a tax credit in case the tribe should later impose an applicable  
35 "possessory interest tax or business opportunity tax."

36  
37 In 1996, the parties entered negotiations on the ROW renewal and an additional 16-inch pipeline.  
38 Tribal and Mid-America representatives agreed to a formula that multiplied the previous renewal  
39 amount by the consumer price index (all urban consumers), resulting in compensation of  
40 \$518,000 each for the renewal and the new easement (\$320 per rod).

41  
42 **c. El Paso Natural Gas Company**

43  
44 In 1956, EPNG compensated the Tribe \$4,250 for damages for a 20-year, 6.647-mile ROW for a  
45 24-inch natural gas pipeline (the El Paso mainline). EPNG's payment was double the estimated  
46 damages.

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

12  
13 In January 1989, EPNG applied for renewal of the ROWs renewed in 1979 and submitted  
14 payment of \$349,326, which it based on a Tribal Council resolution requiring \$600 per acre for  
15 ROW renewals. The Tribe refused the offer and requested compensation based on alternative  
16 valuations such as throughput. The Tribe requested \$2,638,000 for a 10-year renewal. EPNG  
17 countered with an offer of \$966,933. The final agreed-upon figure was \$1.3 million for a 10-year  
18 renewal of the ROWs.

19  
20 EPNG applied in May 1998 for a 20-year renewal of the mainline ROW, due to expire in  
21 February 2000, and included payment of \$77,289 for 96.611 acres based on an appraisal of \$800  
22 per acre. The company subsequently proposed 10 annual payments of \$25,122 per year, or a  
23 lump sum of \$303,507. Negotiations were not concluded until March 2000. The agreement  
24 called for EPNG to assign its Colorado Dry Gas Gathering System to the Tribe and for the Tribe  
25 to pay EPNG \$2 million and provide renewed 20-year ROWs for the El Paso Field Services  
26 Blanco Gathering System and the mainline facilities.

#### 27 28 **d. Red Cedar Gathering Company**

29  
30 In an effort to expand the pipeline infrastructure required to expedite development of its coal-bed  
31 methane resource, the Tribe issued a blanket 11-year grant to WestGas for all ROWs necessary  
32 for constructing and operating gathering systems and pipelines in the western part of the  
33 Reservation. ROW compensation consisted of a throughput fee of \$0.015 per million Btu on all  
34 gas compressed and processed in a defined area.

35  
36 When the Public Service Company of Colorado decided to sell WestGas in 1994, the Tribe  
37 entered into partnership with an investment group, Stephens Group, Inc., to bid on it. The bid  
38 was initially rejected but then reconsidered when it was made clear that the Tribe would have to  
39 consent to the transfer of easements from WestGas to the winning bidder. The partnership  
40 bought WestGas for \$87 million, and Stephens and the Tribe created the Red Cedar Gathering  
41 Company, a joint venture. Stephens contributed all of WestGas's assets to Red Cedar, and the  
42 Tribe contributed \$5 million and an extension of WestGas's existing ROWs to the end of 2036.  
43 The throughput fee was also increased to \$0.0175, with subsequent upward adjustments to be  
44 made in 2009 and every five years thereafter, as long as the adjustments were in Red Cedar's  
45 best interests. The blanket grant was also extended from the previously defined area to all tribal  
46 lands.

### 1 **9.3. Morongo Indian Reservation**

2 The Morongo Band of Indians is one of several linguistically related tribal groups in south-  
3 central California collectively referred to as the Cahuilla. The Morongo Reservation was created  
4 in 1877 by Executive Order. The size of the reservation grew and got smaller with subsequent  
5 Executive Orders and allotment activity. In 2003, the reservation encompassed 32, 402 acres, of  
6 which 31, 115 acres were tribal lands. The Morongo Band did not organize under the IRA.  
7

8 The Morongo Band's reservation possesses no oil, gas, or mineral resources. Nevertheless, the  
9 Band has numerous energy ROWs. The reservation's location in southern California is an ideal  
10 east-west corridor for transmission of natural gas, oil, and electricity. Beginning in 1995, the 50-  
11 year term of some electric and transmission line ROWs began to expire, and renewal  
12 negotiations are currently underway.  
13

14 The degree of tribal involvement in negotiations for the initial energy ROWs is unclear from  
15 BIA and Tribal records. Appraisals were used to determine compensation for some ROWs, but  
16 there are also instances of the Tribe exploring alternative forms of compensation.  
17

#### 18 **a. ROW No. 372-Morongo-15**

19  
20 In 1946, the Southern California Gas Company and the Southern Counties Gas Company of  
21 California were granted a ROW for a 30-inch gas pipeline at a rate of \$99.75 per acre for the  
22 8.02-mile easement.<sup>190</sup> In 1966, the Tribe requested that Southern California Gas Company  
23 provide gas service to the Reservation. The company did so in 1968, in exchange for obtaining  
24 renewals of the 30-inch pipeline in addition to another ROW and for receiving a new ROW for a  
25 36-inch natural gas pipeline. The estimated cost of the gas system installed by Southern  
26 California Gas Company was \$82,078.  
27

#### 28 **b. ROW No. 378-Morongo-143**

29  
30 In April 1945, representatives from the BIA and Southern California Edison (SCE) attended a  
31 general meeting of the Morongo Band to discuss SCE's plans to build a transmission line  
32 connecting Boulder Dam to Los Angeles. Two months after the meeting, the DOI granted SCE  
33 authority to construct the line. The Morongo Band, BIA, and SCE were negotiating  
34 compensation for the ROW as the transmission line was being built. The Morongo contested  
35 BIA's appraisal of \$25 per acre.  
36

37 In November 1945, SCE requested permission for two transmission lines and a road across the  
38 Morongo Reservation. Damages were estimated at \$6,421.50, and the BIA required an annual  
39 payment of \$5 per mile. SCE agreed to pay the damages fee but balked at the annual fee. The  
40 Morongo Band pushed for payment of the annual fee and continued to protest the \$25-per-acre  
41 appraisal, at one point suggesting to DOI that \$100 per acre was the appropriate land value.  
42

43 The final compensation schedule for the transmission lines totaled \$6,421.50 (39 towers at \$25  
44 per tower; \$25 per acre for dry land; \$637.50 for 2.49 acres of irrigated land) and a \$5-per-mile  
45 annual rental for an unspecified number of years. In May 1950, SCE submitted a license

1 application to FERC's predecessor, the Federal Power Commission (FPC), for the transmission  
2 line. The 50-year license was issued in April 1954 but with a starting date of July 1, 1945.

3  
4 SCE initiated the renewal process in 1992, three years before the ROW expiration date. The  
5 Morongo Band asserted that the FPC license, which also had a 1995 expiration date, could not be  
6 renewed by FERC, the successor agency to FPC, because the line was no longer a primary line  
7 and therefore no longer under FERC's jurisdiction. The Morongo Band reported that it had to  
8 threaten SCE with litigation to remove the line before SCE would agree to enter negotiations  
9 with it. Both parties have since entered into an agreement that calls for negotiations to begin in  
10 2008 and conclude by 2010.

#### 11 **c. ROW No. 378-Morongo-47**

12  
13  
14 When the California Electric Power Company (CEPC) applied for a 150-foot ROW for two  
15 115-kV transmission lines on 4.73 miles of the Reservation in 1959, the Morongo Band  
16 suggested that the company provide electric service to reservation homes in addition to a damage  
17 fee.<sup>191</sup> CEPC was amenable to this and offered payment of \$21,000 and provision of a  
18 distribution system to allotted lands, on the condition of receiving ROWs for the distribution  
19 lines. CEPC's \$21,000 payment was based on an appraisal of \$400 per acre, which the appraiser  
20 reduced by 40% on the basis that the land did not have potential for subdivision or commercial  
21 development. BIA's appraisal valued the land at \$13,250, which was 50% of appraised market  
22 value of the fee title. The Morongo Band accepted the company's offer.

23  
24 In 1963, SCE acquired CEPC's power lines and increased the voltage of one line to 230 kV,  
25 apparently with the approval of BIA. At some point, SCE installed fiber-optic lines on the ROW  
26 for its own use. In the late 1990s, SCE requested a ROW amendment to allow it to sell its excess  
27 fiber-optic capacity. The amendment was agreed to for a lump-sum payment of \$535,000.

#### 28 **d. ROW No. 378-Morongo-277**

29  
30  
31 SCE's 33-kV Banning-Palm Springs electric distribution line had been FPC-licensed since 1929.  
32 After the FPC determined that the line was no longer a primary line, SCE applied for a 25-foot,  
33 4.02-mile ROW for the line in 1969. In keeping with its BIA-approved practice of valuing  
34 easements at 50% of market value for lines of voltages less than 220 kV, SCE offered \$7,155 for  
35 approximately 12.19 acres. It also estimated severance damages at \$1,500. The BIA stated that  
36 the appraisal was adequate compensation but noted that nothing was constraining the Morongo  
37 Band's free-bargaining position.

38  
39 In a special election, the Morongo Band approved granting SCE 50-year ROWs for a 220-kV  
40 transmission line and 12-kV and 33-kV distribution lines. The lump-sum payment was \$153,660.

#### 41 **8.4.4. Navajo Nation**

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

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

6  
7 The Navajo Nation Oil and Gas Company (NOG) was chartered through DOI as a federal  
8 corporation under Section 17 of the IRA and ratified by the Navajo Nation Council in 1998.<sup>192</sup>  
9 Five years later, NOG began developing energy resources on tribal lands by granting new oil and  
10 gas leases.<sup>193</sup>

11  
12 As energy ROWs came up for renewal in the 1970s and 1980s, the Navajo Nation and energy  
13 companies negotiated consolidated easements that incorporated a number of ROWs into one  
14 package. Since the 1980s, it has been the Nation's practice to negotiate directly with ROW  
15 applicants.

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

17  
18 Four Corners Pipe Line Company (Four Corners) applied to BIA and the Navajo for an easement  
19 for a 16-inch oil pipeline in April 1957 and received it in May 1959. The Navajo participated in  
20 the application approval process and, at one point, withdrew its consent to the application until  
21 stipulations agreed to earlier were included in the agreement. One of the stipulations called for  
22 damages of \$1 per lineal rod. Damages payment for the 20-year easement for 230 miles of  
23 pipeline and other facilities totaled \$199,796.

24  
25  
26 Twenty-six miles of the pipeline fell across lands subject to a land dispute between the Hopi  
27 Indians and the Navajo. Four Corners paid each tribe \$10,000 for the 26-mile segment.

28  
29 In April 1976, Four Corners applied to renew the ROW, set to expire in May 1977. The BIA,  
30 indicating that current market value was \$3 per rod, rejected the company's initial offer of \$2 per  
31 rod. Although Four Corners responded with an offer at the higher rate, the ROW was not  
32 renewed.

33  
34 In February 1980, Four Corners requested an easement consolidating all of its ROWs on Navajo  
35 Nation lands. The subsequent 1981 agreement between the Navajo and Four Corners renewed all  
36 of the company's prior ROWs, both expired and unexpired.

37  
38 Payment for the consolidated renewals was primarily based on throughput of hydrocarbons in the  
39 main line at 3 cents per barrel, adjusted annually on the basis of the CPI. The first year's  
40 payment was not to be less than \$250,000 for 1981. Four Corners also paid \$900,000 for the  
41 period in which the mainline was in use but the ROW had expired. In return, the Navajo released  
42 the company from liability during that trespass. Four Corners further agreed to pay for actual  
43 damages caused by pipeline construction or operation.

44  
45 In 1998, Questar Southern Trails Pipeline Company (Questar) purchased the Four Corners  
46 pipeline with the intent to convert it from oil to natural gas. Since this change required additional

1 construction, the 2001 agreement between Questar and the Navajo Nation to re-renew the 1981  
2 ROW also included Navajo consent to additional ROWs for the necessary construction.

3  
4 The 2001 20-year ROW agreement called for undisclosed compensation in the form of 20 annual  
5 installments, with all payments after the first adjusted annually according to the CPI; annual  
6 contributions to the Navajo Nation Scholarship Program; and installation of up to six taps for  
7 delivery of gas on the reservation.

#### 8 9 **b. Arizona Public Service 500-kV Line**

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

14  
15 Final approvals for the Navajo sections of the line were granted in March 1967 for a 25-year  
16 term with an option to renew for a “like term.”<sup>194</sup> The Navajo were involved in the approval  
17 process.

18  
19 In December 1991, consistent with the ROW terms, APS submitted payment of \$108,176.47  
20 (\$6.98 per rod) to BIA for the Navajo Nation to renew the ROW associated with the 500 kV line  
21 but indicated its willingness to discuss other considerations for renewal. The Navajo Nation  
22 rejected that payment and asked the BIA to return the check to APS. The payment was  
23 resubmitted to BIA in March 1992; the check was cashed without being returned to APS.<sup>195</sup>

24  
25 The Navajo rejected compensation at the same rate as the initial grant and appointed a  
26 negotiation team to seek different terms. The BIA suggested that the APS appraisal of \$4.73 to  
27 \$4.76 per rod was significantly short of the “going rate,” which was a minimum of \$45 per  
28 rod.<sup>196</sup>

29  
30 By late December of 1993, the Hopi Nation and the Navajo Nation were part of a confidentiality  
31 agreement with SCE to negotiate the ROW renewal. SCE was involved because it had the right  
32 to use the entire capacity of the transmission line. A task force was established in 1994 to  
33 negotiate the ROW renewal with APS, SCE, the City of Los Angeles Department of Water and  
34 Power, and the Public Service Company of New Mexico.

35  
36 The Navajo Nation requested BIA to return to APS any payments it had made for the ROW  
37 renewal because they were not acceptable. The ROW has not yet been renewed.

#### 38 39 40 **c. Transwestern Pipeline Company, San Juan Line**

41  
42 Transwestern Pipeline Company (Transwestern) began operation of a 30-inch natural gas  
43 pipeline on the Navajo Reservation in 1960, added compression facilities in 1967, and began  
44 building loop lines in 1969. By 1980, the capacity of the Transwestern system on Navajo land  
45 was 750,000 mcf per day. Information on the initial ROW grant is not available, but it was set to  
46 expire in October 1979.

1  
2 Transwestern's ROW renewal application was submitted to BIA without Navajo Nation consent.  
3 The BIA rejected the application determining that the Nation's consent was required by the  
4 Navajo Treaty of 1868 and applicable federal regulations. Transwestern sued in federal court to  
5 have the rejection of its application overturned, but the Navajo Nation's right to consent was  
6 upheld and Transwestern returned to negotiations with the Navajo Nation.<sup>197</sup>

7  
8 In 1984, Transwestern and the Navajo Nation developed a memorandum of understanding  
9 (MOU) that allowed Transwestern to renew its expired ROWs and to extend its unexpired ROWs  
10 to a new expiration date of December 2003. The parties also reached agreement to an  
11 undisclosed settlement amount.

12  
13 Transwestern and the Navajo Nation agreed to a subsequent MOU in 1991 that allowed the  
14 company an option to acquire 79.5 miles of additional ROWs. Under the MOU, 25% of the  
15 consideration would be paid as a nonrefundable payment with the remainder (of the fee), paid  
16 when Transwestern exercised its option to acquire ROWs, adjusted according to the CPI and the  
17 actual size of the ROWs. The MOU committed Transwestern to sell and deliver up to 3,000 mcf  
18 of natural gas to the Navajo Nation upon completion of a service agreement.

19  
20 In 1998, Transwestern began the process of renewing its easements scheduled to expire at the  
21 end of 2003. The company sought one grant to cover all its easements on Navajo Nation trust  
22 land. An independent appraiser estimated that the market value of the affected land ranged from  
23 \$10.69 to \$14.40 per rod. The BIA recommended instead that the market value of the land was  
24 \$25 per lineal rod.

25  
26 Transwestern and the Navajo Nation agreed to an extension of the ROWs to November 2009.  
27 Transwestern's other rights would expire at that time and the parties desired that all ROWs  
28 would have the same renewal and expiration dates.<sup>198</sup> Payment for the extension was to be made  
29 in an initial installment followed by six annual payments based on the CPI and adjusted upward  
30 but not decreased. The 2001 agreement was amended in 2004 to allow Transwestern to construct  
31 a new 36-inch, 21,415-rod pipeline, the easement for which will also expire in 2009.

#### 32 33 **d. El Paso Natural Gas Company, San Juan Line**

34  
35 The EPNG pipeline system on the Navajo Nation land may be the largest network of energy  
36 ROWs on tribal land. The company's pipelines also cross lands of the Southern Ute, Laguna  
37 Pueblo, Acoma Pueblo, Gila River, Tohono O'odham, and San Carlos Apache.

38  
39 EPNG's first ROW on Navajo land was for a 218-mile, 24-inch natural gas pipeline. The  
40 application filed in July 1950 offered \$1 per rod (\$320 per mile) in damages, in addition to any  
41 actual damages caused by construction on agricultural or forested lands. No additional  
42 information is available on that transaction.

43  
44 EPNG expanded its operations in the 1950s and 1960s to include sections of loop line at 24, 30,  
45 and 34 inches in diameter. In 1971, EPNG applied for renewal of the main line and the loop lines

1 in addition to other ROWs. The company sought to combine the ROWs even though expiration  
2 dates ranged from 1972 to 1986.

3  
4 An appraiser for EPNG established the fee simple market value at \$25 to \$670 per acre,  
5 depending on the land type. The appraiser then discounted those values by 50% on the basis that  
6 the ROWs accounted for only about 50% of the land's value. The appraiser also stated that 8% of  
7 the value of the land taken would be a just rental rate for the land. These calculations put the  
8 value of the ROWs at \$50,769. The BIA recommended a value of \$125,272 after reviewing that  
9 appraisal.

10  
11 The ROWs in question were eventually renewed as two consolidated ROWs. Total compensation  
12 for the renewals was \$260,000 for tribal and allotted land. One of the new ROWs had a 14-year  
13 term, expiring in 1986, with an option to renew for an additional 20 years. Consideration for the  
14 20-year renewal would be \$276,000, adjusted every five years on the basis of the CPI. The other  
15 new ROW did not include similar renewal provisions.

16  
17 Negotiations to renew these ROWs began in January 1982, four years before their expiration  
18 date. The Navajo sought an agreement based on throughput, which EPNG opposed. At some  
19 point, the parties seemed to agree to a payment of \$600,000, but they disagreed as to what the  
20 payment covered. The Navajo claimed that the \$600,000 covered only one ROW, but EPNG  
21 asserted that it covered both. The Nation further believed that EPNG had agreed to renegotiate  
22 consideration for all its ROWs.

23  
24 The final agreement to resolve these issues required an initial \$2 million payment to the Navajo  
25 Nation and 20 annual payments of \$1.35 million, adjusted every three years on the basis of the  
26 CPI. Under the agreement, EPNG was allowed to acquire 15 miles of gathering lines. Rather  
27 than consolidating all of EPNG's ROWs into one easement, the agreement divided the renewals  
28 into several different easements.

29  
30 However, all the easements shared the same expiration date. The agreement states this was done  
31 to ease the administrative burdens on both parties.<sup>199</sup>

32  
33 When EPNG submitted the official renewal applications in 1985, it included appraisal  
34 information estimating the value of the land at \$15 per rod. The BIA noted that the rate for other  
35 pipelines ranged from \$20 to \$40 per rod but that the per-rod rate under the recent renewal  
36 agreement came to almost \$78.

37  
38 In the ensuing years, EPNG and the Navajo have negotiated amendments to the 1985 agreement,  
39 which expired in October 2005. The easements have been extended to December 31, 2006.

#### 40 **9.4. Survey Information**

41 Edison Electric Institute (EEI) and the Interstate Natural Gas Association of America (INGAA)  
42 conducted surveys inquiring into their members' experiences negotiating energy ROWs on tribal  
43 lands. Reports on their survey findings are available on the 1813 website.

#### 1 **9.4.1. Edison Electric Institute**

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

5  
6 In its survey, EEI sought information about costs, terms, and conditions of energy ROW  
7 renewals; data on the appraised value of lands included in the ROW; comparative data about the  
8 terms and conditions of the ROW contract that immediately preceded the renewed ROW  
9 contract; and the information on the methodology used to determine the renewal cost. Member  
10 companies were asked to concentrate on energy ROW renewal transactions occurring within the  
11 past five years. EEI aggregated survey results to protect the confidentiality interests of all parties  
12 involved.

13  
14 At the request of EEI, findings from the surveys were independently verified against source  
15 documents provided by energy companies. This verification consisted of comparing source  
16 documents, supplied by the companies, to the companies' survey responses and to the aggregated  
17 survey data that EEI used as the basis for its comments dated May 15, 2006. It was not feasible  
18 to verify the accuracy or completeness of the source documents provided by the energy  
19 companies.

20  
21 Following this verification, EEI corrected the few differences that were found and then  
22 re-aggregated the data and submitted a survey addendum dated June 21, 2006. Since several of  
23 the energy ROW renewals included in the survey had occurred more than five years ago, EEI  
24 revised its report to present findings of the full data set (which included all energy ROW  
25 renewals) and the 2001–2005 data set (which included only renewals that occurred during that  
26 time span).

27  
28 EEI's original comments and addendum are available on the website. The following data were  
29 extracted from the revised comments dated June 21, 2006, unless otherwise noted. Information  
30 presented in the following tables and the text expanding on the information in those tables has  
31 been verified as accurately reported by EEI, unless specifically noted below.

32  
33 A preliminary EEI screening survey of its 75-member base revealed that 28 companies had  
34 jurisdictional territories that overlapped tribal reservation lands; 20 of those 28 companies had  
35 ROWs on tribal land. Eight of the 20 companies had completed renewal transactions within the  
36 past five years, and only one out of the eight declined participation in the survey. Information  
37 was gathered on 20 energy ROWs, seven of which were renewed prior to 2001.

38  
39 The EEI survey data show that, on average, energy ROWs are being renewed for a shorter term  
40 of years than the ROWs that preceded them. As shown in Table 1, this was true for ROWs  
41 renewed since 2001 and for the ROWs in the entire data set.

42

Data Set	Number of ROWs	Duration in Years		
		Average	Median	Range
<b>2001-2005</b>				
Term of Expiring ROW	12	48	50	20-50
Term of Renewed ROW	12	31	25	20-50
<b>Full</b>				
Term of Expiring ROW	20	43	50	20-50
Term of Renewed ROW	20	28	25	10-50

1  
 2 In the next table, EEI compares the “fair market value” of land associated with existing ROWs to  
 3 the cost paid for that ROW. EEI defines the term “fair market value” as the “economic (i.e.,  
 4 competitive) value of the land.”<sup>200</sup> To arrive at this “fair market value,” EEI calculated the  
 5 market value of the land. In that calculation, EEI took into account the variation in terms of years  
 6 of the renewals and whether the market value of the energy ROW was presented in a survey  
 7 response as fee simple or easement.

8  
 9 Energy ROW prices were adjusted by EEI to reflect a usable life of 50 years. For example, a 25-  
 10 year renewal compensated at \$2 million was normalized to \$4 million for 50 years. When land  
 11 value was presented in a survey as fee simple, it was discounted by 50 percent in one calculation  
 12 and 70 percent in another to obtain the easement value.

13  
 14 On the basis of a 50 percent discount, EEI calculated the average multiple of market value was  
 15 31 for energy ROWs renewed within the last five years; the average multiple was 21 on the basis  
 16 of a 70 percent discount. The average multiples for the full data set were 115 on the basis of the  
 17 50 percent discount and 83 on the basis of the 70 percent discount. When an outlier (1,624 times  
 18 the market value) was dropped from the full data set, the average multiples were 31 and 23,  
 19 respectively. These averages, medians, and ranges of multiples of market value for energy ROW  
 20 renewals are presented in Table 2.

Data Set	Number of ROWs	Multiple of Market Value of 50% / 70%		
		Average	Median	Range
<b>2001-2005</b>	12	31 / 22	8 / 6	1-150 / 1-107
<b>Full</b>	19	115 / 83	12 / 8	1-1,625 / 1-1,161
<b>Full minus outlier</b>	18	31 / 23	10 / 7	1-150 / 1-107

22  
 23 EEI reported that of the 12 energy ROW renewals completed within the past five years, when  
 24 easements were assessed at 50 percent of the fee simple value, the market value was paid in two  
 25 cases, was between 2 and 4 times the market value in four cases, and was between 11 and 25

1 times in three cases; also, in three cases, compensation was between 65 and 150 times market  
 2 value. When the easement value was assessed at 50 percent of the fee simple value for the full  
 3 data set, the market value was paid in two cases, was between 2 and 4 times in five cases, and  
 4 was between 11 and 25 times in five cases; also, in five cases, compensation was between 65 and  
 5 1,625 times market value.

6  
 7 The EEI survey requested information on the methodologies used to establish the value of the  
 8 ROW renewal. In the full data set, EEI reported that tribal negotiators sought renewal fees based  
 9 on build around costs in five cases, throughput was used in one instance, and in three cases the  
 10 valuation sought was based on other recent ROW renewals. For the ROWs renewed in the 2001-  
 11 2005 period, build around costs were sought in two cases, throughput was requested once, and  
 12 recent ROW renewals were used as the basis in two cases.

13  
 14 Another measure of energy ROW renewals used by EEI was per mile cost. EEI reported that the  
 15 traditional all-inclusive cost (i.e., ROW and construction) of high-voltage, overhead transmission  
 16 facilities are about \$500,000 per mile for rural land and about \$1 million per mile for suburban  
 17 land. Lower-voltage transmission and distribution lines generally are hundreds of thousands of  
 18 dollars per mile.<sup>201</sup> EEI clarified that the all-inclusive cost estimates are based on easements in  
 19 perpetuity and not temporary permits on tribal land.<sup>202</sup>

20  
 21 EEI reported that the average per-mile cost of ROW renewals was \$893,700 for respondents in  
 22 the 2001–2006 data set and \$727,400 for respondents in the full data set. When per-mile costs  
 23 are normalized over a 50-year term, the average is \$1,494,900 for renewals in the past five years  
 24 and \$1,366,000 for renewals in the full data set. Additional data on per-mile costs of renewals is  
 25 provided in Table 3.

26

Data Set	Number of ROWs	Per-Mile Cost (\$)		
		Average	Median	Range
<b>2001-2005</b>				
Unadjusted	11	893,700	140,500	12,800–7,300,000
Normalized	11	1,494,900	280,900	12,800–10,400,000
<b>Full</b>				
Unadjusted	18	727,400	146,200	12,800–7,300,000
Normalized	18	1,366,000	318,900	12,800–10,400,000

27  
 28 When information was available on the compensation paid for the energy ROW preceding the  
 29 renewal described in the survey response, EEI calculated the multiple of the renewal price to the  
 30 preceding price. Table 4 conveys the results of that analysis. As EEI pointed out in its report, the  
 31 findings in Table 4 are based on relatively few data points.

32

Data Set	Number of ROWs	Multiple		
		Average	Median	Range

**Table 4 ROW Renewal Cost as Multiple of Previous ROW Cost**

Data Set	Number of ROWs	Multiple		
		Average	Median	Range
2001–2005	5	779	227	18–2,767
Full	11	863	227	10–3,812

1  
2  
3  
4

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

**Table 5 ROW Renewal Negotiation Periods**

Data Set	Number of ROWs	Months		
		Average	Median	Range
2001–2005	12	23	13	6-102
Full	20	25	14	6-102

5  
6  
7  
8  
9  
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11  
12  
13  
14  
15  
16  
17  
18

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

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

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

#### 19 **9.4.2. Interstate Natural Gas Association of America**

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

23  
24 INGAA reports that several members chose not to become involved in the survey, either out of  
25 concern that their participation could have an impact on present or future negotiations with tribes  
26 or because there was not sufficient time to gather the requested information. INGAA also states  
27 that members were reluctant to participate in the survey because the information sought was  
28 highly sensitive business information, was subject to a confidentiality agreement, or could be  
29 used by tribes as a starting point for negotiations.

30  
31 Six INGAA companies and one non-INGAA member, a products pipeline company, submitted  
32 survey information on a total of 20 energy ROWs on tribal land involving 15 different tribes in  
33 11 states.

1  
2 At INGAA's request the Departments verified its use of survey data. As in the case of the EEI  
3 survey, this verification consisted of comparing INGAA's survey responses with information in  
4 the source documents submitted by participating companies. It was also not feasible to verify the  
5 accuracy or completeness of the source documents. In addition, because of concerns regarding  
6 the confidentiality of data, not all the companies that submitted survey information supplied  
7 source documents for the independent assessment.

8  
9 The verification of the relevant documents confirmed the following findings that INGAA  
10 included in its report:

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

19  
20  
21 Three of the five case studies volunteered by EPNG for the INGAA report are summarized  
22 below. The information in these case studies has been verified through source documents  
23 provided by El Paso. The two remaining El Paso case studies described in the INGAA comments  
24 were summarized previously in Sections 8.4.2 and 8.4.4.

25  
26 In 1993, the easement for the Plains to Gallup Crossover Line — two 30-inch, 56-mile natural  
27 gas pipelines that cross the Laguna Indian Reservation and move gas from the Permian Basin to  
28 the San Juan Basin — was appraised at a value of \$300 per acre. The negotiated settlement for a  
29 20-year ROW renewal was approximately \$7,000 per acre.

30  
31 Similarly, EPNG's negotiated settlement for a 20-year ROW renewal for 23 miles of the  
32 Crossover Line that crosses the Acoma Indian Reservation reached almost \$7,000 per acre.  
33 EPNG reported the land was appraised at \$300 per acre.

34  
35 Since it began its business relationship with the Gila River Indian Community (GRIC) of  
36 Arizona in the 1930s with a 10-inch pipeline that covered 20 miles of GRIC land, EPNG  
37 acquired additional easements and now has more than 100 miles of pipeline on the land. In 1987,  
38 EPNG and GRIC negotiated an easement that would renew the ROWs for all EPNG facilities on  
39 the tribal land with a common expiration date of December 31, 1994. An approved GRIC  
40 appraiser initially appraised the easement at \$130,000 but modified it to \$260,000. The final  
41 negotiated agreement was \$3.2 million.

42  
43 When the ROW was renewed in 1994, EPNG paid \$3.588 million for a 10-year renewal. In  
44 2004, the company paid \$5.2 million for an additional 10-year renewal in addition to payments  
45 for administrative costs, a scholarship fund, and an education fund.

46

1 INGAA included the following comment, which was not verified through source documents, in  
2 its May 15, 2006 submission: tribes generally began negotiations by requesting terms of less than  
3 20 years and that few respondents were satisfied with the negotiations.  
4

5 INGAA also included the results of a 1998 survey in its submission for the Section 1813 study.  
6 That survey is not described here because it did not differentiate between tribal and allotted lands  
7 and it included data from Canada and from ROWs other than those for oil and natural gas  
8 pipelines and electric transmission lines — the subjects of this report. Similarly, the case studies  
9 included in the INGAA report that were volunteered by a non-INGAA member are not  
10 summarized here because the company is a products pipeline company.  
11

## 12 **9.5. Other Case Study Reports Submitted by the Parties**

13 The following examples of historic rates of compensation for energy ROWs on tribal land were  
14 selected from among several submissions by tribes and the federal power marketing  
15 administrations. The following case studies were chosen for inclusion because they were fairly  
16 complete or they addressed issues raised in the Section 1813 study, including valuation methods  
17 and conflict adjudication processes.  
18

19 Due to limited time and resources, only the case volunteered by Bonneville Power  
20 Administration was verified. The other cases included in this section are only a summary of the  
21 submittal by individual participants and were not subject to verification by the Departments.

### 22 **9.5.1. Bonneville Power Administration**

23 In 1978, DOE's Bonneville Power Administration (BPA) entered into an agreement with the  
24 Confederated Tribes of the Warm Springs Reservation of Oregon that provides BPA with  
25 perpetual easements for an additional-width energy ROW as well as opportunities for two future  
26 ROWs totaling a width of not more than 747.5 feet. Documentation indicates that BPA paid at  
27 least five times market value for the additional-width ROW.  
28

29 One of the future ROWs would accommodate moving BPA's existing transmission line  
30 approximately 12 miles if the tribe exercised that option. Compensation for the future corridors  
31 would be negotiated consistent with prevailing economic conditions and market values.  
32

33 Pursuant to the terms of the 1978 agreement, if BPA and the tribe were unable to agree on the  
34 proper compensation for the ROW, it would be determined by arbitration. Each party would  
35 select an arbitrator, and then these two arbitrators would select a third one. If the two arbitrators  
36 were unable to agree on a third, either party could request the Chief Judge of the United States  
37 District Court for the District of Oregon to appoint the third impartial arbitrator. Thereafter, the  
38 three arbitrators would meet in formal session to hear and receive evidence from the parties  
39 concerning the compensation for the ROW. The decision of the arbitrators as to the amount of  
40 compensation would be binding on both parties.

### 1 **9.5.2. The Hopi Tribe**

2 The Hopi Reservation has the second lowest percentage of households with access to electricity  
3 in the United States: 29% of reservation residents live without electricity, as opposed to the  
4 national average of approximately 1%.<sup>203</sup>

5  
6 The major provider of electrical services in Arizona has a 500-kV transmission line ROW across  
7 the Hopi Reservation. Under the original 25-year term of the agreement, the Tribe was paid a  
8 total of \$755.00 for an approximately 50-mile ROW. In their submittal, the Hopi state that  
9 “Though there is some debate between the Tribe and the electrical provider whether the original  
10 agreement was automatically renewable at the same compensation at the end of the first 25 years,  
11 the electricity has continued to flow uninterrupted.”<sup>204</sup>

12  
13 The transmission line does not provide any electricity to Hopi Reservation residents. However,  
14 the Tribe, to encourage electrification, foregoes compensation from the electric provider for  
15 ROWs providing electrical service to the reservation. Often the Tribe pays to have these  
16 distribution lines extended pursuant to the energy provider’s policy that extensions can be  
17 charged to users on a per-foot basis.

18  
19 Thus, the Tribe reported that it has been paid a total of \$1,510 for a 50-year, 50-mile  
20 transmission ROW that supplies electric power to millions while supplying none to the Hopi,  
21 foregoes fees on other ROWs to supply power to its residents’ homes, and sometimes pays for  
22 the necessary extension for those distribution lines.<sup>205</sup>

23  
24 APS, the holder of the ROW for the 500-kV line, stated that ROW is 97.53 miles in length and  
25 that it paid the Hopi Tribe \$755.00 per mile for a total payment of \$36,818.33. The resolutions  
26 approving the ROW and payment state that the second payment for the second 25-year term will  
27 be an amount equal to the first payment. APS subsequently sent payments totaling \$38,137.17.<sup>206</sup>

28  
29 APS also stated that the 500-kV line does not provide electricity to any Arizona residents  
30 because 100% of the capacity of the line is owned by SCE.

### 31 **9.5.3. Pueblo of Santa Ana**

32 In the 1980s, the Pueblo of Santa Ana negotiated 20-year ROWs for a 12-inch natural gas  
33 pipeline and a 30-inch gas pipeline at an acre-per-year compensation of approximately \$356.42  
34 and \$143.65, respectively. Both ROWs included terms for an automatic renewal for an additional  
35 20-year term, with compensation based on the rate of inflation. When the renewals occurred, the  
36 ROW compensation came to approximately \$697.56 and \$271.66, respectively.<sup>207</sup>

### 37 **9.5.4. San Xavier District of the Tohono O’Odham Nation**

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

43

1 The District and its allottees were offered \$1.76 per square foot for the land between those  
2 easements, and the width of the easement was reduced from 60 to 30 feet. The power line has  
3 been constructed, but negotiations for appropriate compensation continue.<sup>208</sup>  
4

#### 5 **9.5.5. Shoshone-Bannock Tribes of the Fort Hall Reservation**

6 The Fort Hall Reservation has 19 electric transmission lines and 3 natural gas pipelines on its  
7 545,000 acres. One of the earliest energy ROWs was the 50-year, 1941 grant to the Utah Power  
8 Company for a 26-mile transmission line. Negotiations for the ROW were conducted between  
9 the BIA and the company and led to a damage assessment of \$6.00 per pole and a proposed  
10 \$5.00 per mile annual rental fee. The Tribes received \$177.00 in damages; records do not  
11 confirm that the per-mile annual rental fee was ever paid.  
12

13 The transmission line ROW expired in 1991. The company did not request its renewal until 2001  
14 when, in response to an Idaho Public Utilities Commission hearing on Utah Power's proposed  
15 merger with another company, the Tribes testified that the company was in trespass. Within a  
16 week of the hearing the company filed a renewal which was approved, for a 20-year term, after a  
17 brief period of negotiations for an undisclosed fee.<sup>209</sup>  
18

19 Two electric transmission line ROWs on the Reservation are held in perpetuity. The fees for  
20 these ROWs were \$15,050 for a 138 kV line and \$33,950 for a 345 kV line. The former ROW is  
21 15.28 acres and the latter is 183.56 acres.<sup>210</sup>

#### 22 **9.5.6. Ute Indian Tribe of the Uintah and Ouray Reservation**

23 In addition to the case studies prepared by HRA and summarized in Section 5.4.1, the Northern  
24 Ute submitted additional examples of the Tribe's more recent practices in consenting to energy  
25 ROWs.<sup>211</sup> Each of the case studies involved situations in which energy companies had existing  
26 energy facilities on a ROW but with new negotiations for access. Negotiations were needed to  
27 resolve disputed instances of trespass or remedy disputes over past performance under existing  
28 agreements. All negotiations resulted in agreements on renewals or replacement agreements. In  
29 addition, the agreements expanded the scale and the scope of the Tribe's and the companies'  
30 energy-related activities on the Reservation.  
31

32 In one case, the Tribe and the energy company developed several incentives to accomplish their  
33 mutual business objectives: (1) throughput fees of five cents per mcf for a ROW renewal, (2)  
34 capacity priority position for the Tribe's royalty in-kind gas, (3) an overriding royalty to provide  
35 a ROW for each well location; (4) a commercial right for the Tribe to participate in any pipeline  
36 expansion and a right to participate in any new drilling in the area, and (5) preferential  
37 transportation cost for any third-party commercial gas.  
38

39 In another case, the Tribe offered an energy company a concession agreement which would  
40 allow the company to manage all its ROWs on the Reservation under one master agreement. The  
41 fee for the concession agreement had a floor and ceiling to be reset based on a specified index.  
42 The parties agreed that binding arbitration would be used for certain disputes if they could not

1 resolve them amicably. The Tribe granted a limited waiver of sovereign immunity and agreed to  
2 submit to jurisdiction of outside legal courts for enforcement of arbitration awards.  
3

4 Through negotiations in a third case the Tribe was able to resolve several long-standing disputes,  
5 maintain throughput as the basis for a ROW renewal, and increase its energy development  
6 opportunities. Though characterized as “tough” negotiations, the outcomes created partnerships  
7 and aligned the parties’ economic interests.  
8

### 9 **9.5.7. Rosebud Sioux Tribe**

10 In 1974 and 1976 the BIA signed easements for a 15-mile 115-kV transmission line through the  
11 Rosebud Sioux Reservation. Despite statutory provisions<sup>212</sup> that ROWs over reservation lands  
12 are not to exceed a period of 50 years, the ROWs were granted in perpetuity.  
13

14 The Tribal Council consented to the ROWs on the understanding that the transmission line  
15 would supply an additional source of electric energy throughout the area which would benefit the  
16 Reservation. The fees for the 1974 and 1976 ROWs were \$14,484.00 and \$10,520.00,  
17 respectively, to be paid to the Tribe and the individual land owners whose property the ROWs  
18 crossed. The Tribe does not have documentation of appraisals made for the ROWs or distribution  
19 of payments for them.<sup>213</sup>

1  
2  
3  
4  
5

## **Appendix A**

The document, *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006*, is an appendix to this draft report. The document is available on the public website, <http://1813.anl.gov>.

1  
2  
3  
4  
5  
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10

## **Appendix B**

### **EPAct Section 1813 Study Commenters**

(“Commenter” is defined here as someone who submitted a comment in writing to the Departments. It does not include verbal comments made in pre-scoping telephone calls or at public meetings or government-to-government meetings)

Affiliated Tribes of Northwest Indians  
Agua Caliente Band of Cahuilla Indians  
Ak Chin Indian Community Council  
Andrews Davis Corporation  
Appraisal Institute  
Arizona Corporation Commission  
Arizona Public Service Company  
Arizona Tribal Energy Association  
Arkansas Riverbed Authority  
Association of Oil Pipe Lines  
Association of Property Owners and Residents of the Port Madison Area  
Augustine Band of Cahuilla Indians  
Avista Utilities  
Bill Barret Corporation  
Birdbear, C  
Blackfeet Nation  
Blackfeet Tribal Business Council  
Burton, Steven  
Chambers, Reid  
Cheyenne River Sioux Tribe  
City of Toppenish (William Rogers)  
Colorado Office of Consumer Counsel  
Colorado River Indian Tribes  
Confederated Salish and Kootenai Tribes of the Flathead Nation  
Confederated Tribes of the Colville Reservation  
Confederated Tribes of the Umatilla Indian Reservation  
Confederated Tribes of the Warm Springs Reservation of Oregon  
Coquille Indian Tribe  
Cornell, Stephen  
Council of Energy Resource Tribes  
Dawson, Marlene  
Eastern Shoshone Tribe  
Edison Electric Institute  
El Paso Natural Gas Company  
Fair Access to Energy Coalition  
Fallon Paiute-Shoshone Tribe  
Fond du Lac Reservation Business Committee  
Frye, Paul  
Governor Bill Owens (Colorado)  
Governor Bill Richardson (New Mexico)  
Harvey, Carol  
Havens, Bill  
Hopi Tribe  
Hualapai Nation  
Idaho Power Company  
Interstate Natural Gas Association of America  
Intertribal Monitoring Association on Indian Trust Funds

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Jemez Pueblo  
Jicarilla Apache Nation  
Kinder Morgan Energy Partners  
Kiowa Tribe  
Kooros, Ahmed  
Lac Courte Oreillies Band of Lake Superior Ojibwe  
Leech Lake Band of Ojibwe  
Mandan, Hidatsa and Arikara Nation  
Manzanita Band of Diegueno Mission Indians  
Manzanita Band of Mission Indians  
Marek, Joanna F.  
Meloy, Charles  
Montana Wyoming Tribal Leaders Council  
Morongo Band of Mission Indians  
National Congress of American Indians  
Navajo Nation  
New Mexico Oil and Gas Association  
Nez Perce Tribe  
Nighthorse Campbell, Honorable Ben  
Oneida Tribe  
Organized Village of Kake  
Paul, Chris A.  
Pechanga Band of Luiseno Mission Indians  
Plains Pipeline  
Public Service Company of New Mexico  
Pueblo de San Ildefonso  
Pueblo of Acoma  
Pueblo of Isleta  
Pueblo of Jemez  
Pueblo of Laguna  
Pueblo of San Felipe  
Pueblo of Sandia  
Pueblo of Santa Ana  
Pueblo of Zia  
Quechen Indian Tribe  
Questar Southern Trails Pipeline Company  
Quileute Indian Tribe  
Rosebud Sioux Tribe  
Sac and Fox Nation  
Sachau, B.  
Salt River Pima-Maricopa Indian Community  
Salt River Project  
San Diego Gas & Electric/Southern Cal Gas Co  
San Xavier District of the Tohono O'odham Nation  
Santa Clara Pueblo

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Sempra Energy  
Senate Chamber, State of Colorado  
Senator Wayne Allard (Colorado)  
Seneca Nation of Indians  
Shipps, Thomas H.  
Shoshone Business Council  
Shoshone-Bannock Tribes  
Skokomish Indian Tribe  
Southern Ute Indian Tribe  
St. Regis Mohawk Tribe  
Tanana Chiefs Council  
Taos Pueblo  
TDX Power (Ron Philemonoff)  
Three Affiliated Tribes  
Tohono O'odham Nation  
Town of Aurelius (Edward Ide)  
Tribal Council of the Northern Cheyenne Tribe  
Tribes of the Mni Sose Intertribal Water Rights Coalition  
Tulalip Tribes  
Ute Energy  
Ute Indian Tribe of the Uintah and Ouray Reservation  
Ute Mountain Ute  
Western Business Roundtable  
White Mountain Apache Tribe  
Yakima Nation  
Zuni Tribe

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## 1 ENDNOTES

<sup>1</sup> *See, e.g.*, Comments of the Edison Electric Institute 5-6 (Sept. 4, 2006); Comments of the FAIR Coalition 19 (Sept. 4, 2006).

<sup>2</sup> Comments of the FAIR Coalition 19 (Sept. 4, 2006).

<sup>3</sup> *Id.*

<sup>4</sup> Comments of the Edison Electric Institute 6 (Sept. 4, 2006).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Comments of the FAIR Coalition 21 (Sept. 4, 2006).

<sup>8</sup> Comments of the Isleta, Zia, and Sandia Pueblos 6 (Sept. 1, 2006).

<sup>9</sup> *Id.* (emphasis in the original).

<sup>10</sup> Public Testimony of the Jicarilla Apache Nation 1 (Mar 7-8, 2006)

<sup>11</sup> *Id.*

<sup>12</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 19 (May 11, 2006) (emphasis in the original).

<sup>13</sup> Comments Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes and the Pueblo of Zia 13 (Jan. 20, 2006).

<sup>14</sup> *Id.* (citing U.S. Dep't of Energy, Energy Consumption and Renewable Energy Development Potential on Indian Lands ix (April 2000) (*available at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/ilands.pdf> (using information from the 1990 Decennial Census)*).

<sup>15</sup> *Id.* at 14 (citing U.S. Dep't of Commerce, Bureau of the Census Statistical Brief Housing of American Indians on Reservations - Equipment and Fuels 3, Table (April 1995) (*available at [http://www.census.gov/apsd/www/statbrief/sb95\\_11.pdf](http://www.census.gov/apsd/www/statbrief/sb95_11.pdf)*)).

<sup>16</sup> *Id.* at 12.

<sup>17</sup> National Energy Policy Development Group, National Energy Policy, viii (May 2001).

<sup>18</sup> *Id.* at vii.

<sup>19</sup> *Id.* at 7-1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 7-7 and 7-8.

<sup>22</sup> *Id.* at 7-5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 7-6.

<sup>25</sup> *Id.* at 7-7 and 7-8.

<sup>26</sup> *Id.* at 7-12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 7-9.

<sup>31</sup> *Id.* at 7-8 to 7-9.

<sup>32</sup> *Id.* at 7-9.

<sup>33</sup> 16 U.S.C. § 824p.

<sup>34</sup> 16 U.S.C. § 824p (a)(2).

<sup>35</sup> 42 U.S.C. § 15926 (a).

<sup>36</sup> 42 U.S.C. § 15926 (b)

<sup>37</sup> 42 U.S.C. § 15926 (d).

<sup>38</sup> 16 U.S.C. § 824p (e).

<sup>39</sup> 25 U.S.C. § 3502.

<sup>40</sup> 25 U.S.C. § 3504 (e)

<sup>41</sup> 25 U.S.C. § 3504 (b).

<sup>42</sup> 25 U.S.C. § 3504 (a) and (b).

<sup>43</sup> 71 Fed. Reg. 48626.

<sup>44</sup> 25 U.S.C. § 3504 (c).

<sup>45</sup> Indian Right-of-Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323–328.

<sup>46</sup> The primary allotment act, the General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388, authorized the President to allot portions of tribal lands to individual Indians. Individual allotments were to remain in trust for a period of years, allowing the individual time to assimilate, and then would be conveyed in fee to the individual. Tribal lands not assigned to individuals were to be sold as surplus lands. The primary effect of the General Allotment Act was a reduction of Indian held land, for a variety of reasons, from 138 million acres in 1887 to 48 million in 1934. Federal policy reversed course with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, which ended allotment and restored the status of tribal lands. *See* William C. Canby, Jr., *American Indian Law in a Nutshell* 19-25 (2<sup>nd</sup> ed. 1988).

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

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

<sup>49</sup> Comments of Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, Three Affiliated Tribes 6 (April 29, 2006).

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

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

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

<sup>53</sup> *See, e.g.*, Comments of the Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and Three Affiliated Tribes 3-6 (April 29, 2006) (citations omitted).

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

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

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

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

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

<sup>59</sup> Comments of the Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and Three Affiliated Tribes, Sept. 4, 2006

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

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

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

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

<sup>64</sup> 25 U.S.C. § 321.

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

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

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

<sup>68</sup> 25 U.S.C. § 323.

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

<sup>70</sup> 25 U.S.C. § 324.

<sup>71</sup> 25 U.S.C. § 326.

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

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

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

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

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

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

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

<sup>79</sup> 25 U.S.C. § 461.

<sup>80</sup> 25 U.S.C. § 450a.

<sup>81</sup> *Id.* at § 450(a)(2).

<sup>82</sup> 25 U.S.C. § 3502.

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

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

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

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

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

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

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

<sup>90</sup> *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108, 110-111 (D. Mont. 1958).

<sup>91</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 214 (Aug. 2005 ed.).

<sup>92</sup> FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 104 (1941) (footnotes omitted) (citing to 25 U.S.C. §§ 311–322 and historical regulations at 25 C.F.R. §§ 256.24, 256.53, and 256.83).

<sup>93</sup> A trust relationship may arise when the United States is required by statute to manage or operate Indian lands or resources. *See United States v. Mitchell*, 463 U.S. 206 (1983) (specific duties defined by statute and regulation). In order for a trust to exist the three common-law elements of a trust must be present: a trustee (the United States), a beneficiary, and a corpus (timber, lands, funds, etc.).

<sup>94</sup> 25 C.F.R. § 169.12.

<sup>95</sup> Comments of the Confederated Salish and Kootenai Tribes of the Flathead Nation 2 (April 25, 2006).

<sup>96</sup> Comments of the Shoshone-Bannock Tribes 8 (May 12, 2006).

<sup>97</sup> In the case of the Ute Indian Tribe of the Uintah and Ouray Reservation, HRA prepared the request memorandum during the site visit. For the other reservations, the request was circulated prior to HRA’s visit.

<sup>98</sup> 33 Fed. Reg. 19807 (Section 161.12).

<sup>99</sup> *See, e.g.*, Comments of FAIR Access to Energy Coalition 2 (May 15, 2006); Comments of Edison Electric Institute 14 (May 15, 2006); Comments of Interstate Natural Gas Association of America 12 (May 15, 2006).

<sup>100</sup> *See, e.g.*, Comments of Interstate Natural Gas Association of America 2 (May 15, 2006).

<sup>101</sup> Comments of the Edison Electric Institute 14 (May 15, 2006).

<sup>102</sup> Comments of FAIR Access to Energy Coalition 2 (May 15, 2006).

<sup>103</sup> Comments of Idaho Power Company 3 (Feb. 15, 2006).

<sup>104</sup> Comments of FAIR Access to Energy Coalition 5 (May 15, 2006).

<sup>105</sup> *See, e.g.*, Comments of Edison Electric Institute 10-11 (May 15, 2006); Comments of Interstate Natural Gas Association of America 2 (May 15, 2006)

<sup>106</sup> Comments of FAIR Access to Energy Coalition 2-3 (May 15, 2006).

<sup>107</sup> *Id.* at 7-10.

<sup>108</sup> *See, e.g.*, Comments of Idaho Power Company 4 (Feb. 15, 2006); Comments of Edison Electric Institute 14 (May 15, 2006).

<sup>109</sup> *See, e.g.*, Comments of Idaho Power Company 4 (Feb. 15, 2006); Comments of Edison Electric Institute 10 (May 15, 2006).

<sup>110</sup> Comments of Interstate Natural Gas Association of America 9 (May 15, 2006).

<sup>111</sup> *See, e.g.*, Comments of the Quechan Indian Tribe 1-2 (May 15, 2006); Comments of The Confederated Tribes of the Warm Springs Reservation of Oregon 7 (May 15, 2006).

<sup>112</sup> *See generally* Comments of the Jicarilla Apache Nation, 17-21 (May 12, 2006).

<sup>113</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 3 (May 15, 2006); Comments of the Jicarilla Apache Nation, 18-19 (May 12, 2006); Comments of Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes and the Pueblo of Zia 3-7 (Jan. 20, 2006).

<sup>114</sup> *See, e.g.*, *Id.*; Comments of The Confederated Tribes of the Warm Springs Reservation of Oregon 3 (May 15, 2006).

<sup>115</sup> *See, e.g.*, Comments of Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes and the Pueblo of Zia 3-7 (Jan. 20, 2006).

<sup>116</sup> *See, e.g.*, Comments of the Pechanga Band of Luiseño Mission Indians 5 (May 15, 2006).

<sup>117</sup> *See generally* Seneca Leasing Act of 1950, 64 Stat. 442 (Act of Aug. 14, 1950) and Seneca Nation Land Claims Settlement Act of 1990, 25 U.S.C. § 1774.

<sup>118</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 16 (May 15, 2006).

<sup>119</sup> Comments of the Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and Three Affiliated Tribes, Sept. 4, 2006

<sup>120</sup> Municipal Administrative Services, Inc., 5 and 7 (May 12, 2006) (submitted with comments of the Navajo Nation (May 13, 2006)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2.

<sup>123</sup> *See, e.g.*, Comments of the Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and Three Affiliated Tribes 6 (April 29, 2006) (citing *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989)); Comments Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes and the Pueblo of Zia 24 (Jan. 20, 2006).

<sup>124</sup> *See, e.g.*, Comments of the Pechanga Band of Luiseño Mission Indians 7 (May 15, 2006); Comments of the Shoshone-Bannock Tribes 15 (May 12, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 3 (May 15, 2006); Comments of the Jicarilla Apache Nation, 13-14 (May 12, 2006).

<sup>125</sup> *See, e.g.*, Comments of the Southern Ute Indian Tribe 5-6 (May 15, 2006); comments of the Affiliated Tribes of Northwest Indians Economic Development Corporation 8 (May 14, 2006).

<sup>126</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 6-7 (May 15, 2006); Comments of the Jicarilla Apache Nation, 18-19 (May 12, 2006); Comments of the Shoshone-Bannock Tribes 9 (May 12, 2006).

<sup>127</sup> *See, e.g.*, Comments of the Southern Ute Indian Tribe 5-6 (May 15, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 9 (May 15, 2006).

<sup>128</sup> WINNING NEGOTIATIONS THAT PRESERVE RELATIONSHIPS 3 (Harvard Business School Press, 2004)

<sup>129</sup> Uniform Appraisal Standards for Federal Land Acquisitions 30 (5<sup>th</sup> ed. 2000).

<sup>130</sup> *See generally* Uniform Standards of Professional Appraisal Practice, Standard 1: Real Property Appraisal, Development (July 1, 2006) (*available at* <http://commerce.appraisalfoundation.org/html/2006%20USPAP/toc.htm>)

<sup>131</sup> Comments of Sempra Energy 2 (May 15, 2006).

<sup>132</sup> Comments of the Edison Electric Institute 5 (May 15, 2006).

<sup>133</sup> *See generally* Comments of Interstate Natural Gas Association of America (May 15, 2006); Comments of the Edison Electric Institute (May 15, 2006).

<sup>134</sup> Comments of the Edison Electric Institute 12 (May 15, 2006 and Sept. 4, 2006).

<sup>135</sup> Comments of the Edison Electric Institute 8 (June 21, 2006); Comments of Interstate Natural Gas Association of America 8-10 (May 15, 2006).

<sup>136</sup> Comments of the Edison Electric Institute 8 (May 15, 2006).

<sup>137</sup> Comments of the Shoshone-Bannock Tribes 9 and 15 (May 12, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 6-7 (May 15, 2006); Comments of the Ute Mountain Ute Tribe 2 (May 15, 2006); Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 87 (May 11, 2006).

<sup>138</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 67 (May 11, 2006).

<sup>139</sup> Comments of the Ute Mountain Ute Tribe 3 (May 15, 2006).

<sup>140</sup> Dale M. Nesbitt, Altos Management Partners, Inc., Impacts on Natural Gas Markets of Charges Assessed for Tribal Rights-of-Way in the Southwestern United States 4 (May 15, 2006) (submitted with comments of the Southern Ute Indian Tribe (May 15, 2006)).

<sup>141</sup> *Id.*

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- <sup>142</sup> Charles J. Cicchetti, Pacific Economics Group, The Economic Implications of Navajo Right of Way Fees 8 (May 15, 2006) (submitted with comments of the Navajo Nation (May 13, 2006)).
- <sup>143</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 36-46 (May 11, 2006).
- <sup>144</sup> Id.
- <sup>145</sup> Comments of the FAIR Access to Energy Coalition 9 (June 16, 2006).
- <sup>146</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 47-50 (May 11, 2006).
- <sup>147</sup> Testimony of Federal Energy Regulatory Comm'n Chairman Joseph Kelliher, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, summary and 6 (Nov. 2, 2005).
- <sup>148</sup> Energy Information Administration, Dep't of Energy, Annual Energy Outlook 147 (2006)
- <sup>149</sup> Testimony of Philip D. Wright, Williams Pipeline Company, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, 2 (Nov. 2, 2005).
- <sup>150</sup> The Brattle Group, Why are Electricity Prices Increasing? 10 (June 2006) (percentages calculated from operation and maintenance costs shown in Figure 2-1) (*available at* <http://www.eei.org>).
- <sup>151</sup> Comments of the Edison Electric Institute 5 (May 15, 2006).
- <sup>152</sup> *See, e.g.*, Comments of the Shoshone-Bannock Tribes 15 (May 12, 2006).
- <sup>153</sup> *See, e.g.*, Comments of the Edison Electric Institute 2 (May 15, 2006); Comments of Interstate Natural Gas Association of America 3 (May 15, 2006); Comments of Idaho Power Company 2 (May 15, 2006).
- <sup>154</sup> Comments of Idaho Power Company 2 (May 15, 2006).
- <sup>155</sup> Comments of Interstate Natural Gas Association of America 3 (May 15, 2006).
- <sup>156</sup> Comments of the Edison Electric Institute 5 (May 15, 2006).
- <sup>157</sup> Id. At 5 n. 2 (citing 5 U.S.C. §§ 551(8) and 558(c), as interpreted by *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499, 506 (D.C. Cir. 1980); *Miami MDS Co. v. Federal Communications Comm'n*, 14 F.3d 658, 659-60 (D.C. Cir. 1994); and *Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency*, 859 F.2d 156, 213 (D.C. Cir. 1988)).
- <sup>158</sup> *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 8 (May 15, 2006); Comments of the Jicarilla Apache Nation 13 (May 15, 2006).
- <sup>159</sup> *See, e.g.*, Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 74 (May 11, 2006).
- <sup>160</sup> Comments of Edison Electric Institute 3 (Sept. 4, 2006);
- <sup>161</sup> *See, e.g.* Comments of Questar Southern Trails Pipeline Company 2 (May 15, 2006); Comments of Bill Barrett Corporation 1 (March 8, 2006).
- <sup>162</sup> The Brattle Group, Why are Electricity Prices Increasing? (June 2006) (*available at* <http://www.eei.org>).
- <sup>163</sup> National Commission on Energy Policy, Siting Critical Energy Infrastructure (June 2006) (*available at* <http://www.energycommission.org>)
- <sup>164</sup> The Brattle Group, Why are Electricity Prices Increasing? 9 (June 2006) (*available at* <http://www.eei.org>).
- <sup>165</sup> Id.
- <sup>166</sup> Id. at 52.
- <sup>167</sup> Id. at 52-55.
- <sup>168</sup> Id. at 64.
- <sup>169</sup> National Commission on Energy Policy, Siting Critical Energy Infrastructure 18 (June 2006) (*available at* <http://www.energycommission.org>)
- <sup>170</sup> Id.
- <sup>171</sup> Id.
- <sup>172</sup> Id.
- <sup>173</sup> Comments of the Edison Electric Institute 12 (May 15, 2006).
- <sup>174</sup> *See, e.g.*, Comments of Western Business Roundtable 1 (Jan. 20, 2006); Comments of Idaho Power Company 2 (May 15, 2006); Comments of Edison Electric Institute 13 (May 15, 2006); Comments of Interstate Natural Gas Association of America 3 (May 15, 2006).
- <sup>175</sup> Comments of the Edison Electric Institute 5 (Sept. 4, 2006)
- <sup>176</sup> Comments of the New Mexico Oil and Gas Association 1 (Jan. 20, 2006).
- <sup>177</sup> Comments of the Bill Barrett Corporation 2 (Mar. 8, 2006).
- <sup>178</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 61-62 (May 11, 2006).
- <sup>179</sup> Comments of the Southern Ute Indian Tribe 4 (May 15, 2006).
- <sup>180</sup> Id. at 8.
- <sup>181</sup> Comment of Edison Electric Institute, pg 4, (September 4, 2006)
- <sup>182</sup> Comments of Interstate Natural Gas Association, pg 4, (Sept. 3, 2006)

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- <sup>183</sup> Comment of Edison Electric Institute, pg 10, (Sept. 4, 2006)
- <sup>184</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation, 109, (May 11, 2006)
- <sup>185</sup> Comments of Greenberg Traurig, pg 2, (Oct. 11, 2006)
- <sup>186</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs”).
- <sup>187</sup> See *United States v. Celestine*, 215 U.S. 278, 285 (1909); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978); *United States v. Dion*, 476 U.S. 734, 738-39 (1986); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
- <sup>188</sup> See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Dion*, 476 U.S. 734, 738-39 (1986); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
- <sup>189</sup> Page 50 of the HRA Report states that the Tribe assigned operation of 21 acquired wells to Red Willow and retained royalty interests in 30 other wells. The Tribe states that it retained royalty interests on all wells operated by Red Willow on the Reservation. Comments of the Southern Ute Indian Tribe 6 (Sept. 2, 2006).
- <sup>190</sup> Comments of the Morongo Band of the Mission Indians 6 (Sept. 3, 2006). (the unit of measure stated in the HRA Report is acres but should be miles.)
- <sup>191</sup> Comments of the Morongo Band of the Mission Indians 6 (Sept. 3, 2006). (the unit of measure stated in the HRA Report is acres but should be miles.)
- <sup>192</sup> Comments of the Navajo Nation 8 (Sept. 1, 2006).
- <sup>193</sup> Id. At 9. Page 113 of the HRA Report states that the Navajo Nation had refused all offers to develop its energy reserves from 1978 to 2003. The Navajo Nation states that it granted rights to 254,000 acres to Chuska Energy Company for oil and gas exploration and development under an operating agreement signed in 1987 and had prior agreements with the company in 1983 and 1984.
- <sup>194</sup> Historical Research Associates, Inc., *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands - 1948-2006* 123 (July 7, 2006).
- <sup>195</sup> Comments of Arizona Public Service Company 2-3 (Sept. 3, 2006).
- <sup>196</sup> Historical Research Associates, Inc., *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands - 1948-2006* 125 (July 7, 2006).
- <sup>197</sup> Comments of the Navajo Nation 7-8 (Sept. 1, 2006).
- <sup>198</sup> Id. at 8.
- <sup>199</sup> Id.
- <sup>200</sup> Comments of the Edison Electric Institute 6 (May 15, 2006).
- <sup>201</sup> Id. at 9 (May 15, 2006).
- <sup>202</sup> Comments of the Edison Electric Institute 17 (Sept. 4, 2006).
- <sup>203</sup> U.S. Dep’t of Energy, *Energy Consumption and Renewable Energy Development Potential on Indian Lands*, (2000) (available at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html>.)
- <sup>204</sup> Comments of the Hopi Tribe 3 (May 14, 2006).
- <sup>205</sup> Id.
- <sup>206</sup> Comments of Arizona Public Service Company 3-4 (Sept. 3, 2006).
- <sup>207</sup> Comments of the Pueblo of Santa Ana 3 (May 15, 2006).
- <sup>208</sup> Comments of the San Xavier District of the Tohono O’odham Nation 1 (May 15, 2006).
- <sup>209</sup> Comments of the Shoshone-Bannock Tribes of the Fort Hall Reservation 9 (May 12, 2006).
- <sup>210</sup> Comments of the Shoshone-Bannock Tribes of the Fort Hall Reservation attachment (May 12, 2006).
- <sup>211</sup> Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 77-85 (May 11, 2006).
- <sup>212</sup> 43 U.S.C. § 961.6.
- <sup>213</sup> Comments of the Rosebud Sioux Tribe 3-6 (May 15, 2006).