

DRAFT REPORT TO CONGRESS:
ENERGY POLICY ACT OF 2005, SECTION 1813,
INDIAN LAND RIGHTS-OF-WAY STUDY

U.S. Department of Energy
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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
EI	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
MOU	memorandum of understanding
NOG	Navajo Nation Oil and Gas Company
OIWA	Oklahoma Indian Welfare Act
Pub. L.	Public Law
ROW	right-of-way
SCE	Southern California Edison

SEC	Securities and Exchange Commission
S. Rept	Senate Report
Stat	<i>U.S. Statutes at Large</i>
U.S.	United States
U.S.C	<i>United States Code</i>
USPAP	Uniform Standards of Professional Appraisal Practices
ZR	zone rent

Units of Measure

kV	kilovolt(s)
mcf	thousand cubic feet

Executive Summary

[The executive summary for the final report will be prepared after receiving comments on the draft report.]

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 (EPAct).

In this Introduction, the Departments begin by explaining their effort to set study parameters to best comply with Congress' mandate in Section 1813. The Departments also present a summary of comments received in consultation with interested tribes, energy companies, associations, interest groups, and other governmental representatives.

In Section 2 of the report, the Departments present an assessment of the statutory and regulatory foundations for seeking an energy right-of-way (ROW) on tribal land and the implications of this process for tribal sovereignty and self-determination.

In Section 3 of the report, the Departments present an analysis of national energy transportation policies relevant to energy ROWs on tribal lands. This analysis provides an additional foundation for understanding the principles of tribal sovereignty and self-determination in the context of national energy transportation on tribal lands.

Based on these assessments, and taking into consideration issues present in energy ROW negotiations, the Departments then present a range of options for consideration by tribes, energy companies, and Congress regarding procedures for energy ROW negotiations and standards for determining fair and appropriate compensation for energy ROWs on tribal lands.

Finally, the Departments provide a summary of the data and information collected for historic and current rates of compensation for energy ROWs on tribal land. The data and information were gathered through case studies and from survey information collected by others.

1.1. Statutory Language of Section 1813

Section 1813(a)(1) of EPAct requires the Departments to jointly conduct a study of issues regarding grants, expansions, and renewals of energy ROWs on tribal lands. Section 1813(a)(2) further requires the Departments 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:

- (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 Sections 5, 4, 2, and 3, respectively. The report is organized in this manner because the analysis of tribal sovereignty, self-determination, and energy policy issues, set the context for discussion of standards and procedures for determining fair and appropriate compensation for energy ROWs on tribal lands.

1.2. Scope of Section 1813

The language of Section 1813 presents a very broad field of study. Potentially, Section 1813 encompasses hundreds of tribes and thousands of different types of energy ROWs on tribal lands over the entire course of the federal relationship with Indian tribes.

To focus on the core issues in the time available to conduct the study, the Departments clarified and narrowed the terms of the study. In doing this, the Departments relied heavily on the body of comments from Indian tribes, energy companies, associations, state and local governments, and interest groups. The Departments' intent was to address the core issues raised by Congress.

First, Section 1813 requires "an analysis of historic rates of compensation paid for energy rights-of-way on tribal land." Given the limited time and resources available to conduct the study, as well as the confidential nature of energy ROW agreements, the Departments determined that the most feasible approach for an analysis of historic rates was to rely on case studies of energy ROWs, supplemented by voluntary surveys of tribal and energy groups. The Departments received many comments on this approach. Tribes and tribal associations (tribal parties) commented that a case study approach would seriously limit the Departments' ability to get a full understanding of energy ROWs on tribal lands, in particular, historic negotiations with tribes for energy ROWs. Tribes also noted that this approach would fail to account for numerous ROWs that lacked documentation or compensation agreements. Energy companies, trade associations, and interest groups (industry parties) were generally comfortable with a study plan that relied on case studies.

After careful consideration of these comments, the Departments reaffirmed the decision to rely on case studies and voluntary survey information as the most feasible option for completing the study in the time allotted while also managing confidentiality issues. The Departments acknowledge that the data included in this report do not constitute a comprehensive review of rates paid for energy ROWs on tribal lands. The Departments also acknowledge that the case study approach may tend to focus on the more complicated or contentious examples of energy ROW negotiations. Moreover, as many tribes reported in their comments, the case study approach can represent only a few of the thousands of energy ROWs on tribal lands, many of which were successfully granted, renewed, or expanded.

Second, the definition of tribal lands provided by Section 1813 requires clarification. "Tribal lands" is defined, by reference to EPAct, Section 503, which amends Section 2601 of the Energy Policy Act of 1992, as "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 laws of the United States." In conducting this study, the Departments found that it was important to clarify

to the participants that this definition does not include energy ROWs on tribal fee lands, individual Indian trust allotments, or individual Indian fee lands.¹

Third, clarification of the term “energy rights-of-way” is also needed. This term is not defined in Section 1813, is very broad, and could encompass many different types of ROWs. In comments for the Section 1813 report, the Jicarilla Apache Nation listed some of the types of energy ROWs that could potentially fall within the scope of this term:

- Local gas gathering pipelines from wells to transmission line tie-in points with the gas field,
- Intrastate gas transmission lines from gathering system tie-in points to processing plants,
- Intrastate and interstate gas transmission pipelines from gas processing plants to an industrial end user or gas distribution system,
- Local gas distribution system pipelines (the consumer delivery system),
- Local oil gathering lines from wells to transmission line tie-in points to a refinery,
- Intrastate oil transmission lines from gathering system tie-in points to a refinery,
- Intrastate and interstate refined products pipelines from a refinery to distribution terminals,
- Intrastate and interstate high-voltage electric power lines from a generating station to transformer stations,
- Local low-voltage electric power lines to consumers,
- Coal slurry pipelines,
- Roads for hauling oil from wellhead storage tanks to a refinery, and
- Roads for hauling coal from a mine to a coal-burning facility.²

The term “energy right-of-way” could also include a variety of railroad lines carrying energy products across tribal lands.

While all these different ROWs pertain to energy, they are not necessarily comparable. As explained in Section 2, different types of energy ROWs may derive from slightly different statutory authority. In addition, the economics, environmental impacts, federal oversight, and service requirements for each type of energy ROW are very different. Because the range of energy ROWs on tribal lands is so extensive, the Departments determined that a more limited examination was required to successfully complete this report.

The Departments therefore focused the scope of the Section 1813 study to electric transmission lines, and natural gas and oil pipelines. The study includes ROWs associated with interstate

¹ Federal policy regarding Indian land holding has varied over the history of the federal-tribal relationship. The majority of Indian lands are now held as tribal trust lands and are the focus of this study. The General Allotment Act of 1887 created tribal and individual allotted lands, many of which are still present. Many tribes have also purchased lands in fee, sometimes to recover lands lost through allotment. These lands may be held in fee, or transferred to trust status through regulations at 25 C.F.R. Part 151.

² Comments of the Jicarilla Apache Nation 11-12 (May 12, 2006).

transit and local distribution. The Departments selected these energy ROWs for study because of the number of interested parties that discussed these types of ROWs, the availability of information on them, and the nature of their role in delivering energy resources to consumers.

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

1.3. Issues Raised in Scoping the Study

The Departments held two nationwide public meetings in March and April 2006 to solicit comments from stakeholders on the scope of the study. The dates and times of these meetings were published in the *Federal Register*. 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>).

In the course of the two public meetings and through submission of written comments by interested groups and individuals, hundreds of study participants raised issues related to the Section 1813 study. The Departments received 144 sets of written comments from 100 commenters, including 53 tribes, 7 tribal associations, 14 energy companies, 4 energy trade associations, 5 state or local governments, 2 interest groups, and 15 individuals or other commenters.

The following common themes surfaced in the course of scoping the study:

- Tribal sovereignty and its inherent connectedness to the statutory and regulatory requirements of tribal consent in energy ROW matters,
- Importance of tribal self-determination policies in advancing oversight of energy ROWs and expanding energy production,
- Rising costs of energy ROW renewals, and
- Trends toward shorter term lengths (in years) for ROWs and longer negotiation periods.

1.3.1. Tribal Sovereignty, Consent, and Self-Determination

As an overarching issue, nearly all parties from all perspectives recognized the inherent sovereignty of Indian tribes and supported federal policies of tribal self-determination. Tribal parties emphasized the federal government's recognition of their inherent sovereignty through treaties, legislation, Supreme Court decisions, Executive Orders, and ongoing interactions between the federal government and tribes. Paraphrasing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW,³ one tribal party referred to the "long-standing principle of federal Indian law that Indian tribes possess inherent sovereignty," which "exists in the tribe itself" and "does not derive

³ See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 204–220 (Aug. 2005 ed).

from the federal government.”⁴ Referring to the tribal consent provisions in existing ROW statutes and regulations, many tribal parties commented that tribal consent is a manifestation of tribes’ sovereign authority to determine the terms of access to tribal lands.⁵ Tribal parties commented on the interrelatedness of sovereignty, the federal policy of tribal self-determination, and tribal governmental functions.⁶ Representatives from the energy industry also voiced their recognition of tribal sovereignty.⁷

Several tribal parties noted that tribal governments perform the responsibilities of sovereigns by providing services such as education, health care, environmental protection, sanitation, and law enforcement but, for practical purposes, are unable to raise revenues through taxation as other sovereigns are able to do. In addition, consistent with the goals of the federal self-determination policy, tribal parties described the development of governing capacity that is necessitated by managing ROWs, and is supported by energy ROW fees. Several tribal parties stated that energy ROW management activities require high levels of staff time and tribal resources.⁸ For example, the need for tribal governmental capacity to deal with energy ROWs was evident when a natural gas pipeline exploded on the Confederated Tribes of the Umatilla Reservation in 1999. The Tribe’s police, fire, and emergency response personnel responded to the blast and assisted in containing the damage and investigating the cause of the explosion.⁹

Tribal parties also commented that tribal governmental involvement is necessary to prevent harm to reservation resources. In particular, tribal parties noted that sovereignty and governmental capacity were critical to protect tribal natural and cultural resources, and tribal sacred sites.¹⁰

1.3.2. Increasing Costs of Energy ROWs

Several energy industry parties indicated that the statutory and regulatory requirement that tribes consent to energy ROWs on tribal lands resulted in increased energy ROW costs, including costs from longer negotiation periods.¹¹ Industry parties expressed concern about the increasing cost of energy ROWs and the implications of those rising costs for energy companies and consumers. Industry parties noted concern about the increasing costs of energy ROW renewals because of energy companies’ investment in existing facilities and the potential for regulatory constraints against abandoning an energy line.¹²

⁴ Comments of Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, Three Affiliated Tribes 6 (April 29, 2006).

⁵ *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).

⁶ *See, e.g.*, Comments of the Council of Energy Resource Tribes and National Congress of American Indians 2 (Jan. 20, 2006).

⁷ *See, e.g.*, Statement of New Mexico Oil & Gas Association 2 (April 18, 2006); Comments of the Edison Electric Institute 2 (May 15, 2006).

⁸ *See, e.g.*, Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 67 (May 11, 2006).

⁹ Comments of the Confederated Tribes of the Umatilla Indian Reservation 4 (Jan. 6, 2006).

¹⁰ *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).

¹¹ *See generally*, Comments of Interstate Natural Gas Association of America (May 15, 2006); Comments of the Edison Electric Institute (May 15, 2006).

¹² Comments of the Edison Electric Institute 8 (May 15, 2006).

Member surveys and case studies conducted by the Edison Electric Institute (EEI) and Interstate Natural Gas Association of America (INGAA) provided information on the increase in prices for energy ROW renewals.¹³

1.3.3. Decreasing Energy ROW Term of Years and Increasing Negotiation Periods

Industry parties generally noted that the terms of years for energy ROWs are decreasing but that the ROW negotiation times are increasing. Industry parties pointed out that shorter energy ROW terms and longer negotiation periods increase the ROW-related administrative costs to both industry and tribes. These factors also “add to the uncertainty which utilities must consider in their investment and planning processes.”¹⁴

Tribal parties also commented on the length of negotiations. One tribe observed that negotiations took from six months to eight years, but that most of the time, the parties worked in good faith to resolve their differences. Tribal parties noted that each energy ROW over tribal lands has unique characteristics that can affect negotiation times. For example, the particular energy ROW may:

- traverse large, compact, contiguous tracts of land;
- impact lands of cultural or religious significance;
- affect agricultural lands;
- provide utility services to reservation residents;
- involve a large number of individual landowners; or
- require an environmental assessment.¹⁵

One energy company representative noted the efficiency of negotiating with tribes for energy ROWs, stating that while the company could readily obtain ROWs for exploration and production operations on tribal lands, “the overall time required to bring gas to market, inclusive of obtaining Rights of Way for gathering systems, is a fraction of the time required on Federal surface.”¹⁶

1.3.4. Uncertainty in Energy ROW Negotiations

Many industry parties commented that the exercise of tribal sovereignty and consent to energy ROWs, in the absence of a uniform and measurable standard for valuing ROWs, creates a high degree of uncertainty for the nation’s energy infrastructure and consumer’s energy costs.¹⁷

On the other hand, tribal parties made it clear that changes to tribal sovereignty and their ability to consent to energy ROWs through imposition of a standard valuation method would result in great uncertainty about a tribe’s ability to exercise self-determination and to manage its energy resources.

¹³ Comments of the Edison Electric Institute 8 (June 21, 2006); Comments of Interstate Natural Gas Association of America 8-10 (May 15, 2006).

¹⁴ Comments of the Edison Electric Institute 5 (May 15, 2006).

¹⁵ *See, e.g.*, Comments of the Shoshone-Bannock Tribes 15 (May 12, 2006).

¹⁶ Comments of the Bill Barrett Corporation 1 (Mar. 8, 2006).

¹⁷ *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).

1.3.5. Investments in Infrastructure

Industry parties commented that financial institutions and rating agencies could view shorter energy ROW term of years, longer negotiation periods, and escalating energy ROW rates as a “risk” to the industry. The perception of such a risk by financial institutions could “adversely affect the cost of the capital needed to build new generation and transmission infrastructure....”¹⁸ Moreover, industry parties noted that excessive energy ROW fees and other access costs associated with tribal lands generally discourage expansion of, and investment in, existing facilities on those lands thereby reducing job-creation and development opportunities for tribes.¹⁹

One industry party commented, however, that risks in the energy industry were widespread and could come from financial markets and national and international policies, in addition to fluctuating prices, supply, and demand which contribute to the volatile nature of the industry.²⁰ Another energy company also noted that the Section 1813 study itself, and concern about changes in the law, created uncertainty.²¹

To gauge the level of business risk in the energy industry that is related to interactions with tribes, a consultant for one tribal party reviewed Security and Exchange Commission (SEC) filings and notations of risk in those filings.²² Among the 18 western companies studied from 2001 to 2005, the consultant found that in most years all of these energy companies faced challenges associated with energy infrastructure construction and/or operation. However, the consultant found that over the five-year period, only three companies ever characterized the negotiation – or renegotiation – of tribal ROWs as a material issue in annual reports to the SEC.

Tribal parties also generally commented that energy production and the number of ROW grants on their reservations are increasing or consistent with earlier levels. One tribal party presented data on the number of natural gas pipeline and electric transmission ROWs granted on their lands since 1980 to illustrate that the granting of energy ROWs continued at earlier rates or grew with some fluctuation depending on economic cycles.²³ Another tribal party commented that over the last twenty years they have successfully concluded negotiations for grants or renewals of interstate pipelines with El Paso Natural Gas Company, Northwest Pipeline Company (Williams), TransColorado, Transwestern, and Mid-America Pipeline Company.²⁴

Tribal parties also noted that innovative energy ROW agreements have led to expansion of energy investment and resources on their reservations. In one case, these agreements added about 1.7 trillion cubic feet to the nation’s supply of natural gas.²⁵

¹⁸ Comments of the Edison Electric Institute 12 (May 15, 2006).

¹⁹ *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).

²⁰ Comments of the New Mexico Oil and Gas Association 1 (Jan. 20, 2006).

²¹ Comments of the Bill Barrett Corporation 2 (Mar. 8, 2006).

²² Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 47-50 (May 11, 2006).

²³ *Id.* at 61-62.

²⁴ Comments of the Southern Ute Indian Tribe 4 (May 15, 2006).

²⁵ *Id.* at 8.

1.3.6. Potential for Uncertainty Related to Trespass Situations

Industry parties expressed concern about the possibility that energy ROW agreements could expire, leaving energy facilities in trespass. A trade association raised concerns that members found in trespass could have access to their facilities curtailed or blocked, thereby limiting their ability to conduct maintenance on lines and other facilities.²⁶ This trade association also noted, however, that the Administrative Procedure Act and three federal court rulings protect a timely ROW renewal applicant from actual trespass.²⁷

Tribal parties stated that the industry parties pointed to no specific instances in which the statutory and regulatory requirements for tribal consent or delays in energy ROW renewals resulted in disruptions in energy delivery or threatened the reliability of the system.²⁸ Tribal parties noted that they have never evicted an energy company with an expired ROW or required a company to remove its energy infrastructure from tribal lands. Instead, tribal parties commented that tribes should be fully compensated for trespass situations. Tribal parties also commented that they have not and will not disrupt the transportation of energy supplies, and viewed trespass situations as an opportunity to create opportunities for improved long-term business relationships.²⁹

1.3.7. Cost to Consumers

Industry parties expressed concern that escalating energy ROW fees and negotiation costs will raise customers' energy costs. An energy company, noting that 70 percent of its natural gas comes from two major supply companies with infrastructure on tribal lands, indicated that its natural gas ratepayers could be negatively impacted by unreasonable energy ROW fees paid by interstate pipeline companies.³⁰ A trade association also contended that energy ROW renewals resulted in tens of millions of dollars in additional costs to its member utilities and their customers.³¹

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

Using the Altos North American Regional Gas model, an energy analyst found that energy ROW costs on tribal lands had no impact on downstream markets. The analyst stated that energy ROW charges on pipelines traversing tribal lands in the southwestern United States would induce a volumetric tariff difference of \$0.02/mcf (thousand cubic feet) for all pipelines emanating from or traversing the greater San Juan/Four Corners area and have zero discernible effect on market

²⁶ Comments of the Edison Electric Institute 5 (May 15, 2006).

²⁷ *Id.*, citing 5 U.S.C. §§ 551(8) and 558(c), as interpreted by *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499, 506 (D.C. Cir. 1980); *Miami MDS Co. v. Federal Communications Comm'n*, 14 F.3d 658, 659-60 (D.C. Cir. 1994); and *Natural Resources Defense Council, Inc. v. United States Env'tl. Protection Agency*, 859 F.2d 156, 213 (D.C. Cir. 1988).

²⁸ *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).

²⁹ *See, e.g.*, Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 74 (May 11, 2006).

³⁰ Comments of Sempra Energy 2 (May 15, 2006).

³¹ Comments of the Edison Electric Institute 12 (May 15, 2006).

prices.³² The analyst concluded that the tribal energy ROW costs do not impact downstream markets at all.³³

A second tribally commissioned study, using published reports of the Navajo Nation's proposed ROW fee for the El Paso Natural Gas (EPNG) network, determined that the potential impact on downstream consumers in Arizona, California, and Nevada would be between \$0.40 and \$0.60 per year for the average residential user if the ROW fee is spread over EPNG's total pipeline system. The cost would be between \$0.58 and \$0.85 per year if the Tribe's ROW cost is passed directly to the consumers in these downstream states.³⁴

And, a third tribally contracted study sought to determine what percentage of a consumer's bill is attributable to energy ROW costs for electric transmission lines and natural gas pipelines on tribal lands. The study first determined the percentage of energy costs that are attributable ROW fees generally, and then estimated the portion of these costs attributable to ROWs on tribal lands. The study concluded that for the average homeowner tribal ROW costs amounted to between \$0.01 and \$0.06 per month for electricity and between \$0.001 and \$0.016 per month for natural gas.³⁵

An economic analysis of energy ROW compensation presented by an interest group, however, stated that if residential customers fully bear the cost increases associated with energy ROW renewal fees for all 95 tribal ROWs under the jurisdiction of a gas and electric utility of New Mexico, those customers could see their electric rates increase as much as 5 percent.³⁶

Industry parties also commented that consumer energy prices could increase because of increased negotiation costs, in particular, potential trespass damages levied against utilities. A trade association commented that trespass penalties could add hundreds of thousands, or even millions, of dollars in additional costs to the utility and its customers but provided no specific data or actual instances of such a problem.³⁷

1.3.8. Standards for Valuing Energy ROWs on Tribal Land

Industry parties stated that concerns about the impacts of energy ROWs on infrastructure reliability and consumer energy costs could be alleviated through imposition of an "objective, consistent, transparent, and uniform standard for valuing" energy ROWs on tribal land.³⁸ One trade association suggested that compensation on tribal lands should be based on objective assessments of comparable, nearby land value, the nature of use, and location of the energy ROW.³⁹ An interest group suggested that fair market value would be an appropriate standard for

³² 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)].

³³ Id.

³⁴ 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)].

³⁵ Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 36-46 (May 11, 2006).

³⁶ Comments of the FAIR Access to Energy Coalition 9 (June 16, 2006).

³⁷ Comments of the Edison Electric Institute 5 (May 15, 2006).

³⁸ See, e.g., Comments of Interstate Natural Gas Association of America 2 (May 15, 2006).

³⁹ Comments of the Edison Electric Institute 14 (May 15, 2006).

valuing energy ROWs on tribal land citing it as the nationally recognized standard for determining compensation for interests in land required for the public good.⁴⁰

These suggested standards are similar to those used in eminent domain proceedings. Indeed, one utility company stated that without an eminent domain alternative there are few, if any, limits to the amount of compensation discussed in negotiations between tribes and utilities.⁴¹

Tribal parties observed that imposing a standard valuation method and mandating its acceptance would constitute an exercise of eminent domain that cannot apply to lands reserved for tribal use. Tribal parties asserted that condemning tribal lands for private energy purposes violates the “exclusive use” provision of many treaties, the federal government’s trust responsibility to the tribes and the promise that tribal lands and tribal reservations will remain under the control and beneficial ownership of the tribes.⁴² Tribal parties also commented that traditional land appraisal techniques do not recognize that tribal lands can not be bought and sold in an open market.

Citing the uniqueness of tribal lands and particular tribal circumstances, tribes voiced their support for maintaining the present negotiating process. Tribal parties stated that negotiation between a tribe and an energy company is an appropriate basis for determining energy ROW valuation because, like other governments, tribes have sovereign responsibilities and must appropriately manage its resources for the benefit of its people.⁴³ Finally, tribal parties stated that proposals for uniform valuation techniques were regressive and similar to discredited federal Indian policies.⁴⁴

⁴⁰ Comments of FAIR Access to Energy Coalition 2 (May 15, 2006).

⁴¹ Idaho Power Company 3 (Feb. 15, 2006).

⁴² *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).

⁴³ *See, e.g.*, Comments of the Pechanga Band of Luiseño Mission Indians 5 (May 15, 2006).

⁴⁴ *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 16 (May 15, 2006).

2. Negotiations for Energy ROWs on Tribal Land and the Implications for Tribal Self-Determination and Sovereignty

2.1. Statutory Background

The history of statutes governing energy and other types of ROWs over tribal land can be divided into three major periods. During the first phase, lasting roughly from the 1880s to 1899, Congress authorized ROWs by enacting a specific statute for each particular ROW. In the second phase, beginning in 1899, Congress began to pass acts concerning categories of ROWs, such as those for the purpose of building railroad lines. The current phase began in 1948 with promulgation of the principal statute governing ROWs across tribal lands, commonly called the General Right-of-Way Act or the Indian Right-of-Way Act (1948 Act).⁴⁵

During the first phase, the last two decades of the 19th century, Congress passed more than 100 separate laws granting specific ROWs on Indian reservations. These early statutes primarily involved easements for railroads and telegraph and telephone lines. Generally they required the company obtaining the ROW to pay damages or compensation as determined by the Secretary of the Interior. The acts also sometimes required that Indian consent be obtained for the ROW or the amount of ROW compensation.⁴⁶

In 1899, in the second phase, Congress ended the practice of passing a separate statute for each ROW over Indian land and instead gave the Secretary of the Interior general authority to grant ROWs for railroads and telegraph and telephone lines.⁴⁷ Companies needing ROWs across Indian land no longer had to seek Congressional authorization but rather applied directly to the Secretary of the Interior, who could approve the ROW if the company complied with the terms of the authorizing statute. Those terms did not include the consent of the tribe that owned the land.⁴⁸

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

The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction . . . of pipe lines for the conveyance of oil and gas through any Indian reservation . . . or through any lands which have been allotted.⁴⁹

This statute is silent with regard to tribal consent. However, the statute gave the Secretary the discretion to establish “such terms and conditions as he may deem proper” on renewals of ROWs.⁵⁰ Thus, this statute authorized tribal consent as one such term or condition, at least with regard to renewals.

⁴⁵ Act of February 5, 1948, Vol. 62, p. 17, 62 Stat. 17, codified at 25 U.S.C. §§ 323–328.

⁴⁶ 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).

⁴⁷ Act of March 2, 1899 (30 Stat. 990).

⁴⁸ *Id.*

⁴⁹ 25 U.S.C. § 321.

⁵⁰ *Id.*

On March 4, 1911, Congress gave “head of the department having jurisdiction over the lands” authority to grant ROWs for electric transmission lines across Indian reservations.⁵¹ This statute also is silent with regard to tribal consent, requiring only the approval of the “chief officer of the department under whose supervision or control such reservation falls.”⁵²

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

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes. . .⁵³

No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act and the Oklahoma Indian Welfare Act]⁵⁴ shall be made without the consent of the proper tribal officials. . .⁵⁵

Sections 323 to 328 of this title shall not in any manner amend or repeal provisions of the Federal Water Power Act. . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.⁵⁶

The consent provision in the 1948 Act is consistent with the tribal organization statutes, which confer on tribes organized under those statutes the power to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without their consent.⁵⁷ Including the consent requirement in the 1948 Act prevents implied supercession of the consent provisions of the tribal organization acts.⁵⁸ The 1948 Act also includes authority to impose conditions at the discretion of the Secretary.

Statutes on the same subject are to be construed together. The 1948 Act constitutes a comprehensive scheme for granting ROWs across Indian lands. It simplifies and unifies the earlier procedures and removes some of the confusion that resulted from the practice of enacting specific legislation for each separate type of ROW or easement.⁵⁹ The 1948 Act supplants the earlier ROW statutes but explicitly does not repeal them. When read together, the statutes

⁵¹ Act of March 4, 1911, codified at 43 U.S.C. 961.

⁵² *Id.*

⁵³ 25 U.S.C. § 323.

⁵⁴ 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.”

⁵⁵ 25 U.S.C. § 324.

⁵⁶ 25 U.S.C. § 326.

⁵⁷ 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).

⁵⁸ Senate Report (S. Rept.) 823, 80th Congress (Cong.), January 14, 1948, reprinted in 1948, U.S. Code Congressional (Cong.) Service 1033, pp. 1034–1036.

⁵⁹ *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”).

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.

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.⁶⁰

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 codify past DOI policy.⁶¹

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.”⁶² 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.

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 it 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 much stronger 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)⁶³ and the Indian Self-Determination and Education Assistance Act of 1975.⁶⁴ 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.”⁶⁵ Most recently, Title V of EPAAct directed the Departments to create Indian energy programs in accordance with “federal policies promoting Indian self-determination.”⁶⁶

Requiring the consent of a tribe before granting a ROW over its lands is in accordance with the federal policy promoting Indian self-determination. The tribal consent requirement has been virtually unchanged since 1951. It reflects a longstanding interpretation of the pertinent statutes by the agency charged with their administration.

⁶⁰ 25 C.F.R. § 256.83 (1939).

⁶¹ 16 Fed. Reg. 8578 (1951).

⁶² 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.

⁶³ 25 U. S. C. § 461.

⁶⁴ 25 U. S. C. § 450a.

⁶⁵ Id. at § 450(a)(2).

⁶⁶ 25 U. S. C. § 3502.

2.4. The Issue of Consent and Implications for Tribal Sovereignty

Many tribal parties focused on the authority of Indian tribes to consent to energy ROWs as the primary issue raised by the Section 1813 study. They strongly objected to the study as an affront to the principles of tribal sovereignty underlying the relationship between the federal government and Indian tribes. A number of tribal parties commented that thousands of energy ROWs over tribal land have been successfully negotiated and approved without disruption to energy delivery, thereby demonstrating that no changes are needed to the existing procedures.

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. A tribe's authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty — the right to govern its people, resources, and lands. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others.⁶⁷ The present right of tribes to govern their members and territories flows from a historical and preexisting independence and right to self-government that has survived, albeit in diminished form, through centuries of contact with other cultures and civilizations.

This history of tribal sovereignty forms the basis for the exercise of tribal powers today.⁶⁸ Although the United States has long recognized the sovereignty of Indian tribes as “distinct, independent, political communities” exercising the authority of self-governance,⁶⁹ the relationships between federal and state governments and tribal governments are complicated and delineated in the Constitution, treaties, legislation, Supreme Court decisions, and Executive Orders.

A tribe's determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self-determination. The implication of any reduction in the tribe's authority to make that determination is that it would reduce the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.

⁶⁷ BLACK'S LAW DICTIONARY 1402 (7th ed. 1999).

⁶⁸ FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (1982 ed.).

⁶⁹ See *Worcester v. Georgia*, 31 U.S. 515, 559 (6 Pet.), 1832.

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

The Departments' analysis of relevant national energy transportation policies relating to energy ROWs on tribal lands focuses on policy expressions regarding tribal consent for the use of tribal lands and the application of eminent domain principles to tribal lands. Although there are few national energy transportation policies that directly relate to energy ROWs on tribal lands, the few policies available directly address the issue of tribal consent. Overall, the policies put in place by Congress and the executive branch strongly support tribal decision-making regarding energy ROWs on tribal lands.

Because there are few national energy transportation policies that directly relate to energy ROWs on tribal lands, this section also considers policies that indirectly relate to energy ROWs on tribal lands or are generally applicable to energy matters affecting or involving tribes. These policies provide additional information about the role of tribal consent and of eminent domain principles. Although expressed in much more general terms, these policies support tribal decision making and tribal involvement in energy matters.

Statutes that express national energy policy concerning emergency situations are also included in this discussion as generally applicable energy policies. While the Departments have seen no evidence that tribal consent would be an issue in an emergency situation, an analysis of these emergency authorities addresses system integrity and security issues raised by some commenters

3.1. National Energy Transportation Policies Directly Relevant to Energy ROWs on Tribal Land

3.1.1. Indian Right-of-Way Act of 1948 and Implementing Regulations

As explained in Section 2.1 above, energy ROWs on tribal lands are governed by the 1948 Act.⁷⁰ Pursuant to the 1948 Act, the consent of some Indian tribes must be obtained for an energy ROWs. Section 2.2 described DOI's regulations for the 1948 Act. These regulations furthered Congress's desire to establish a uniform procedure and harmonize the 1948 Act with the prior ROW statutes. The regulations establish general procedures for ROW applications,⁷¹ ROW renewals,⁷² termination of a ROW,⁷³ and specific regulations to recognize and incorporate historical ROW statutes.⁷⁴ As pointed out earlier, the regulations require the consent of all Indian tribes, stating, "No right-of-way shall be granted over and across any tribal land . . . without the prior written consent of the tribe."⁷⁵

Indeed, most tribes conduct substantial oversight authority for energy ROWs on their lands. As described to the Departments during public scoping, tribes negotiate ROW issues such as route,

⁷⁰ Indian Right-of-Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323–328.

⁷¹ 25 C.F.R. § 169.5.

⁷² 25 C.F.R. § 169.19.

⁷³ 25 C.F.R. § 169.20.

⁷⁴ See 25 C.F.R. § 169.25 (regarding oil and gas pipelines) and § 169.27 (regarding power projects that include electric transmission lines).

⁷⁵ 25 C.F.R. § 169.3.

compensation, term, and environmental, cultural, and emergency protections pursuant to the 1948 Act.⁷⁶

Through the 1948 Act and conditions required in DOI regulations, the policy of Congress and DOI is to require tribal consent for all energy ROWs on tribal lands. Although Congress required the consent only of tribes organized under the IRA and the Oklahoma Indian Welfare Act (OIWA), DOI determined that tribal consent was necessary for all tribes. DOI's determination was later approvingly cited by Congress when it explained that the legislative history of the 1948 Act "shows no congressional intent that consent ought not to be sought from 'unorganized' tribes."⁷⁷ Moreover, as discussed below, DOI's inclusion of a uniform tribal consent requirement reflected the frequent practice of obtaining tribal consent pursuant to historical statutes and regulations.

3.1.2. Historical Energy ROW Statutes and Regulations

National energy transportation policy relating to tribal lands was implemented in a variety of approaches between the 1880s and 1940s. Of course, it should be noted that federal Indian policy during this time was shifting from the allotment era which was intended to remove tribal control of Indian lands to reorganization of tribal governments, and restoration of tribal land status.⁷⁸ As pointed out earlier, from 1880 to 1899, Congress authorized ROWs by enacting a specific statute for each particular one. Although policy expressions in these acts were not consistent, some required that tribal consent be obtained for the ROW or the amount of ROW compensation.⁷⁹

Statutes passed in 1904 and 1911 were intended to authorize particular types of energy ROWs on tribal lands and differed from the earlier acts in terms of policy direction regarding the requirement of tribal consent. First, neither of these statutes explicitly required tribal consent for an energy ROW. Second, the 1904 Act directed the Secretary of the Interior to require the establishment of "such terms and conditions as he may deem proper," but only for the renewal of gas or oil pipeline ROWs.⁸⁰ Third, the 1911 Act more broadly required that electric transmission ROWs be authorized "under general regulations to be fixed [by DOI]."⁸¹ The 1911 Act also

⁷⁶ See comments summarized in the Introduction.

⁷⁷ House of Representatives, Committee on Governmental Operations, *Disposal of Rights in Indian Tribal Lands without Tribal Consent*, 1969 (as it quotes underlying memorandum from Natural Resources and Power Subcommittee staff).

⁷⁸ 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 (2nd ed. 1988).

⁷⁹ See *e.g.*, 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.

⁸⁰ 25 U.S.C. § 321.

⁸¹ 43 U.S.C. § 961.

stated that electric transmission ROWs would be allowed on an “Indian . . . reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls.”⁸²

Nevertheless, on April 12, 1940, writing about an 1890 act, a DOI Opinion of the Solicitor stated generally, “When the United States reserves rights-of-way over Indian lands or authorizes rights-of-way to be acquired by private companies, the customary practice has been to provide for obtaining the consent of the Indians or for the payment of compensation.”⁸³ The 1941 version of Felix Cohen’s *Handbook of Federal Indian Law* described the state of the law as follows:

Congress . . . has conferred upon administrative authorities various statutory powers to alienate interests in tribal land less than fee, particularly easements and rights-of-way. Generally these statutes do not make tribal consent a condition to the validity of the alienation, but as a practical administrative matter tribal consent is frequently made a condition of the grant.⁸⁴

3.2. General Policies Relating to Energy Matters on Tribal Land

A few general policies further inform the Departments’ study of national energy transportation policies on tribal lands. These include energy emergency policies, the National Energy Policy, and goals or protocols for working with tribes. The Departments’ analysis of these expressions of policy finds a continuing pattern of working cooperatively with tribal governments and with tribal consent.

3.2.1. Emergency Authorities

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

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

⁸² 43 U.S.C. § 961.

⁸³ Opinions of the Solicitor, Application to Flathead Tribal Lands of the Act of August 30, 1890 (26 Stat. 391), April 12, 1940.

⁸⁴ 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).

3.2.2. Executive Branch Policies

In May 2001, the Administration's National Energy Policy Development Group issued a report in May 2001 entitled *National Energy Policy*. In general terms, the policy touches on at least two issues related to energy transportation on tribal lands. First the policy notes the involvement of tribes in the ROW process. Second, the policy recognizes the need to increase energy infrastructure – a significant issue for many tribes.

Chapter 7 of *The National Energy Policy* addresses national energy transportation issues and briefly notes that “tribal governments are authorized to grant rights-of-way across . . . tribal lands.” for energy resources electric transmission lines and natural gas and oil pipelines.⁸⁵ For electric transmission ROWs, the policy does not mention problems with obtaining electric transmission ROWs on tribal lands. Instead, the primary electric transmission issues the report cites are transmission bottlenecks and constraints, limited investment in transmission facilities, individual state siting authority, and limited enforcement of reliability standards.⁸⁶

The primary natural gas and oil pipeline issues raised in the *National Energy Policy* include problems associated with pipeline capacity; obtaining ROWs from federal, state, and local governments; and community resistance to pipeline construction. The report states, “[C]urrently it takes an average of four years to obtain approvals to construct a new natural gas pipeline.”⁸⁷ It is not clear whether approvals from tribal governments were included in this calculation. In addition, while it is possible that tribal communities could resist pipeline construction, as other communities do, the report does not indicate that tribal communities cause problems for natural gas transmission.

In an Overview section, the *National Energy Policy* discusses general goals and proposes modernizing and expanding the nation's energy infrastructure to raise the living standards of the American people.⁸⁸ Modernization and expansion would particularly benefit tribal communities that currently lack modern electrical and natural gas service. The Energy Information Administration, an independent statistical agency within DOE, found that 14.2% of Indian households do not have electricity, compared to 1.4% for all U.S. households.⁸⁹ And, a United States Census study reported that 16% of Indian households use utility gas to heat their homes, compared to 51% of all United States households.⁹⁰ Increasing service to these tribal communities was noted by some tribal commentators as a national energy transportation policy relevant to tribal lands.

Other general policy expressions relevant to energy matters on tribal lands are contained in Presidential Proclamations. On November 12, 2001, President Bush issued a proclamation stating that “we will protect and honor tribal sovereignty and help stimulate economic

⁸⁵ National Energy Policy Development Group, *National Energy Policy*, 7-9 (May 2001).

⁸⁶ *Id.* at 7-5 to 7-7.

⁸⁷ *Id.* at 7-12.

⁸⁸ *Id.* at xi.

⁸⁹ 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).

⁹⁰ 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/aprd/www/statbrief/sb95_11.pdf.

development in reservation communities.”⁹¹ More recently, in another proclamation, the Administration recognized the defining principles of tribal sovereignty and the right to self-determination by noting the enactment of EPAct and efforts to enhance energy opportunities and strengthen tribal economies.⁹²

Prior administrations have also generally expressed a policy of working with tribes on matters related to tribal interests, including energy matters. In an Executive Order entitled “Consultation and Coordination with Indian Tribal Governments” executive agencies are instructed to consult with Indian tribes. It states:

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

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards; and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.⁹³

The Departments each have internal policies implementing this Executive Order.

⁹¹ Presidential Proclamation 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).

⁹² Presidential Proclamation 7956, 70 Fed. Reg. 67635 (Nov. 7, 2005).

⁹³ Executive Order No. 13175, 65 Fed. Reg. 67429 (Nov. 9, 2000).

4. Issues for Stakeholder Consideration Concerning Standards and Procedures for Negotiation and Compensation for Energy ROWs on Tribal Land

4.1. Valuation Methods and Negotiations Regarding Energy ROWs on Tribal Land

Section 1813 directs the Departments to develop recommendations for appropriate standards and procedures for determining fair and appropriate compensation for energy ROWs on tribal lands. In this draft report, the Departments provide options, as opposed to recommendations, for consideration by interested participants.

In the existing statutory and regulatory process the value of a grant, expansion, or renewal of an energy ROW on tribal lands is determined through negotiations between an Indian tribe and an energy company. Valuation methods used in these negotiations include:

- methods used by municipalities
- methods used for public lands
- comparison to sales of similar lands
- valuation of land “over the fence” from the proposed ROW
- sharing of net benefits or other partnership arrangements
- cost of alternative routes
- opportunity cost
- percentage of energy throughput
- value of the land before and after the ROW
- cost of government services
- adherence to the Uniform Appraisal Standards for Federal Land Acquisitions (Federal Land Acquisition Standards), and the Uniform Standards of Professional Appraisal Practice (USPAP)

Indian tribes and energy companies may use any combination of these valuation methods, and others, in their negotiations for appropriate compensation for energy ROWs on tribal lands. This open negotiation process enables tribes to determine the terms for access to tribal lands and resources. This process is consistent with long-standing expressions of tribal sovereignty and self-determination in the federal-tribal relationship.

4.2. Summary of Comments

The Departments received a number of comments recommending and discussing different valuation methodologies used in negotiations for energy ROWs on tribal lands and elsewhere. Overall, most industry parties contended that valuation of tribal lands for energy ROWs should be based on market value principles.⁹⁴ Tribal parties 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.

⁹⁴ 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).

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

the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.⁹⁵

These market value principles are supported by the USPAP for use in real estate transactions generally.⁹⁶

Most industry parties commented that some form of market value principles should be used to determine, or at least form the basis for, appropriate compensation for energy ROWs on tribal lands. One interest group described market value principles in depth, noting that market value does not reflect the proposed use of the ROW or the value of the ROW to the acquiring government.⁹⁷ Industry parties frequently commented, however, 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.⁹⁸

Industry parties 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 Forest Service of the Department of Agriculture for determining land values for a variety of purposes, including energy ROWs.⁹⁹ 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.¹⁰⁰

Most industry parties 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

⁹⁵ Uniform Appraisal Standards for Federal Land Acquisitions 30 (5th ed. 2000).

⁹⁶ *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>)

⁹⁷ Comments of FAIR Access to Energy Coalition 5 (May 15, 2006).

⁹⁸ *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).

⁹⁹ Comments of FAIR Access to Energy Coalition 2-3 (May 15, 2006).

¹⁰⁰ *Id.* at 7-10.

objective standard for determining value.¹⁰¹ The desire for an objective standard was particularly emphasized in the case of energy ROW renewals.

In renewal situations, energy companies have existing physical assets and investments on tribal lands, and industry parties expressed concern that without an objective standard energy ROW negotiations would automatically escalate to a company's cost to build around the tribal lands containing the company's assets.¹⁰² Build-around costs could include lost revenue stream, new construction, and new ROW fees. Energy companies could also be faced with selling their existing facilities on tribal land at a reduced value if energy ROWs are not renewed.¹⁰³ Industry parties stated that the threat of incurring build-around costs causes uncertainty for existing projects and discourages future investment in tribal lands.

Tribal parties rejected market value principles as being inapplicable to tribal lands. They noted that tribal lands are not bought and sold on open markets.¹⁰⁴ Furthermore, they pointed out that tribal lands are held in trust by the federal government and are protected against alienation through treaties and other agreements which recognize tribal sovereignty over tribal lands and federal obligations to tribal property.¹⁰⁵ Tribal parties commented that one of the most vital components of their tribal sovereignty is the authority to determine access to and use of tribal lands and resources.¹⁰⁶ They cited history of the federal-tribal relationship as set out in long-standing treaties, statutes, Supreme Court opinions, and Executive Orders, for confirmation of this authority.¹⁰⁷

Several tribal parties indicated that valuation of tribal lands could be comparable to valuation methods used by municipalities because both have jurisdiction and responsibilities for providing services to members or citizens. As reported in a study prepared for one tribal party, cities such as Houston and Laredo, Texas; and Atlanta, Georgia value ROWs by linear foot.¹⁰⁸ The study also noted that franchise fees received from the use of public rights-of-way may represent a significant percentage of a city's general budget.¹⁰⁹ The valuation methods used by municipalities were reported to depend upon the purpose of the ROW and whether the ROW could accommodate other uses.¹¹⁰ Tribal parties further noted that related energy ROW fees

¹⁰¹ See, e.g., Comments of Idaho Power Company 4 (Feb. 15, 2006); Comments of Edison Electric Institute 14 (May 15, 2006).

¹⁰² See, e.g., Comments of Idaho Power Company 4 (Feb. 15, 2006); Comments of Edison Electric Institute 10 (May 15, 2006).

¹⁰³ Comments of Interstate Natural Gas Association of America 9 (May 15, 2006).

¹⁰⁴ See generally Comments of the Jicarilla Apache Nation, 17-21 (May 12, 2006).

¹⁰⁵ 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).

¹⁰⁶ See, e.g., Id.; Comments of The Confederated Tribes of the Warm Springs Reservation of Oregon 3 (May 15, 2006).

¹⁰⁷ 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).

¹⁰⁸ Municipal Administrative Services, Inc, 5 and 7 (May 12, 2006) (submitted with comments of the Navajo Nation (May 13, 2006)).

¹⁰⁹ Id.

¹¹⁰ Id. at 2.

provide the tribes with governmental revenue and that tribes, for practical reasons, are not able to tax energy resources transported across their reservation lands.¹¹¹

Tribal parties also rejected the application of any single standard for determining energy ROW compensation. They contended that a single standard could not be appropriately used to determine compensation given the variety of energy ROWs and the variety of mineral, natural, cultural, and sensitive environmental resources under their jurisdiction.¹¹² Without the flexibility to address these different factors, tribal parties and some energy companies commented that a single valuation method based on market value of the land crossed by the energy ROW would reduce participation by tribes in energy partnerships and decrease energy production and transportation on tribal lands.

Finally, tribal parties commented that calls for requiring energy ROW valuation according to market value principles were disingenuous for several reasons. First, they pointed out that energy companies entered into existing ROW agreements with the knowledge that these were limited-term agreements and that renewal of the agreements would require renegotiation.¹¹³ Second, they asserted that some energy ROWs were originally obtained for little or no compensation, and that past compensation rates are relevant to the current study.¹¹⁴ Thus, the tribal parties maintain that industry parties are essentially complaining about a change in the business environment.¹¹⁵

The aforementioned comments demonstrate that the energy industry parties and the tribal parties are very much at odds over the standards to be used for valuing energy ROWs on tribal lands. The Departments note, however, that most energy ROW negotiations are completed successfully. This is true even if the negotiations are protracted and the method for determining the value of the energy ROW results in compensation that sometimes greatly exceeds the market value of the tribal lands involved.

4.3. Scope and Nature of the Issue

Many of the industry parties interested in Section 1813 contend that the existing legal framework and practices for negotiating energy ROWs on tribal lands are problematic because the status quo creates an uncertain business climate and increases consumers' energy costs. Tribal parties contend that there is no problem with the existing legal framework and practices because energy continues to be transported across tribal lands, and there is no evidence of significant increases in costs to consumers. In this section of the report, the Departments identify the scope and nature of

¹¹¹ See, e.g., Comments of the Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and Three Affiliated Tribes 6-7 (April 29, 2006).

¹¹² 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).

¹¹³ 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).

¹¹⁴ 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).

¹¹⁵ 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).

the issue of negotiating energy ROWs on tribal land from a public interest perspective and assess its existing and potential magnitude.

Although the issue is significant for the parties, it does not appear to be consequential for the nation or consumers in general for at least four reasons. First, total energy transportation costs are a small component of overall energy costs. The Chairman of the Federal Energy Regulatory Commission (FERC) recently testified before Congress that transportation costs for natural gas and crude oil petroleum products are relatively small – the transportation component for natural gas is approximately 6 percent of its delivered cost and approximately 1 percent of the delivered cost for petroleum products.¹¹⁶ Similarly, transmission costs for electricity are in the range of 10 percent of total delivered electricity costs.¹¹⁷

Second, the fraction of energy transportation infrastructure that is on tribal lands is also small. Although some tribes require compensation for energy ROWs on their lands in excess of the lands' market value for other purposes, the effects are not large enough to have a significant effect on overall energy transportation costs and the total cost of delivered energy paid by consumers.

Third, apart from price impacts, there is no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers. The conditions cited above concerning the relatively small economic impacts of existing or potential disputes over energy ROWs on tribal lands also imply that, except in unusual geographic circumstances, the effects of any future potential ROW disputes on the reliability or security of energy supplies to consumers are also likely to be small.

Fourth, the problem may be essentially self-limiting. That is, most tribes need additional revenue sources and have reasons to seek economic development opportunities, including productive relationships with energy companies. At the same time, many energy companies have commented that they now find negotiations with tribes so difficult that with respect to new pipelines or transmission lines, they will “build around” tribal land if possible.

Having determined the scope of the issue, the Departments now turn in this report to a discussion of its nature. Although much of the commentary by the parties has focused on the appropriateness of methods for determining compensation for an energy ROW, their inability to agree on such methods appears to be a symptom of more fundamental factors impeding their ability to reach agreement on terms for ROWs on tribal lands.

The basic factor is a negotiating climate often marked by uncertainty and lack of shared objectives. Uncertainties abound when:

- energy ROWs with limited terms require renewal, but past valuation methods are unclear, undocumented, or were developed with little involvement of the tribe;
- new valuation methods lack transparency;
- the parties have widely differing cultural values;

¹¹⁶ Testimony of Chairman Joseph Kelliher, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, summary and 6 (Nov. 2, 2005).

¹¹⁷ EIA Annual Energy Outlook 2006, p. 147.

- the parties do not have comparable resources to commit to the negotiations;
- either party considers the existing relationship to have been unproductive; or
- the parties lack shared goals for the future of an energy ROW.

In this uncertain environment, negotiations can take longer, information about the energy ROW in question may be limited, the parties may feel constrained by older practices that limit creative business solutions, or the parties may lack the common ground needed to explore potential solutions.

The significance of these factors — as compared to the use of some set valuation method — is made clear by the comments of some energy companies whose representatives stated that they had no problems with the current process for obtaining an energy ROW on tribal lands. Energy companies that built productive relationships and partnerships with tribes commented that they find tribes to be fair negotiators for energy ROW valuation on tribal lands.¹¹⁸

4.4. Options to Address the Issue

To resolve and help avert concerns that could arise in the process of obtaining an energy ROW on tribal lands, the Departments have developed a range of options for consideration by the parties and Congress. A number of these options could be helpful in addressing obstacles that prevent more successful negotiations. Other options require legislative changes by Congress if it concludes that the issues associated with the existing legal framework and practices concerning energy ROW negotiations are sufficiently important to require such actions.

4.4.1. Options for Consideration by the Parties or the Departments

a. Develop comprehensive ROW inventories for tribal lands

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

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

¹¹⁸ See, e.g. Comments of Questar Southern Trails Pipeline Company 2 (May 15, 2006); Comments of Bill Barrett Corporation 1 (March 8, 2006).

b. Develop model or standard business practices for energy ROW transactions

Indian tribes, energy companies, the Departments, 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.

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

c. Broaden the scope of energy ROW negotiations

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

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

d. Develop an industry-tribal ROW institute

To facilitate the options discussed above, or for other purposes, tribes, energy companies, or other entities could establish a non-governmental energy ROW institute specifically designed to advance and support energy ROW agreements on tribal lands. The institute could be designed for the benefit of both tribes and energy companies. The institute could assist tribes with land management planning, geographic information system development, energy resource assessment, energy corridor development, and identification of environmentally or cultural sensitive areas. For energy companies seeking to do business on tribal lands, the institute could provide guidance on appropriate business practices and access to relevant environmental and cultural information concerning tribal lands. The institute could also facilitate development of standard business practices, provide training, or offer dispute resolution.

4.4.2. Options for Consideration by Congress

As discussed above, the Departments found that under existing law and regulations, difficulties arise in ROW negotiations from time to time that are sometimes very significant to the parties. At the same time, however, it appears unlikely that these difficulties could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas.

With that perspective in mind, the Departments list below a range of options that Congress could consider if it concludes that these difficulties merit a legislative solution. Some of these options would involve major changes to the long-standing relationship between the tribes and the federal government concerning tribal sovereignty and the federal policy of tribal self-determination — in particular, the principle that tribal lands should not be alienated without a tribe's consent.

These options should not be considered recommendations from the Departments.

a. Congress could elect no change, allowing ROW negotiations to continue under current laws, regulations, practices, and procedures

Many comments from tribal parties and energy companies indicate that current policies for granting and renewing energy ROWs are, in general, working. Only a small number of parties have had significant problems arriving at ROW agreements. Option (a) would continue the present practice, which allows tribes and energy companies to use their own methods for valuing a ROW and to conduct negotiations on their own terms.

b. Congress could establish a legislative clarification of tribal consent

As described earlier, part of the status quo is a DOI regulation in effect since 1951 requiring consent of the tribe before an energy ROW is authorized. Congress could emphasize the importance of tribal consent to energy ROWs by elevating it to the legislative level by enacting a new statute requiring that the consent of the tribe be obtained as a condition to the authorization of an energy ROW. Such a new statute, or an amendment to the 1948 Act, would clarify that consent is required from *all* tribes for an energy ROW across tribal land, not only tribes organized under the IRA or the OIWA. Such legislation would also constitute a strong affirmation by Congress of the principles of tribal sovereignty and self-determination..

c. Congress could authorize the federal government to determine fair compensation

Under this option, Congress could direct the executive branch to establish a federal entity to determine fair compensation *for all energy ROWs across tribal land*. This entity would be responsible for developing a valuation methodology (and the attendant regulations) to calculate fair compensation for the use of the land. However, each party (tribes or industry) would reserve the right to accept or reject the calculated value.

Various methods are available for calculating fair compensation. These include, but are not limited to, the following:

- 1) Case-by-case estimates of land value using the Uniform Appraisal Standards for Federal Land Acquisition and USPAP. These are well-known and well-understood methodologies that are used widely to determine the value of land for various purposes.

For example, in the federal land appraisal process, DOI establishes a market value for the land under consideration. The market value is the amount in cash, or terms

reasonably equivalent to cash, for which, in reasonable probability, the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell. This market value gives due consideration to all available economic uses of the property at the time of appraisal. However, the estimate of highest and best use must be an economic use. A non-economic highest and best use, such as conservation, natural lands, preservation, or any use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value under these standards.

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

- 2) Establish a ROW compensation schedule similar to that developed and currently used by the Bureau of Land Management (BLM). The BLM compensation schedule sets fair market rent for all ROWs, eliminating the need for real estate appraisals for each ROW, as well as avoiding the costs, delays, and unpredictability of the appraisal process.

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

The formula for ZR is:

$$\text{ZR} = (\text{Zone Value}) \times (\text{Impact Adjustment}) \times (\text{Price Index}) \times (\text{Treasury Security Rate})$$

where

- a. “Zone Value” is the land value that was established for the county,.
- b. “Impact Adjustment” reflects the differences in land use impacts between ROWs and other potential uses of the land (e.g., development),
- c. “Price Index” allows the rental values to increase with inflation, and
- d. “Treasury Security” reflects a reasonable rate of return to the United States for the use of the land within the ROW.

For example, the BLM has determined that Duchesne and Uintah Counties in Utah fall into Zone 2 of the ROW Rent Schedule with a Zone Value of \$100 per acre. Wasatch County, also in Utah, falls into Zone 4, with a Zone Value of \$300 per acre.

For 2006, the ZR for energy pipeline ROWs given these values is \$8.01 per acre in Duchesne and Uintah Counties and \$24.06 per acre in Wasatch County.

The BLM rate schedule would have to be adapted to tribal lands.

Whatever method a Congressionally authorized federal entity uses to determine a fair land value (Option 4.4.2.c (1) or 4.4.2.c(2)), it should represent the baseline value. A process for adjusting the fair value up or down would be specified in the regulations that implement either of these two options. Reasons for adjustment could include:

- a. Adjustment for tribal government oversight of safety, cultural, and environmental issues associated with the energy ROW. Calculations would be based on the costs to the tribal government for providing these services on tribal lands. Unlike a federal or state government, a tribal government is unable to tax facilities within the energy ROW to offset administrative costs associated with energy ROW management. The authorized federal entity would be responsible for calculating compensation adjustments on the basis of identified needs, benefits, and responsibilities.
- b. Adjustment for tribal benefits that may be derived from an energy ROW, such as access to energy resources for tribal members or tribal businesses, improvements to roads or other infrastructure, job opportunities, or training.
- c. Adjustment for the value associated with establishing an energy ROW across a large section of land in a single agreement, compared to a more piecemeal approach on non-tribal land.

d. Congress could require binding valuation

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

- 1) Requiring the parties to enter into binding arbitration conducted by a mutually approved-upon third party. The decision of the third party would not be subject to appeal. Either party could petition to invoke this procedure.
- 2) Requiring the parties to enter into binding arbitration conducted by a third party selected by Congress. This decision by the arbiter would not be subject to administrative appeal. Either party could petition to invoke this procedure.
- 3) Requiring the parties to accept fair compensation as determined by a federal entity using the strategy outlined in Option (c) above. In this case, the process would be invoked only if the parties did not reach an agreement on their own, unlike Option (c), where fair compensation for *all* energy ROWs would be determined by a federal entity.

e. Congress could specifically authorize condemnation of tribal lands for public necessity

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

The Supreme Court has recognized that, as a sovereign government, the United States must have the power of eminent domain.¹¹⁹ Eminent domain allows the United States the right to take lands that it determines are necessary for some public use.¹²⁰

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

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

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

Congress may exercise its plenary power over Indian affairs and manifest its intent to impose projects on Indian lands thereby effectuating a condemnation. Numerous district court decisions prior to the Indian Civil Rights Act and the Indian Self Determination Act have held that an appropriation act that appropriates money for a specific project will manifest a clear intent to engage in the project.¹²¹ The clear and precise intent expressed by Congress in an appropriations act, when considered with the General Condemnation Act, may furnish authority for taking land within an Indian Reservation.¹²²

¹¹⁹ United States v. Carmack, 329 U.S. 230 (1946).

¹²⁰ Id.

¹²¹ United States v. 40 Acres of Land, 162 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).

¹²² United States v 5,677.94 Acres of Land, 162 F. Supp. 108, 110-111 (D. Mont. 1958).

5. Analyses of Negotiations and Compensation Paid for Energy ROWs on Tribal Land

5.1. Background

For the reasons described in Section 1.2 above and Section 5.3 below, the Departments relied on a case study approach to shed light on past and present determinations of energy ROW compensation. The Departments recognize concerns that the case studies would be mere “snapshots in time” that did not adequately represent the context within which the ROW was granted or renewed. The Departments appreciate the efforts of tribal parties and industry parties who volunteered case studies for review, conducted ROW surveys, and submitted information on specific ROWs.

5.2. Case Study and Survey Process

The Ute Indian Tribe of the Uintah and Ouray Reservation, the Morongo Band of Mission Indians, the Southern Ute Indian Tribe, and the Navajo Nation agreed to participate in the Section 1813 study and allowed 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. The Southern Ute and Navajo Nation cases were supplemented with documents provided by El Paso Western Pipelines.

These case study reports are summarized in Section 5.4. The complete HRA report is included as an appendix to this report.

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 reviewed the source documents used to compile survey results to assess the accuracy of survey reporting. Results of those surveys are described in Section 5.5.

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 5.6.

5.3. Limitations on Historical Analysis

5.3.1. Number of Energy ROWs on Tribal Land

A complete historical analysis of energy ROW compensation on tribal lands was not possible because of the number of energy ROWs on tribal lands and the diffuse locations of ROW records. The exact number of energy ROWs on tribal land has not been calculated, but a few examples can illustrate the scope of ROWs.

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.¹²³ The Shoshone-Bannock Tribes of the Fort Hall Reservation have 22 energy ROWs: 19 for electric transmission lines and 3 for natural gas lines.¹²⁴

EI reported that its members anticipate having to renew 271 ROWs over the next 15 years.¹²⁵ The Public Service Company of New Mexico indicates that approximately 95 ROWs involving various tribes will be subject to renewal over the next 15 years.¹²⁶ These energy ROW renewals include high-voltage transmission lines, high-pressure natural gas lines, and low-level distribution and gas lines.

The historical analysis of energy ROWs on tribal land is further complicated by the diversity of locations of ROW records. Energy ROW information is held in various industry, BIA, and tribal offices across the country.

5.3.2. Difficulty of Comparing Energy ROWs

Even if compiling a complete and detailed historical inventory of energy ROWs on tribal land was possible, an analysis of compensation rates might only have marginal benefit as a result of the significant differences among energy ROWs. Even when limited to electric transmission lines and natural gas and oil pipelines, these energy ROWs have been established pursuant to a variety of legal authorities. In addition, energy ROWs vary in their duration, size, renewal rights, and valuation methods. Other factors that complicate an across-the-board analysis are the financial and environmental risks associated with specific energy ROWs, additional facilities built on or related to the energy ROW, and land use. The impacts of the energy ROW on cultural resources and areas of significance can also affect energy ROW costs. Energy ROW compensation will also differ on the basis of agreements as to who is responsible for security and emergency responses and whether the energy ROW includes tribal energy development or provision of energy services.

5.3.3. Confidentiality of Energy ROW Information

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

5.4. Formal Case Studies

As noted, 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.

¹²³ Comments of the Confederated Salish and Kootenai Tribes of the Flathead Nation 2 (April 25, 2006).

¹²⁴ Comments of the Shoshone-Bannock Tribes 8 (May 12, 2006).

¹²⁵ Comments of the Edison Electric Institute, survey addendum, 5 (June 21, 2006).

¹²⁶ Comments of the Public Service Company of New Mexico 1 (May 15, 2006).

5.4.1. 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.

a. ROW No. H62-1989-070

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

b. ROW No. H62-1978-005

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

c. ROW No. H62-1983-18

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

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

d. ROW No. H62-1992-80

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

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

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

5.4.2. Southern Ute Indian Tribe

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

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

In the 1990s, the Tribe formed the Red Willow Production Company to operate oil and gas wells and leases and the Red Cedar Gathering Company to pursue coal-bed methane gas production. By this point in time, compensation negotiations were conducted between the Tribe and energy companies, and the Tribal Council would accept or reject ROW proposals. The BIA would then

approve the ROWs to which the council consented. Appraisals were seldom done, since the Tribe established general compensation rates for particular types of ROWs.

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

a. Western Slope Gas Company

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

b. Mid-American Pipeline Company

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

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

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

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

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

c. El Paso Natural Gas Company

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

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

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

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

d. Red Cedar Gathering Company

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

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

5.4.3. Morongo Indian Reservation

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

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

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

a. ROW No. 372-Morongo-15

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

b. ROW No. 378-Morongo-143

In April 1945, representatives from the BIA and Southern California Edison (SCE) attended a general meeting of the Morongo Band to discuss SCE's plans to build a transmission line connecting Boulder Dam to Los Angeles. Two months after the meeting, the DOI granted SCE authority to construct the line. The Morongo Band, BIA, and SCE were negotiating

compensation for the ROW as the transmission line was being built. The Morongo contested BIA's appraisal of \$25 per acre.

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

The final compensation schedule for the transmission lines totaled \$6,421.50 (39 towers at \$25 per tower; \$25 per acre for dry land; \$637.50 for 2.49 acres of irrigated land) and a \$5-per-mile annual rental for an unspecified number of years. In May 1950, SCE submitted a license application to FERC's predecessor, the Federal Power Commission (FPC), for the transmission line. The 50-year license was issued in April 1954 but with a starting date of July 1, 1945.

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

c. ROW No. 378-Morongo-47

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

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

d. ROW No. 378-Morongo-277

SCE's 33-kV Banning-Palm Springs electric distribution line had been FPC-licensed since 1929. After the FPC determined that the line was no longer a primary line, SCE applied for a 25-foot, 4.02-mile ROW for the line in 1969. In keeping with its BIA-approved practice of valuing easements at 50% of market value for lines of voltages less than 220 kV, SCE offered \$7,155 for

approximately 12.19 acres. It also estimated severance damages at \$1,500. The BIA stated that the appraisal was adequate compensation but noted that nothing was constraining the Morongo Band's free-bargaining position.

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

5.4.4. Navajo Nation

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

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

The Navajo Nation Oil and Gas Company (NOG) was chartered by the Navajo Nation Council in 1998. Five years later, NOG was allowed to develop energy resources on tribal lands by granting new oil and gas leases. From 1978 to 2003, all new energy resource development offers had been refused in anticipation of the right time to exploit the Nation's resources.

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

a. Four Corners Pipeline

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

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

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

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

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

In 1998, Questar Southern Trails Pipeline Company (Questar) purchased the Four Corners pipeline with the intent to convert it from oil to natural gas. Since this change required additional construction, the 2001 agreement between Questar and the Navajo Nation to re-renew the 1981 ROW also included Navajo consent to additional ROWs for the necessary construction.

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

b. Arizona Public Service 500-kV Line

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

Final approvals for the Navajo sections of the line were granted in March 1967 for a 25-year term with an option to renew for a "like term."¹²⁷ The Navajo were involved in the approval process.

In March 1992, APS applied to renew the 500-kV ROW. It submitted a payment very similar to the one that it paid for the initial grant but also indicated its willingness to discuss other considerations for the renewal. The Navajo rejected compensation at the same rate as the initial grant and appointed a negotiation team to seek different terms. The BIA suggested that the APS appraisal of \$4.73 to \$4.76 per rod was significantly short of the "going rate," which was a minimum of \$45 per rod.¹²⁸

By late December of 1993, the Hopi Nation and the Navajo Nation were part of a confidentiality agreement with SCE to negotiate the ROW renewal. SCE was involved because it had the right to use the entire capacity of the transmission line. A task force was established in 1994 to

¹²⁷ Historical Research Associates, Inc., *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands - 1948-2006*, 123 (July 7, 2006).

¹²⁸ *Id.* at 125.

negotiate the ROW renewal with APS, SCE, the City of Los Angeles Department of Water and Power, and the Public Service Company of New Mexico.

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

c. Transwestern Pipeline Company, San Juan Line

Transwestern Pipeline Company (Transwestern) began operation of a 30-inch natural gas pipeline on the Navajo Reservation in 1960, added compression facilities in 1967, and began building loop lines in 1969. By 1980, the capacity of the Transwestern system on Navajo land was 750,000 mcf per day. Information on the initial ROW grant is not available, but it was set to expire in October 1979. Transwestern submitted a ROW renewal application to BIA in 1979, and, in the absence of a definitive response, submitted another in 1981.

It is not clear what followed, but in 1984, Transwestern and the Navajo Nation developed a memorandum of understanding (MOU) that allowed Transwestern to renew its expired ROWs and to extend its unexpired ROWs to a new expiration date of December 2003. The parties also reached agreement to an undisclosed settlement amount.

Transwestern and the Navajo Nation agreed to a subsequent MOU in 1991 that allowed the company an option to acquire 79,507 miles of additional ROWs. Under the MOU, 25% of the consideration would be paid as a nonrefundable payment with the remainder (of the fee), paid when Transwestern exercised its option to acquire ROWs, adjusted according to the CPI and the actual size of the ROWs. The MOU committed Transwestern to sell and deliver up to 3,000 mcf of natural gas to the Navajo Nation upon completion of a service agreement.

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

By May 2001, Transwestern and the Navajo Nation were unable to resolve ROW renewal terms and conditions and instead signed an agreement extending the ROWs to November 2009. Payment for the extension was to be made in an initial installment followed by six annual payments based on the CPI and adjusted upward but not decreased. The 2001 agreement was amended in 2004 to allow Transwestern to construct a new 36-inch, 21,415-rod pipeline, the easement for which will also expire in 2009.

d. El Paso Natural Gas Company, San Juan Line

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

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

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

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

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

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

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

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

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

5.5. Survey Information

Edison Electric Institute and the Interstate Natural Gas Association of America conducted surveys inquiring into their members' experiences negotiating energy ROWs on tribal lands. Reports on their survey findings are available on the 1813 Web site.

5.5.1. Edison Electric Institute

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

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

At the request of EEI, findings from the surveys were independently assessed. This assessment consisted of comparing source documents, supplied by the companies, to the survey responses and the aggregated data. EEI corrected the few differences that were found and then re-aggregated the data and revised the report. Since several of the energy ROW renewals included in the survey had occurred more than five years ago, EEI revised its report to present findings of the full data set (which included all energy ROW renewals) and the 2001–2005 data set (which included only renewals that occurred during that time span).

EEI's original and revised reports are available on the website. The following data were extracted from the revised report dated June 21, 2006, unless otherwise noted.

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

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

Table 1 Term of Years of Energy ROW Renewals and Prior Term of Years				
Data Set	Number of ROWs	Duration in Years		
		Average	Median	Range
2001-2005				
Term of Expiring ROW	12	48	50	20-50
Term of Renewed ROW	12	31	25	20-50
Full				
Term of Expiring ROW	20	43	50	20-50
Term of Renewed ROW	20	28	25	10-50

To assess the ratio of energy ROW renewal compensation to the fair market value of the land, EEI had to calculate the fair market value of the land. In that process, EEI took into account the variation in terms of years of the renewals and whether the fair market value of the energy ROW was presented in a survey response as fee simple or easement.

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

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

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

Of the 12 energy ROW renewals completed within the past five years, when easements were assessed at 50% of the fee simple value, the fair market value was paid in two cases, was between 2 and 4 times the market value in four cases, and was between 11 and 25 times in three cases; also, in three cases, compensation was between 65 and 150 times fair market value. When the easement value was assessed at 50% of the fee simple value for the full data set, the fair market value was paid in two cases, was between 2 and 4 times in five cases, and was between 11 and 25 times in five cases; also, in five cases, compensation was between 65 and 1,625 times fair market value.

When information was available on the compensation paid for the energy ROW preceding the renewal described in the survey response, EEI calculated the multiple of the renewal price to the preceding price. Table 3 conveys the results of that analysis. As EEI pointed out in its report, the findings in Table 3 are based on relatively few data points.

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

A fourth measure of energy ROW renewals was per mile cost. EEI reported that the traditional all-inclusive cost (i.e., ROW and construction) of high-voltage, overhead transmission facilities are about \$500,000 per mile for rural land and about \$1,000,000 per mile for suburban land. Lower-voltage transmission and distribution lines generally are hundreds of thousands of dollars per mile.¹²⁹

The average per-mile cost of ROW renewals was \$893,700 for respondents in the 2001-2006 data set and \$727,400 for respondents in the full data set. When per-mile costs are normalized over a 50-year term, the average is \$1,494,900 for renewals in the past five years and \$1,366,000 for renewals in the full data set. Additional data on per-mile costs of renewals is provided in Table 4.

¹²⁹ Comments of the Edison Electric Institute 9 (May 15, 2006).

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

EEI's May 15, 2006, report includes information it gathered in follow-up discussions with member companies. In contrast to the survey data, that information was not independently assessed, but it is summarized here.

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.

5.5.2. Interstate Natural Gas Association of America

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

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

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

At INGAA's request, an independent assessment of its use of survey data was conducted. Survey responses were compared to information in the source documents submitted by participating

companies. Because of concerns regarding the confidentiality of data, not all the companies that submitted survey information supplied source documents for the independent assessment.

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

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

Information was not available from the source documents to fully confirm INGAA's findings that tribes generally began negotiations by requesting terms of less than 20 years and that few respondents were satisfied with the negotiations.

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

Three of the five case studies volunteered by EPNG for the INGAA report are summarized below. The information in these case studies has been verified through source documents provided by El Paso. The two remaining El Paso case studies were summarized previously in Sections 5.4.2 and 5.4.4.

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

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

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

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

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

5.6. Other Case Studies

The following examples of historic rates of compensation for energy ROWs on tribal land were selected from among several submissions by tribes and the federal power marketing administrations. The following case studies were chosen for inclusion because they were fairly complete or they addressed issues raised in the Section 1813 study, including valuation methods and conflict adjudication processes. Because of the limited time and resources, only the case volunteered by Bonneville Power Administration was independently assessed.

5.6.1. Bonneville Power Administration

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

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

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

5.6.2. The Hopi Tribe

The Hopi Reservation has the second lowest percentage of households with access to electricity in the United States: 29% of reservation residents live without electricity, as opposed to the national average of approximately 1%.¹³⁰

The major provider of electrical services in Arizona has a 500-kV transmission line ROW across the Hopi Reservation. Under the original 25-year term of the agreement, the Tribe was paid a total of \$755.00 for an approximately 50-mile ROW. In their submittal, the Hopi state that

¹³⁰ U.S. Department of Energy, 2000, *Energy Consumption and Renewable Energy Development Potential on Indian Lands*, available at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html>.

“Though there is some debate between the Tribe and the electrical provider whether the original agreement was automatically renewable at the same compensation at the end of the first 25 years, the electricity has continued to flow uninterrupted.”¹³¹

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

Thus, the Tribe has been paid a total of \$1,510 for a 50-year, 50-mile transmission ROW that supplies electric power to millions while supplying none to the Hopi, foregoes fees on other ROWs to supply power to its residents’ homes, and sometimes pays for the necessary extension for those distribution lines.¹³²

5.6.3. Pueblo of Santa Ana

In the 1980s, the Pueblo of Santa Ana negotiated 20-year ROWs for a 12-inch natural gas pipeline and a 30-inch gas pipeline at an acre-per-year compensation of approximately \$356.42 and \$143.65, respectively. Both ROWs included terms for an automatic renewal for an additional 20-year term, with compensation based on the rate of inflation. When the renewals occurred, the ROW compensation came to approximately \$697.56 and \$271.66, respectively.¹³³

5.6.4. San Xavier District of the Tohono O’odham Nation

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

The District and its allottees were offered \$1.76 per square foot for the land between those easements, and the width of the easement was reduced from 60 to 30 feet. The power line has been constructed, but negotiations for appropriate compensation continue.¹³⁴

¹³¹ Comments of the Hopi Tribe 3 (May 14, 2006).

¹³² Id.

¹³³ Comments of the Pueblo of Santa Ana 3 (May 15, 2006).

¹³⁴ Comments of the San Xavier District of the Tohono O’odham Nation 1 (May 15, 2006).

Appendix

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>.