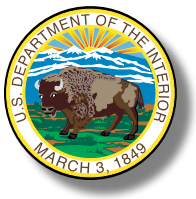
Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study

Report to Congress

May 2007

U.S. Department of Energy



U.S. Department of the Interior

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
BOR	Bureau of Reclamation
BPA	Bonneville Power Association
CEPC	California Electric Power Company
CFR	*Code of Federal Regulations*
Cong.	Congress, Congressional
CPI	consumer price index
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
EEI	Edison Electric Institute
EIA	Energy Information Administration
EPAct	Energy Policy Act of 2005
EPNG	El Paso Natural Gas Company
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FPC	Federal Power Commission
FR	*Federal Register*
GRIC	Gila River Indian Community
HRA	Historical Research Associates
INGAA	Interstate Natural Gas Association of America
IRA	Indian Reorganization Act of 1934
NEP	National Energy Policy
NEPA	National Environmental Policy Act
NPS	National Park Service
MOU	Memorandum of Understanding
NOG	Navajo Nation Oil and Gas Company

Notation (Cont.)

O&M	operations and maintenance
OIWA	Oklahoma Indian Welfare Act
P.L.	Public Law
ROW	right-of-way
SCE	Southern California Edison
SEC	Securities and Exchange Commission
S. Rep	Senate Report
Stat	*U.S. Statutes at Large*
TERA	Tribal Energy Resource Agreement
U.S.C.	*United States Code*
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
USPAP	Uniform Standards of Professional Appraisal Practices
ZR	zone rent

Units of Measure

kV	kilovolt(s)
mcf	thousand cubic feet
rod	16-1/2 feet

Executive Summary

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

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

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

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

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

The Departments posted the transcripts of both meetings and all comments received on a Web site for public review. The Departments then released a draft report in August 2006. They requested written comments on it and also accepted verbal comments at one nationwide and several regional public meetings held between August 24 and 30, 2006. In addition, the Departments held a series of government-to-government consultation meetings at a tribe's request during this period. The Departments issued a revised draft report in December 2006 and requested comments by February 5, 2007.

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

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.

Potentially, Section 1813 encompasses hundreds of tribes and many 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, and accordingly they narrowed the scope to ROWs for electric transmission lines and to ROWs for natural gas and oil pipelines associated with interstate transit and local distribution. The Departments selected these energy ROWs to 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 following common themes surfaced in the course of the public discussion about the study:

- Tribal sovereignty is manifested in the statutory and regulatory requirements of tribal consent in energy ROW matters.
- Tribal self-determination policies are important in advancing oversight of energy ROWs and expanding energy production.
- Congress exercises plenary authority over affairs regarding Indian issues consistent with treaty and trust responsibilities.
- Uncertainty and lack of transparency in the valuation process are of concern.
- Costs of energy ROW renewals are rising, in conjunction with other costs associated with energy production and delivery.
- With some exceptions, trends toward shorter term lengths (in years) for energy ROWs and longer negotiation periods are appearing.

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others. 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.

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. Most treaties include

clauses intended to preserve this right of self-governance, at least with regard to tribes' internal affairs. The implication of any reduction in a tribe's authority to make that determination is a reduction in the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination. Such a reduction in a tribe's authority is within the broad plenary power of Congress over affairs regarding Indian issues. However, in recognition of tribal sovereignty and the United States' trust responsibility under existing treaties with Indian tribes, legislation granting such authority has been clear in expressing the intent of Congress to do so.

The Departments find that the negotiation processes for establishing or renewing ROWs on tribal land could benefit from mutually agreed-upon practices, procedures, and actions that would improve the understanding and collaboration among the parties. These include the following:

- Develop comprehensive ROW inventories for tribal lands.
- Develop model or standard business practices for energy ROW transactions.
- Broaden the scope of energy ROW negotiations.

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

- Elect to make no changes (i.e., allow ROW negotiations to continue under current laws, regulations, practices, and procedures).
- Enact a legislative clarification of tribal consent.
- Authorize the Federal Government to determine just compensation by using a variety of methods for calculating just compensation (appropriately adjusted to reflect unique tribal concerns).
- Require binding valuation for a particular impasse.
- Authorize *case-by-case* condemnation of tribal lands for public necessity.

After careful consideration of the information presented and the alternative approaches identified, the Departments offer the following recommendations for granting, expanding, or renewing ROWs on tribal lands:

- The valuation of energy ROWs on tribal lands should continue to be based on terms negotiated between the parties.
- If a failure in the negotiations over the grant, expansion, or renewal of an energy ROW has a significant regional or national effect on the supply, price, or reliability of energy resources, the Departments recommend that Congress

consider resolving such a situation through specific legislation rather than making broader changes that would affect tribal sovereignty or self-determination generally.

1. Introduction

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

1.1. Statutory Language of Section 1813

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

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

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

1. An analysis of historic rates of compensation paid for energy ROWs on tribal land;

2. Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land;

3. An assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROWs on tribal land; and

4. An analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy ROWs on tribal land.

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

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

- In Section 3, the Departments set out the statutory and regulatory framework for granting, expanding, or renewing energy ROWs on tribal land. The Departments also assess the tribal sovereignty and self-determination interests affected by granting, expanding, or renewing energy ROWs on tribal land.

- In Section 4, the Departments summarize the data and information collected regarding historic rates of compensation for energy ROWs on tribal land.

- In Section 5, the Departments discuss standards and procedures for determining fair and appropriate compensation for energy ROWs on tribal lands.

- In Section 6, the Departments discuss the common issues raised concerning the energy ROW negotiation process. The Departments analyze and submit findings on these issues. The Departments also provide a variety of approaches for resolving negotiation process concerns.

- In Section 7, the Departments present a range of approaches for Congress to consider regarding procedures for carrying out energy ROW negotiations and standards for determining *fair and appropriate* compensation for energy ROWs on tribal lands.

- Then, in Section 8, on the basis of all the information gathered during the conduct of this study and a review of the alternatives available, the Departments summarize their findings and recommend to Congress appropriate standards and procedures for determining fair and appropriate compensation for energy ROWs on tribal lands.

- Finally, in Section 9, the Departments provide a more detailed description of case studies, survey information, and data submitted by stakeholders regarding historic and current rates of compensation for energy ROWs on tribal land.

1.2. Public and Tribal Consultation Meetings and Comments

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

After this prescoping effort, the Departments held two nationwide public meetings in March and April 2006 to solicit comments from interested participants on the scope of the study. The notices of these meetings were published in the *Federal Register* (FR). In addition, the Departments communicated with tribes by sending letters directly to tribal leaders and contacting

the regional offices of the Bureau of Indian Affairs (BIA). The Departments posted the transcripts of both meetings and all comments received on a Web site for public review.

After this scoping effort, the Departments published a notice in the FR seeking information and comments from interested participants regarding energy ROWs on tribal lands. Information and comments were due to the Departments by May 15, 2006. Upon receiving the information and comments, the Departments began reviewing them, and they requested followup information as needed.

On August 9, 2006, the Departments published a notice in the FR that announced the release of the draft report and requested written comments on it. The Departments also accepted verbal comments at one nationwide and several regional public meetings held between August 24 and 30, 2006. During this period, the Departments also held government-to-government consultation meetings with interested tribes as well. The dates and times of the meetings were published in the FR and announced in a letter sent to tribal leaders.

Comments were due on the draft report by September 1, 2006. This deadline was extended to September 4, 2006. The Departments continued to receive comments through the entire month of September. A revised draft report was issued on December 21, 2006; comments on it were received through February 5, 2007.

Over the entire study process, the Departments held several individual meetings, received extensive public testimony, and met in government-to-government consultation with more than 18 tribes. The Departments also received about 251 sets of written comments from 129 commenters, including 61 tribes, 11 tribal associations, 17 energy companies, 4 energy trade associations, 9 State or local governments, 3 interest groups, and 24 individuals or other commenters.

In the course of the public meetings and government-to-government consultations, and in the written comments submitted by interested groups and individuals, hundreds of study participants raised issues related to the Section 1813 study. The Departments appreciate the extensive efforts of these commenters to provide detailed ROW information and thoughtful comments both during the study process and for this final report. The Departments relied extensively on these comments to help define the scope of the report and analysis. A list of commenters is provided as an appendix to this report.

1.3. Scope of the Section 1813 Report

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

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 conducted by others. The Departments received many comments on this approach. Tribes, tribal energy companies, and tribal associations ("tribes") commented that a case study approach would seriously limit the Departments' ability to obtain a full understanding of energy ROWs on tribal lands, particularly historic practices followed to obtain 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") were generally comfortable with a study plan that relied on case studies. Industry also favored including information from a voluntary survey of companies as a way to capture trends and emerging issues that they see in the ROW negotiation process.

After careful consideration, the Departments reaffirmed their decision to rely on voluntary case studies and survey information as the most feasible option for the timely gathering of information that would be useful in outlining and providing insight into the core issues identified in the scoping process, while also respecting the confidentiality concerns of both tribes and private industry. The Departments acknowledge that the data included in this report do not constitute a comprehensive historical review of rates paid for energy ROWs on tribal lands. The Departments also acknowledge that the case studies and voluntary survey information 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 studies and voluntary survey information can represent only a few of the thousands of energy ROWs on tribal lands, many of which were successfully granted, renewed, or expanded. Finally, the Departments recognize that although case studies cannot be statistically generalized, they do, nevertheless, indicate the nature of historic compensation and the types of issues confronted by both tribes and industry.

Second, as stated before, the definition of tribal lands provided by Section 1813 is defined by reference to the EPAct, Title V, Section 503, which amends Section 2601 of the Energy Policy Act of 1992. In conducting this study, the Departments found that it was important to clarify that this definition does not include energy ROWs on tribal fee lands, individual Indian trust allotments (even when the tribe owns an interest in the allotment), or individual Indian fee lands. Federal policy regarding Indian land holding has varied over the history of the Federal-tribal relationship. The majority of Indian land is now held as tribal trust land and is 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 they may be transferred to trust status through regulations in Title 25, Part 151 of the *Code of Federal Regulations* (25 C.F.R. Part 151).

The Departments recognize that even though the definition of tribal land is limited, the issues surrounding ROW negotiations could affect other landholders, including individual Indian allottees. However, the Departments' analyses are limited to tribal lands as defined by Congress in Section 1813.

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

- 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,
- A variety of railroad lines carrying energy products across tribal lands,
- Roads that serve as corridors to energy sites and to oil and gas drilling locations,
- Roads for hauling oil from wellhead storage tanks to a refinery, and
- Roads for hauling coal from a mine to a coal-burning facility.

While all these types of ROWs pertain to energy, they are not necessarily comparable. As explained in Section 3, different types of ROWs may derive from different statutory authority. In addition, the economics, environmental impacts, tribal or Federal oversight, and service

requirements for each type of energy ROW are 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 refined the scope of the Section 1813 study to electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution. The Departments selected these energy ROWs for study because of the number of interested participants 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 readers of this report that any conclusions or proposals herein should be understood in light of the scope of the focused study. Because the Departments' study focused on electric transmission, natural gas, and oil pipelines, the assessments and analyses in this report were based on the law and facts surrounding these specific energy ROWs. Applying this report beyond ROWs for electric transmission, natural gas, and oil pipelines should be done with caution.

2. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy Rights-of-Way on Tribal Land

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

- The National Energy Policy (NEP),
- Emergency authorities to ensure the transport of energy,
- EPAct provisions related to transmission,
- EPAct Title V, Indian Energy (Title V), and
- Indian Right-of-Way Act of 1948 (1948 Act) and historical acts of Congress permitting ROWs across tribal lands.

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

2.1. Public and Tribal Comments

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

Industry generally commented that the Departments should focus on the Administration's NEP and policies recently enacted as the EPAct. Industry commented that both NEP and EPAct find that the Nation's current transmission and distribution infrastructure is aging and requires expansion to meet growing U.S. demand.[1] Industry commented that EPAct specifically addresses these issues and includes provisions to encourage construction and expansion in the infrastructure. An interest group commented that Congress intended Section 1221 to relieve transmission congestion and constraints that adversely affect consumers, and that Section 368 was intended to reduce siting obstacles faced by the electric transmission line, natural gas pipeline, and other parts of the energy transportation infrastructure.[2] Specifically, in discussing the policies promoted by Section 368, the interest group asserted that "siting constraints will be significantly constrained by current tribal ROW policy."[3]

One trade association noted that its members are already responding to the need to build and expand transmission infrastructure. The association provided data that its "Western and Southwestern shareholder-owned utilities spent roughly $6.8 billion (in 2005 dollars) on transmission between 2000 and 2005 and are planning to spend another $5.4 billion on transmission between 2006 and 2008."[4] The trade association also commented that beyond

2014, "substantial additional transmission will likely be added as the nation's transmission system is upgraded and expanded to provide capacity for the next several generations, including the ability to access clean coal and wind generation."[5] However, the trade association asserted that the need to build such infrastructure "highlights the importance of achieving tribal ROW fees that are reasonable and based on FMV [fair market value], and fee-setting processes that are efficient, prompt, predictable, and fair."[6]

Industry also commented that the underlying intent of policies to expand and improve energy transmission is to strengthen domestic energy sources.[7]

Tribes commented that Congress chose to address energy issues on tribal lands through EPAct Title V. Tribes commented that "Title V is an important expression of national energy policy and is the only piece of recent federal legislation that directly addresses both energy transportation needs and the specific issue of energy rights-of-way on tribal lands."[8] Tribes asserted that "any effort to limit tribal power to consent when companies seek to install or renew rights-of-way across tribal land would be directly contrary to the carefully crafted policy determinations made by Congress when it passed Title V."[9]

Tribes also commented that they already participate in energy policies, such as fostering domestic energy independence through the production and transmission of energy resources on tribal lands. One tribe commented that it "has been part of the energy-producing industry for over 50 years."[10] This tribe commented that the 2,000 active natural gas wells on its reservation produce 22 billion cubic feet of natural gas every year for transport to consumers in the Western United States.[11] Another tribe stated more generally that "rather than being one part of an energy supply and infrastructure *challenge* facing the U.S., the story of historical tribal land energy resource development, and more significantly the prospects for continued development, is one of consistent and positive contribution to meeting the nation's energy needs."[12]

Tribes commented that discussions of relevant national energy transportation policies should also address the lack of utility services to reservation communities. Tribes stated that a basic purpose of national energy transportation policies is to provide for the delivery of energy resources needed by communities across the country and that, given the fact that utility services to Indian households lag far behind those to non-Indian households, these policies should be used to expand and improve utility service for reservation communities.[13] Specifically, Tribes presented data from DOE's Energy Information Administration (EIA) showing that 14.2 percent of Indian households lacked electric service compared to 1.4 percent of all U.S. households.[14] They also cited a U.S. Census Bureau study reporting that 16 percent of Indian households use utility gas to heat their homes, compared to 51 percent of all U.S. households.[15] Tribes concluded that energy policies that maintain tribal sovereignty and promote self-determination, as reflected in current laws and processes for obtaining energy ROWs on tribal lands, are critical for improving energy service on reservations.[16]

2.2. National Energy Transportation Policies Generally Relevant to Energy Matters on Tribal Land

2.2.1. The National Energy Policy

In May 2001, the Administration issued its National Energy Policy (NEP), which discussed many of the issues ultimately addressed by Congress in EPAct. The Administration's NEP set forth a long-term strategy to promote reliable, affordable, and environmentally sound energy for America's future.[17] It proposed meeting this goal by increasing energy conservation, increasing domestic energy supplies, increasing use of renewable and alternative energy, ensuring a comprehensive energy delivery system, and enhancing national energy security.[18]

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

The NEP described the Nation's electricity transmission system as the highway system for interstate commerce in electricity. Currently, however, the NEP found that this system is constrained because investment in transmission "lagged dramatically" over the past decade, the siting process occurs primarily at the State level, and there is limited access to Federal lands.[21] The NEP found that a constrained electric highway system cannot move energy where it is needed most and can lead to cost increases and reliability concerns.

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

With respect to natural gas and oil pipelines, the NEP noted that the primary transmission infrastructure constraints are related to shortfalls in pipeline capacity, community resistance to pipeline construction, and obtaining ROW approvals from Federal, State, and local governments. Summarizing regulatory burdens at different levels of government, the NEP stated that "currently it takes an average of four years to obtain approvals to construct a new natural gas pipeline."[26]

The NEP, however, did not propose eliminating regulatory protections for pipelines. Instead it proposed striking an appropriate balance between regulatory review and expediting approval. Citing three recent pipeline ruptures, the NEP stressed that policies to ensure the protection of

the people and the environment and the safety of the Nation's energy infrastructure are an important part of the permitting process.[27] Thus, the NEP proposed legislation "to improve the safety of natural gas pipelines, protect the environment, strengthen emergency preparedness and inspections and bolster enforcement."[28] In addition to these protections, the NEP encouraged regulatory agencies, which includes tribal agencies, "to continue interagency efforts to improve pipeline safety and expedite pipeline permitting in an environmentally sound manner."[29]

The NEP also noted the significant role of Federal lands with regard to energy corridors, particularly in the western United States. Federal lands discussed in the NEP include lands managed by the BIA (including tribal and individual Indian lands), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), National Park Service (NPS), U.S. Fish and Wildlife Service (USFWS), and U.S. Forest Service (USFS). The NEP concluded that each of these Federal entities deals with ROWs from a "unique perspective"[30] and noted that some of them may encourage ROW development, while others (e.g., NPS, USFWS, BOR) may discourage ROW corridors or require that ROWs be compatible with authorized purposes.[31]

The NEP mentioned tribal lands as lands managed by BIA. It stated that like other Federal land managers, "the BIA and tribal governments are authorized to grant rights-of-way across . . . tribal lands" for energy resources, electric transmission lines, and natural gas and oil pipelines.[32]

2.2.2. Principles of Eminent Domain

Most electric transmission and energy pipelines have been built in the United States at the initiative of the private sector and are under rate regulation of the Federal Energy Regulatory Commission (FERC). Pursuant to the Section 7 of the Natural Gas Act, most large natural gas pipeline projects are subject to FERC jurisdiction for siting as well as for rate regulation. After a National Environmental Policy Act (NEPA) analysis, FERC may grant the pipeline developers a certificate which may include eminent domain authority. Should negotiations fail to secure ROWs on private or State lands, the natural gas pipeline project can use this eminent domain authority to condemn enough land for a ROW. Section 7 of the Natural Gas Act's eminent domain authority does not apply to Federal lands or tribal lands. By contrast, for electric transmission projects, it has historically been the States that have been the siting authorities, which has included the ability to grant eminent domain authority to oil pipeline and electricity project permit holders. However, with the passage of EPAct, Congress granted FERC very limited authority to grant transmission construction permits for projects that are located in any national interest electricity transmission corridors that may be designated by the Secretary of Energy pursuant to Section 1221(a). This limited Federal transmission facility permitting authority includes the authority to grant permittees the right to acquire ROWs through the right of eminent domain. However, the eminent domain authority given to FERC for these transmission projects cannot be used by a permit holder to acquire "property owned by the United States or a State" [1221(e)(1)]. This exclusion includes tribal lands, which are lands owned by the United States in trust for the beneficial use of the tribes. Accordingly, neither Section 7 of the Natural Gas Act nor Section 1221(a) of the EPAct give FERC the authority to grant the right of eminent domain to acquire energy ROWs on tribal lands.

2.2.3. Emergency Authorities

While the Departments found no evidence that negotiation between parties for obtaining an energy ROW on tribal land 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 (FPA). 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.

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 tribes, the Departments' analysis finds that emergency authorities could provide a means of rectifying such a situation if it did occur.

2.2.4. Energy Policy Act of 2005

In addition to the provisions in EPAct Title V, discussed in Section 2.3.1, a number of other EPAct provisions address the Nation's energy infrastructure (particularly the electric transmission system) and may have some general application to tribal lands. EPAct promotes improving and expanding the Nation's energy infrastructure to meet the needs of a growing U.S. economy. Specifically, Sections 1221 and 368 of EPAct provide administrative tools for facilitating the siting and construction of needed energy transmission facilities.

EPAct Section 1221(a) amended FPA by adding a new Section 216(a). This section directs the Secretary of Energy to conduct a nationwide study on electric transmission congestion by August 8, 2006.[33] On the basis of this study, the comments on it, and considerations of issues that include economics, reliability, fuel diversity, national energy policy, and national security, the Secretary may designate "any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects customers as a national interest electric transmission corridor."[34] The national congestion study is to be updated every three years.

Section 368 of EPAct applies to transmission corridors for electricity, natural gas, and oil. It directs the Secretaries of Agriculture, Commerce, Defense, Energy, and the Interior—within two years of the passage of EPAct—to incorporate into land use plans energy ROW corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land in 11 Western States.[35] Within four years of EPAct passage, these Secretaries are to identify corridors within Federal lands in the remaining States.[36] These energy corridors will take into account reliability, congestion, and overall infrastructure capacity.[37]

In Sections 1221 and 368, Congress enacted authorities and processes intended to promote the siting of generation and transmission facilities to help resolve congestion and improve reliability, but it did not make these provisions applicable to tribal lands. Section 1221 gives FERC transmission siting authority under certain conditions, and this authority includes the power to

grant eminent domain. However, this authority specifically excludes property owned by a State or the United States, which includes tribal lands.[38] Similarly, Section 368 applies to Federal lands (e.g., BLM, USFS, U.S. Department of Defense lands) but not to tribal lands. Pursuant to Section 368, the Secretaries listed above are consulting with tribes interested in the Section 368 process. Some tribes have sought inclusion of portions of their land in the Section 368 process, while others have requested not to participate. Future tribal involvement may include participating in the NEPA review of a proposed energy corridor under Section 368.

Accordingly, Sections 1221 and 368 do not alter the framework for negotiating energy ROWs on tribal lands as established under current law, including EPAct Title V. The Departments note that provisions of Title V promote tribal energy resource development and energy-related governing capacity, and encourage tribes' participation in resolving congestion issues.

2.3. National Energy Transportation Policies Specifically for Energy Rights-of-Way on Tribal Land

2.3.1. Energy Policy Act of 2005, Section 503, Indian Energy

The most recent statement of national energy transportation policy that specifically deals with energy ROWs on tribal lands strongly supports tribal decision making and management of energy resources and facilities, while it also correspondingly reduces Federal oversight. EPAct Title V furthers the Federal policy of tribal self-determination by encouraging tribes to develop procedures and safeguards for tribal management of every aspect of energy production and delivery on tribal lands. As expressed generally in the provisions of Title V, the overarching goal is to "assist Indian tribes in the development of energy resources and further the goal of Indian self-determination."[39]

The provisions of Title V that are specifically related to energy ROWs are entitled "Leases, Business Agreements, and Rights-of-Way Involving Energy Development or Transmission" and codified in *United States Code* (25 U.S.C. § 3504). These provisions set out a substantial program for governing energy facilities, including energy ROWs, through the development of Tribal Energy Resource Agreements (TERAs).[40] Upon approval of a tribe's TERA by the Secretary of the Interior, an Indian tribe "may grant a right-of-way over tribal land for a pipeline or an electric transmission or distribution line without review or approval by the Secretary of the Interior" and in accordance with certain terms set out in the statute.[41] These provisions require the energy ROW to (a) be issued in accordance with the tribe's TERA; (b) not last longer than 30 years; and (c) serve an electric generation, transmission, or distribution facility located on tribal land, or a facility on tribal land that processes or refines energy resources developed on tribal land.[42] Regulations to implement this statute were published by DOI in the FR on August 21, 2006.[43]

These provisions also specifically address the renewal of energy ROWs on tribal lands. The renewals of energy ROWs that have been approved according to the substantial process set out in 25 U.S.C. § 3504 will be "at the discretion of the Indian tribe."[44]

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

2.3.2. Indian Right-of-Way Act of 1948, Implementing Regulations, and Historical Statutes

In addition to EPAct Title V, energy ROWs on tribal lands are governed by the 1948 Act[45] and DOI regulations in 25 C.F.R. Part 169. As explained in more detail in Section 3.2, the 1948 Act and its implementing regulations include obtaining the consent of the applicable Indian tribe as an integral element of the energy ROW application process.

In the years leading up to the 1948 Act, from the 1880s to 1940s, national energy transportation policy related to energy ROWs on tribal lands incorporated a variety of approaches. Of course, the Departments recognize that Federal Indian policy during this time was also shifting from the era of allotment—which was intended to remove tribal control of Indian lands—to the reorganization of tribal governments, and finally to the restoration of tribal land status.[46] Energy transportation policies on tribal lands ranged from individual acts of Congress for each ROW to broad statutes authorizing administrative processes for requesting a ROW. As explained in more detail in Section 3.2, the requirement for obtaining a tribe's consent for an energy ROW was also expressed in a variety of ways.[47]

2.4. Departmental Findings

Recent national energy transportation policy generally stresses the need to invest in aging transmission infrastructure and expand transmission to relieve congestion and improve reliability. Much of this policy was recently enacted into law in August 2005 as the EPAct. These general energy transportation policies and enactments, however, recognize the unique laws that apply to tribal lands and do not alter existing laws and regulations for obtaining an energy ROW on tribal lands.

For the past 60 years, national energy transportation laws and policies specifically applicable to tribal lands have sought tribal consent for the grant, expansion, or renewal of energy ROWs on tribal lands. These laws and policies also promote tribal involvement in the determination of energy ROW routes, protection of cultural and natural resources, and emergency matters. The most recent of the Federal Government's statutory and policy expressions—EPAct Title V—encourages tribes to assume greater decisionmaking control over energy ROWs.

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3. Statutory and Regulatory Framework for Granting, Expanding, or Renewing Energy Rights-of-Way on Tribal Land and Associated Tribal Sovereignty and Self-determination Interests

In Section 1813, Congress instructs the Departments to present information on the statutory and regulatory framework that guides the placement of energy ROWs on tribal lands and information on related tribal sovereignty and self-determination issues.

3.1. Public and Tribal Comments

As an overarching issue, in their comments, nearly all parties from all perspectives recognized the inherent sovereignty of Indian tribes and supported Federal policies of tribal self-determination. Tribes emphasized the Federal Government's acknowledgement 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*,[48] one tribe noted the "long-standing principle of federal Indian law that Indian tribes possess inherent sovereignty." Other tribes stated that inherent tribal sovereignty "exists in the tribe itself" and "does not derive from the federal government."[49] Referring to the tribal consent provisions in energy ROW statutes and regulations, many tribes commented that tribal consent to the use of tribal lands is a manifestation of tribes' sovereign authority to determine the terms of access to tribal lands.[50] Tribes commented on the interrelatedness of sovereignty, the Federal policy of tribal self-determination, and tribal governmental functions.[51] Industry also voiced its recognition of tribal sovereignty but noted that this is not an unbounded authority but is instead an authority that has been judicially limited in specific cases.[52]

Several tribes noted that tribal governments fulfill their responsibilities as sovereigns by providing services such as education, health care, environmental protection, sanitation, and law enforcement. Also mentioned were Federal programs, both those in which tribes have governmental responsibilities and those that tribes are actually responsible for implementing (e.g., Clean Water Act; Clean Air Act; National Historic Preservation Act; Comprehensive Environmental Response, Compensation and Liability Act; Emergency Planning and Community Right-to-Know Act; Oil Pollution Act; Native American Graves Protection and Repatriation Act).[53] Tribes noted that even with these governmental obligations, their inherent authority to tax activities on reservation lands in order to raise governmental revenues can be complicated by possible overlaps with the taxing authorities of neighboring jurisdictions.[54]

Tribes also described their responsibility for developing the governing capacity necessary for overseeing energy ROWs. Often these functions are supported by energy ROW fees. Several tribes stated that energy ROW activities require that the tribes have adequate management and business controls, data collection efforts, realty functions, and day-to-day oversight, which requires dedicated staff and considerable tribal fiscal resources.[55] For example, the need for tribal governmental capacity to deal with energy ROWs became evident when a natural gas pipeline exploded on the Confederated Tribes of the Umatilla Reservation in 1999. The tribal

police, fire, and emergency response personnel responded to the blast and assisted in containing the damage and investigating the cause of the explosion.[56] In another example, a tribe cited an oil pipeline that sprang a leak and spilled several thousand gallons of oil across its lands.[57]

Tribes also commented that tribal governmental involvement is necessary to prevent harm to reservation resources. In particular, tribes noted that sovereignty and governmental capacity were critical to protect tribal natural and cultural resources and sacred sites.[58] Tribes noted that relatively recent Federal statutes and their implementing regulations provide a legal framework that can be used by a tribe to prevent damage to sacred places and cultural resources if the tribal government has the financial and human resources to use this framework and to insist that Federal agencies comply with the law. While many tribes have cultural resource programs, and while some have Tribal Historic Preservation Officers, such tribal programs typically place many demands on a limited staff. The National Historic Preservation Act and Native American Graves Protection and Repatriation Act recognize tribal sovereign authority in the general subject matter of cultural resources management. However, the relatively recent passage of these acts means that many existing energy ROWs that will be up for renewal may not have been approved or would have been relocated if the current legal framework had been in place when the ROW was originally granted, because the governing tribe would have either denied consent or insisted on the ROW being relocated to avoid sacred places or other cultural resources.[59]

3.2. Laws, Regulations, and Federal Polices with Implications for Tribal Sovereignty

3.2.1. 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, 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).[60]

During the first phase, 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.[61]

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.[62] 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.[63]

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.[64]

This statute is silent with regard to obtaining tribal consent for the ROW. However, the statute gave the Secretary the discretion to establish "such terms and conditions as he may deem proper" on renewals of ROWs.[65] Thus, this statute authorized tribal consent as one such term or condition, at least with regard to renewals, should the Secretary, in his discretion, so desire.

On March 4, 1911, Congress gave the "head of the department having jurisdiction over the lands" authority to grant ROWs for electric transmission lines across Indian reservations.[66] This statute also is silent with regard to obtaining tribal consent for the ROW, requiring only the approval of the "chief officer of the department under whose supervision or control such reservation falls."[67]

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 . . . 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. . .[68]
>
> No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act (IRA) and the Oklahoma Indian Welfare Act (OIWA)][69] shall be made without the consent of the proper tribal officials. . .[70]
>
> 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.[71]

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.[72] The inclusion of the consent requirement in the 1948 Act prevents implied supercession of the consent provisions of the tribal organization acts.[73] 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.[74] The 1948 Act supplants the earlier ROW statutes but explicitly does not repeal them. When read together, the statutes empower the Secretary to require tribal consent for a tribe organized under the tribal organization statutes, and they vest the Secretary with the discretion to mandate tribal consent and other conditions for ROWs across lands of other tribes.

3.2.2. Regulatory Background

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

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

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."[77] 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.[78]

3.2.3. Federal Policy of Tribal Self-Determination

Self-determination is a Federal policy that guides the Federal Government in its actions, decisions, and programs regarding Indian tribes. Although self-determination was recognized in principle at the very beginning of the Federal Government's relationship with tribes during the negotiation of treaties, it evolved into a specific policy during the latter part of the 20th century. Tribal autonomy formed a basic tenet of various pieces of legislation, especially the Indian Reorganization Act of 1934 (IRA)[79] and the Indian Self-Determination and Education Assistance Act of 1975.[80] 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."[81] Most recently, Title V of the Energy Policy Act of 2005 directed the Departments to create Indian energy programs in accordance with "federal policies promoting Indian self-determination."[82]

3.2.4. Policies Promoting Consultation and Coordination with Tribal Governments

Other policy expressions relevant to energy matters on tribal lands are contained in general tribal policies that provide direction to Federal Agencies on maintaining appropriate government-to-government relationships with tribal governments. These policies have been expressed in Executive Orders and Presidential Proclamations.

On November 12, 2001, President Bush issued a proclamation stating that "we will protect and honor tribal sovereignty and help stimulate economic development in reservation communities."[83] More recently, the Administration focused on tribal energy issues. On November 7, 2005, President Bush recognized defining principles of tribal sovereignty and self-determination and noted EPAct provisions for enhancing energy opportunities and strengthening tribal economies.[84]

Previous administrations articulated ongoing government-to-government consultation policies in Executive Orders. Most recently, Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," instructs executive agencies to consult with Indian tribes. The Executive Order states that:

> [When] 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.[85]

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

3.3. Departmental Analysis

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of tribal consent to energy ROWs. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others.[86] 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. 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. Most treaties include clauses intended to preserve this right of self-governance, at least with regard to tribes' internal affairs. Treaties continue to be a major source of Federal law today.

This history of tribal sovereignty forms the basis for the exercise of tribal powers today.[87] Although the United States has long recognized the sovereignty of Indian tribes as "distinct, independent, political communities" exercising the authority of self-governance,[88] the relationships between Federal, State, and tribal governments are complicated.

Many different authorities define the contours of this relationship, including treaties, the Constitution, legislation, Supreme Court and other Federal court decisions, regulations, and Executive Orders. "The Constitution is the primary source of federal power to regulate Indian affairs. By enumerating powers exercised by the constituent branches of the national government, the Constitution both defines and limits national powers, and, as interpreted by the Supreme Court, provides ample support for regulation of Indian affairs."[89] As the Supreme Court stated in *United States v. Lara* "… the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"[90] This broad Congressional power includes the authority "to impose federal policy directly on tribes without their consent."[91] For example, the Supreme Court upheld Congress' authority to enact legislation which altered a treaty and diminished a reservation.[92] Congress also can limit, modify, or eliminate the powers of tribal self-government.[93] However, in recognition of tribal sovereignty and the United States' trust responsibility under existing treaties with Indian tribes, legislation granting such authority has been clear in expressing the intent of Congress to do so.[94]

Congress has legislated extensively in regard to Indian property, providing for the grant of leases and ROWs and even the disposal of Indian property without consent.[95] Federal court decisions are the source of many general principles of Indian law, and they also address and resolve particular fact situations. All of these authorities have an important role to play in the analysis of the Federal-tribal relationship in general and in the evaluation of individual consent issues in specific cases.

When he was writing in the late 1930s to 1941, Felix Cohen, then with DOI's Solicitor's Office, described the Federal Government's policy for obtaining tribal consent for ROWs in the seminal *Handbook of Federal Indian Law*. Cohen wrote:

> 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.[96]

One important aspect of this complex relationship is that under certain circumstances, the Federal Government becomes the trustee of Indian property.[97] There is no doubt that the trust relationship exists with regard to land held in trust for tribes. Trustees must act in the best interests of the beneficiary of the trust by protecting and preserving the corpus. DOI, as the trustee-delegate, is strongly committed to high standards for managing Indian trust land. In the context of ROWs over tribal lands, the regulations set forth a fairly detailed process, including some specific responsibilities of DOI. In performing those specific responsibilities, DOI fulfills its trust duties. While opinions about the appropriate consideration for a particular ROW may differ, the regulation is clear that the consideration shall be "not less than but not limited to fair market value of the rights granted, plus severance damages, if any" unless otherwise approved by the Secretary.[98] Disagreement about what constitutes *fair market value* is inevitable, but such disagreement does not indicate that DOI has not performed its trust duty in this regard.

While the Federal Government as a whole is the trustee of Indian property, and the Department of the Interior is the primary executive branch agency tasked with carrying out the trust responsibility to Indian tribes and to individual Indians, it is Congress that must define the nature and extent of that responsibility.

3.4. Departmental Finding

The Departments encourage tribal economic development and have a duty to assure that the management of trust assets is in accordance with the best interest of tribes and tribal members. In addition, the proper discharge of the Federal responsibility to manage Indian trust assets also includes deference to and promotion of tribal control and self-determination.

Tribes have become increasingly involved in the process for approving the grant, expansion, or renewal of energy ROWs on tribal lands. As tribes have described to the Departments in their comments, they currently negotiate ROW issues (e.g., routes; compensation; terms; environmental, cultural, and emergency protections) pursuant to the 1948 Act and its implementing regulations.

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. Any reduction in the tribe's authority to make that determination is a reduction in the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination. Granting a ROW on tribal land only with the consent of a tribe is in accordance with the Federal policy promoting tribal self-determination and self-governance. 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.

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4. Analyses of Historical Compensation Paid for Energy Rights-of-Way on Tribal Land

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

4.1. Background

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

The Departments recognize that a case study approach may not fully represent the context within which an energy ROW was granted, renewed, or expanded. In addition, the Departments recognize that these case studies represent a very small subset of the entire data set of energy ROWs crossing tribal lands. The exact number of energy ROWs on tribal land has not been calculated, but the following examples illustrate in brief the extensive data set that would be necessary to make a comprehensive historical analysis.

The Confederated Salish and Kootenai Tribes Reservation hosts 325 miles of ROWs for 11 regional electric transmission lines, 150 miles for local electric transmission lines, more than 2,000 miles for local electric distribution lines, and 56 miles for a regional refined fuels pipeline.[99] The Shoshone-Bannock Tribes of the Fort Hall Reservation have 22 energy ROWs: 19 for electric transmission lines and 3 for natural gas lines.[100] Similar statistics are available for other tribes.

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

4.2. Case Study and Survey Processes

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

At followup meetings with industry trade associations, the Departments further requested industry participation in the case studies. Southern California Edison officials expressed an

interest in participating, but after followup calls were made by the Departments and HRA, they declined to participate.

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

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

- Leases or contracts for the energy ROW;
- Records of negotiations and determinations of compensation, including transcripts of negotiations or meetings involving BIA, tribal, and energy company representatives;
- Correspondence associated with negotiations (between all parties);
- Appraisals of the BIA and/or DOI Office of Special Trustee, company, and tribal entities;
- Applications for energy ROWs;
- Tribal authorizations of energy ROWs, such as tribal council resolutions and meeting minutes; and
- Any modifications to agreements.

DOI circulated this memorandum to tribal officials and BIA superintendents for the four tribal volunteers.[101] During the site visits, HRA reviewed records made available by tribal representatives and reviewed ROW files maintained by the BIA. HRA identified potentially relevant records by carefully reviewing these files and obtained copies of them. During site visits, HRA also met with tribal and BIA representatives to ask questions about how easements for energy ROW have been administered on the reservations.

These case study reports are summarized in Sections 9.1 through 9.4. The complete HRA report is included as an appendix to this report.

4.3. Case Study Results

The history of energy ROWs on the Uintah and Ouray, Southern Ute, Morongo, and Navajo Indian Reservations reveals general trends in the negotiation and management of easements over Indian lands. In particular, negotiations on these Reservations shed light on changes in the amounts and types of compensation and on the role of tribal consent in the negotiation process.

Compensation in the 1950s and 1960s was generally for damages calculated on a per rod or per acre basis. In 1968, the revised Federal regulations specified that consideration "shall be not less than the appraised fair market value of the rights granted, plus severance damages, if any, to the remaining estate."[102] Appraisals had been used in the ROW approval process before 1968, but the language of the new regulation may have changed the methods used to appraise ROW. Appraisers (hired by energy companies) developed various methods for determining *fair market value of the rights granted*, but generally they calculated the fee value of the land by using sales of comparable lands, and then they discounted that amount by some percentage because the lands involved were being used, not sold. The BIA usually either reviewed the company's appraisals or conducted its own appraisal. In these reviews, BIA appraisers determined fair market value by using comparable easements as a standard and by determining the land's sale value on the basis of its highest and best use. Some tribes, such as the Southern Ute Tribe, do not require appraisals for tribal lands, mainly because the tribe itself has determined what the compensation rates should be. Currently, tribes such as the Morongo Band favor appraisal methods that take the revenue-generating potential of the land into account, rather than considering only the sale value of the land.

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

The 1948 Act required tribes to be involved in the approval process by granting their consent to easements if the tribes were organized under a Federal statute. Interior regulations that followed the 1948 Act required the consent of all tribes, not just those organized by statute. The examples above involve two tribes organized under the IRA of 1934 (Ute Indian Tribe and Southern Ute Tribe) and two that are not organized (Morongo Band and Navajo Nation). The case studies indicate that the BIA has had one administrative approach to all tribes, regardless of whether or not they are organized under the IRA.

In providing their consent to energy ROWs, the four tribes involved in these case studies have participated in negotiations to varying degrees. The Navajo Nation began asserting its interests in the 1950s or earlier, as did the Morongo Band (albeit with limited success), while the Southern Ute Tribe and Ute Indian Tribe made that move in the1970s and 1990s, respectively. All four of the tribes now negotiate ROWs directly with the energy company involved, while also

continuing to ratify agreements through the passage of tribal resolutions. The BIA retains an oversight role and the ultimate authority to approve or reject the ROW.

4.4. Survey Results

In addition to case studies, the Departments received information from the Interstate Natural Gas Association of America (INGAA) and the Edison Electric Institute (EEI) based on member surveys they voluntarily conducted. The surveys were conducted in the spring of 2006 and are described later in this report.

Although several of its members were not able to participate in the survey for reasons explained in section 9.5.2, INGAA compiled results on 20 energy ROWs on tribal land involving 15 different tribes in 11 States. INGAA reported that survey respondents reported paying compensation in excess of market value and that compensation included payments in addition to per rod costs. Several respondents reported that ROW negotiations took significantly longer than 2 years. In the instance of the INGAA survey report, the Departments note that of the seven survey respondents "few . . . were satisfied with the negotiations." [103]

EEI gathered survey information on 20 energy ROWs. EEI reported that ROWs, on average, were renewed for shorter terms of years than the ROWs that preceded them, that compensation exceeded EEI's projected values, and that the average ROW negotiation was about 2 years. Moreover, EEI reported that its survey respondents have a high level of dissatisfaction with the recent processes and outcomes of most of their right-of-way renewals. [104]

4.5. Departmental Analysis

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. 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 because 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 ROWs, 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 also differs on the basis of agreements about who is responsible for security and emergency responses and about whether the energy ROW involves tribal energy development or provision of energy services.

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.

Similarly, the surveys represent information collected that is based upon proprietary information that was not made available in total to the Departments. However, the surveys reviewed by the Departments reflect the comments provided by industry groups that ROW negotiations are increasingly complex, take longer, and result in shorter ROW duration, which is a concern of industry.

As stated before, the Departments recognize that the case studies may not fully represent the context within which the energy ROWs discussed in this section were granted or renewed. In addition, the Departments recognize that because these case studies represent a very small subset of the entire data set of energy ROWs crossing tribal lands, the results cannot be statistically extrapolated to the entire suite of energy ROWs on tribal lands, and the discussion of the negotiation process cannot be generalized to that data set.

Nevertheless, the Departments do believe that the cases and surveys presented here illustrate the situation that all parties who were involved in this study testify is true: The nature of the process has evolved significantly over time into one in which tribes are more fully involved in bilateral negotiations with energy companies and in setting the terms and conditions under which energy ROWs are authorized.

4.6. Departmental Findings

In these case studies, in addition to using standard market valuation analysis as a base for compensation, some tribes have successfully negotiated for alternative forms of compensation, such as throughput charges or partial ownership of the lines. These examples demonstrate that mutually satisfactory outcomes are possible, although they do not necessarily reveal a standard recipe for success. However, the Departments also found that there are situations where energy ROW negotiations, although successfully concluded, were not mutually viewed as satisfactory.

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5. Standards and Procedures for Determining Compensation for Energy Rights-of-Way on Tribal Land

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

5.1. Public and Tribal Comments

Overall, most industry representatives contended that the valuation of tribal lands for energy ROWs should be based on market value principles.[105] Tribal representatives rejected industry's description of market value principles as inappropriate for tribal lands and set forth a different understanding of market value.[106] In addition, some energy companies commented that limiting energy ROW negotiations to market value would restrict creative arrangements that promote development of energy resources on tribal lands.

Industry stated that concerns about the impacts of energy ROWs on infrastructure reliability and consumer energy costs could be alleviated through use of an "objective, consistent, transparent, and uniform standard for valuing" energy ROWs on tribal land.[107] One trade association suggested that compensation on tribal lands should be based on objective assessments of the value of comparable nearby land, the nature of the land's existing use, and the location of the energy ROW.[108] An interest group suggested that market value would be an appropriate standard for valuing energy ROWs on tribal land, citing it as the nationally recognized standard for determining just compensation for interests in land required for the public good.[109]

The suggested standards are similar to those used in eminent domain proceedings when the Federal Government and other governments acquire land for public purposes. One utility company stated that when there is no eminent domain alternative, there are few, if any, limits to the amount of compensation that could be discussed in negotiations between tribes and utilities.[110] One interest group described market value principles in depth, noting that market value does not typically reflect the proposed use of the ROW or the value of the ROW to the acquiring government.[111] Industry frequently commented, however, that the 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.[112]

Industry pointed out that market value is the standard within the Federal Government for valuing property generally. An interest group cited the prevalence of market value principles in regulations used by DOI and the USFS for determining land values for a variety of purposes, including energy ROWs.[113] This same group also referenced recent DOI Secretarial Orders and a departmental memorandum requiring the use of market value principles, with some exceptions, for all DOI appraisals.[114] Industry comments contained information that some recent right-of-way renewals resulted in fees that were 20 to 30 times historical payments.

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

an objective standard for determining value.[115] The desire for an objective standard was particularly emphasized by industry in the case of energy ROW renewals.

Industry commented that, in renewal situations, energy companies have existing physical assets and investments on tribal lands, and some members of industry expressed concern that if there was no enforceable standard, an energy ROW negotiation would automatically escalate to a company's cost to build around the tribal lands containing the company's assets.[116] In such cases, they commented that build-around costs could include lost revenue streams, new construction, and new ROW fees. Industry also commented that it could be faced with selling its existing facilities on tribal land at a reduced value if energy ROWs were not renewed.[117] Industry stated that the threat of incurring build-around costs causes uncertainty about existing projects and discourages future investment in tribal lands.

Industry raised concerns that they can no longer rely on the assumption that they can continue to use existing rights-of-way across tribal land—or that they could obtain new rights-of-way across tribal land—at what they consider to be a reasonable fee.

Industry has also stated that that they may be required to pay one or more forms of taxation on tribal land, including a Possessory Interest Tax on facilities or the ROW; a Business Activity Tax; a License and Use Tax; or a Gross Receipts Tax in addition to ROW fees.

In one instance, a company provided information that the control over renewals exercised by a tribe amounted to a "unilateral demand."[118] It was conveyed that the company was unable to successfully negotiate a ROW renewal with the tribe. As a result, the tribe informed the company it would not continue with negotiations but would seek to purchase the company's assets to the exclusion of any other alternative. Faced with this prospect, the company has entered into negotiations to sell the assets. However, the company has indicated that it would resist seizure by the tribe or a "fire sale" of its assets at prices below the company's expected value.[119]

Tribes observed that imposing any standard valuation method and mandating its acceptance would constitute an exercise of eminent domain that is not applicable to lands owned by the United States and reserved for tribal use. Tribes 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 Indian tribes.[120]

Tribes rejected market value principles as being inappropriate and inapplicable to tribal lands. They noted that tribal lands are not bought and sold on open markets, so traditional land appraisal techniques are not applicable.[121] 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 that recognize tribal sovereignty over tribal lands and Federal obligations to tribal property.[122]

Tribes commented that one of the most vital components of their tribal sovereignty is their authority to determine access to and use of tribal lands and resources.[123] They cited the 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.[124]

Citing the uniqueness of tribal lands and the governmental responsibilities of tribes, tribes supported maintaining the present negotiating process. Tribes stated that negotiation between a tribe and an energy company is the most appropriate basis for determining energy ROW valuation because a tribe, like other governments, has sovereign responsibilities and must appropriately manage its resources for the benefit of its people.[125] Tribes commented that a uniform valuation system could not account for all the differences among tribes, tribal governments, and tribal lands. For example, at least one tribe noted that its leasing authority was separately recognized by Congress and unique from the statutory and regulatory process used by most tribes to approve energy ROWs.[126] In contrast to the unique circumstances recognized in modern tribal policies, tribes stated that proposals for uniform valuation techniques were regressive and similar to discredited Federal Indian policies.[127]

Tribes also stated that tribal lands have value tied to tribal histories and oral traditions and the resources that may be used in tribal cultural practices. Tribal lands may contain the graves of ancestors or sites that are used in religious ceremonies. Tribal members may regard a particular place as significant simply because it is part of all they have left of their aboriginal territory, or because their ancestors fought and died to keep it.[128] The standard valuation methods used for nontribal lands cannot account for this factor, which is unique in that tribal lands are the only lands possessed by descendants of aboriginal people.

Several tribes indicated that valuation methods for tribal lands could be comparable to valuation methods used by municipalities because both entities 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 in Texas and Atlanta in Georgia value their ROWs by linear foot.[129] The study also noted that franchise fees received from the use of public ROWs may represent a significant percentage of a city's general budget.[130] The valuation methods used by municipalities were reported to depend on the purpose of the ROW and whether the ROW could accommodate other uses.[131] Tribes further noted that energy ROW fees provide tribes with governmental revenue and that the inherent authority of tribes to tax activities on reservation lands can be complicated by the taxing authorities of neighboring jurisdictions.[132]

Tribes 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.[133] Without the flexibility to address these different factors, tribes and some energy companies commented that a single valuation method based on a standard market valuation methodology would reduce the participation of tribes in energy partnerships and decrease the amount of energy production and transportation on tribal lands.

Finally, tribes commented that calls for energy ROW valuations done according to a standard market valuation methodology were disingenuous for several reasons. First, the tribes pointed out that when energy companies entered into existing ROW agreements, they knew that they

were limited-term agreements and that their renewal would require renegotiation.[134] Second, the tribes asserted that some energy ROWs were originally obtained for little or no compensation and that past compensation rates are relevant to the current study.[135] The tribes maintained that some members of industry are essentially complaining about a change in the business environment—a change that is not to their benefit.[136]

5.2. Departmental Analysis

Recent writings about the negotiation process say that ultimately, a successful negotiation result is not about outwitting or taking advantage of others. It is about arriving at a shared solution to a problem—a solution that benefits all parties involved. It is also about more that just getting the best possible price on the deal. The most effective negotiation will result in a mutually beneficial, enduring relationship in which the parties trust one another and share expectations about how their deals will work in practice as well as on paper.[137]

These statements are especially true with regard to agreements between a private company and a tribal government. Unlike an individual property owner, who may sell his or her land or whose descendants may not necessarily maintain an interest in the property at the end of the agreement's term, a tribal government, whose interests are the well being of its people in perpetuity, will maintain its interest well past the terms of the agreement. The tribe will then bring to the bargaining table its past history of negotiations with private industry.

Furthermore, the efforts of the parties in the negotiation to achieve a win-win solution are enhanced when there is more transparency in the process and less chance that the factors to be considered during the negotiation will change unexpectedly.

To arrive at what is agreed upon to be *fair and appropriate* compensation for an energy ROW, the interested parties, through negotiation, seek to resolve disputes, agree on courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes that serve their mutual interests. The outcome of the negotiating conference may be a compromise satisfactory to all sides, a standoff (failure to reach a satisfactory compromise), or a standoff with an agreement to try again at a later time. As can occur in any negotiation, considerable uncertainty can enter the process when the negotiation time is lengthened because of factors unrelated to the economic context of the situation.

In more general situations not involving tribal lands, market value principles derive from the constitutional concept of *just compensation* (i.e., 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.[138]

These market value principles are supported by the Uniform Standards of Professional Appraisal Practices (USPAP) for general use in real estate transactions.[139]

Energy ROWs across tribal lands are acquired through an *arms-length* negotiation process with a tribe. Valuation methods used in these negotiations often use the Uniform Appraisal Standards for Federal Land Acquisition and USPAP. Typically, these methods involve case-by-case estimates of land value and are well known and well understood. Other methods involve, but are not limited to, the following:

- Methods used by municipalities,
- Methods used for public lands,
- Comparisons to sales of similar lands,
- Valuations of the land *over the fence* from the proposed ROW,
- Sharing of net benefits or other partnership arrangements,
- Costs of alternative routes,
- Opportunity cost,
- Percentage of energy throughput,
- Value of the land before and after the ROW, and
- Cost of government services.

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 highest and best use considered in the estimate must be an economic use. A noneconomic highest and best use (e.g., 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.

Note that the trust nature of the tribal lands under discussion here limits the number of comparable sales that would be appropriate for use in valuation in which standard techniques are applied.

However, there are various additional methods available for calculating *fair and appropriate* compensation. These include, but are not limited to, the following:

a. The BLM compensation schedule sets a 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* on the basis of 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.

   For example, 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.

   If this method were used for tribal lands, different values would have to be determined and applied.

b. In the licensing of hydroelectric projects that occupy tribal lands, a sharing of the net benefits approach has commonly been used to determine the market value of the lands used. Part 1 of the FPA, Section 10(e), requires FERC to set a "reasonable" annual charge for the use of tribal lands by FERC licensed hydroelectric projects.[140] This charge is subject to the approval of the tribe whose land is used.[141] Section 10(e) does not require that FERC use any particular method to set the annual charge, and FERC's regulations allow it to make this determination on a case-by-case basis.[142] Although FERC has not established a preferred methodology, one of the methodologies that has been used in the past by FERC to determine annual charges is the *net benefits* approach.

   The sharing of the net benefits approach compares the cost of generating power at a particular hydroelectric project with the cost of generating the same amount of power from the next-best alternative source, which is typically more expensive. The

difference equals the net benefit of generating the power from the hydroelectric project. These net benefits include the benefits obtained from using tribal lands to generate hydroelectricity by a particular project. While the net benefit may be shared in various ways, a common method is to multiply the net benefit by the percentage of Indian land used by the project to determine the portion of the net benefit that accrues to Indian lands.

FERC has used a variation of this approach, sharing the net benefit on a 50-50 basis between the project owner and the various landowners.

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

a. An adjustment could be made for the tribal government to oversee safety, cultural, and environmental matters associated with the energy ROW. Calculations would be based on the costs to the tribal government for providing these services on tribal lands.

b. Adjustment could be made for the tribal benefits that could be derived from an energy ROW, such as access to energy resources for tribal members or tribal businesses, improvements to roads or other infrastructure, and job and training opportunities.

c. Adjustment could be made 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 nontribal land.

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. In some cases, this negotiation process could lead to an agreed-upon amount for compensation that is more than the amount that would be calculated as market value when the valuation standards usually practiced on nontribal lands were used.

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

5.3. Departmental Findings

The Departments find that negotiation between the interested parties is an appropriate method for determining compensation. During the primary terms of many of these energy ROWs, the self-governance of tribes has evolved. On the basis of existing treaties, laws, regulations, and Executive Orders, tribes have become more involved in the day-to-day decisionmaking and management of activities on tribal lands. This involvement includes decisions on renewing energy ROWs that may have been put into place three, four, or even five decades ago.

Over this time, the responsibilities of tribal governments have also evolved. Many tribes have developed government structures to manage the increased responsibilities assumed by the tribes, such as cultural resource management and the provision of health, safety, and environmental protections. Unlike private property owners along a particular ROW, sovereign tribes do not rely on local or State governments to oversee the health, safety, and environmental reviews, permits, and requirements associated with placing and monitoring energy facilities. The individual tribes must bear the responsibility and costs associated with carrying out such governmental functions.

In the past, the compensation for ROWs could reflect the valuation for *highest and best use*, because much of the management of Indian lands was being performed by the Federal Government. Today, however, many tribes must use their own governmental bodies to perform these tasks for the general well being of their members. But tribes, unlike Federal, local, and State governments, cannot always rely primarily on taxation to provide the fiscal support for these governmental bodies and must capture the associated costs of running tribal government from contracts and compacts with the Federal Government, ROW fees, and other economic development activities, such as resource development and gaming. ROW fees therefore are comparable to property tax rates on assessed real estate established by local governments to fund budgets to provide local services.

The Departments find that the parties themselves could enhance the negotiation processes and benefit from mutually agreed-upon practices, procedures, and actions that would improve the understanding of and collaboration among the parties. These include alternatives set out in the following subsection and which the parties could consider.

5.3.1. Develop Comprehensive Rights-of-Way Inventories for Tribal Lands

Individual tribes, energy companies, 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 the gathering of 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 in future energy ROW negotiations.

5.3.2. Develop Model or Standard Business Practices for Energy Rights-of-Way Transactions

Indian tribes, energy companies, or other entities could develop model or standard business practices for general energy ROW negotiations and for recurrent energy ROW situations. Similar to the need for basic energy ROW information described above, there is a need for organized information about business practices for energy ROWs on tribal lands, the lack of which leads to uncertainty in negotiations. Developing model or standard business practices would help to normalize and guide negotiations. Even if parties decided to depart from standards or models for some reason, the foundation provided by such guides would help them negotiate their individual terms.

Again, some tribal and industry parties have taken steps to develop information along these lines. However, given the level of uncertainty still present in energy ROW negotiations, it appears that the 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. They 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 expanding 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.

5.3.3. Broaden the Scope of Energy Rights-of-Way 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 their standing in existing markets, increasing their 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 by examining the tribes and companies that have developed successful relationships. The Departments found that energy ROW negotiations involved in these relationships did not get stalled over 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 for their mutual benefit.

6. Issues Raised during the Study

6.1. Increasing Costs of Energy Rights-of-Way and Costs to Consumers

6.1.1. Public and Tribal Comments

Industry 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.[143] 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.

Industry also commented that consumer energy prices could increase because of increased negotiation costs with tribes, particularly if potential trespass damages were levied against utilities. A trade association commented that such trespass penalties could add hundreds of thousands of dollars, or even millions of dollars, in additional costs to the utility and its customers, but it provided no specific data or actual instances of such penalties.[144]

Several energy industry representatives indicated that the costs for energy ROWs on tribal lands, including administrative costs associated with longer negotiation periods, have tended to increase.[145] Industry expressed concern about the increasing cost of energy ROWs and the implications of those rising costs for energy companies and consumers, both today and in the future. In the public meetings, industry commented that electric utilities are facing upward cost pressure on multiple fronts. They noted that the cost of fuels, such as coal and natural gas, has risen substantially in recent years for utilities. They also noted that the cost of siting, operating, and maintaining generation, transmission, and distribution facilities has gone up, particularly in areas of the country where the need for new facilities is straining available resources. Finally, they commented that environmental costs are also increasing, as Federal and State governments demand additional reductions in emissions. In such a setting, industry asserts that each and every cost needs to be kept at a reasonable level.[146]

For example, as noted earlier, EEI and INGAA conducted member surveys and provided case studies that included data showing increased fees for energy ROW renewals.[147] Industry was particularly concerned about the increasing costs of energy ROW renewals, as opposed to grants or expansions, because of existing investments in facilities on tribal lands and potential obstacles to abandoning or moving an energy ROW.[148] Furthermore, in public meetings, industry asserted that hundreds of ROW renewals will need to be negotiated over the next 10 to 15 years.

Based on the information collected by INGAA, survey respondents indicated they were paying ROW compensation in excess of what they considered fair market value. In addition, the respondents indicated that terms for ROWs had decreased to an average of 20 years.

Acknowledging cost increases over historic levels, tribal parties commented that increases in energy ROW fees reflected historically low energy ROW valuations, increased tribal

involvement in ensuring an economic return for the use of tribal lands, benefits from obtaining a ROW across large tracts of land from a tribal single owner, and increased tribal government costs while Federal economic support has been decreasing.[149] With regard to the governing capacity required, one tribe commented that ROW activities "demand a high level of personnel, time, attention and use of the Tribe's governmental funds" such that they employ "94 personnel positions" dedicated to various aspects of ROW management.[150]

Tribes also commented that costs on private lands cannot be accurately compared to costs on tribal lands because there is no market for tribal lands to appropriately define cost parameters. One tribe said, "Unlike private lands, Tribal trust land can't be sold. [Also, unlike] private landowners, Tribes provide essential governmental services to people." [151]

Tribes also asserted that rising energy costs are 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.

An energy analyst who used the Altos North American Regional Gas model found that energy ROW costs on tribal lands would have 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 prices.[152] The analyst concluded that the tribal energy ROW costs are such a small part of the overall energy market that they could not have an impact on downstream markets at all.[153]

A second tribally commissioned study that used published reports on the Navajo Nation's proposed ROW fee for the EPNG network determined that the potential impacts on downstream consumers in Arizona, California, and Nevada would cost the average residential user between $0.40 and $0.60 per year if the ROW fee was spread over EPNG's total pipeline system. The cost per user would be between $0.58 and $0.85 per year if the Navajo Nation's ROW cost was passed directly to the consumers in these downstream States.[154]

A third tribally commissioned 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 to 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 on monthly bills that averaged between $50 and $200, and between $0.001 and $0.016 per month for natural gas on monthly bills averaging $47.[155] In addition, this tribe further quantified the impacts of the throughput fee it charges for the use of a ROW on its land; it found that at $0.05/mcf, the throughput fee was a small fraction of the delivered gas in California ($13.27/mcf) and Utah ($11.75/mcf) during August 2006, with the fee equivalent to 0.4 percent of the delivered natural gas price to Utah consumers. [156]

However, an economic analysis of energy ROW compensation presented by an interest group indicated that if the residential customers of one gas and electric utility in New Mexico would

fully bear the cost increases associated with about 95 energy ROW renewals over the next 15 years, those customers' electric rates could increase as much as 5 percent ($5 for every $100 portion of a bill).[157] As explained in the analysis, this estimate depends on the utility that is seeking and being approved for *rate recovery* and is based on the assumption that all 95 energy ROWs will be renewed at a value reported in the Navajo Nation and EPNG's ongoing energy ROW negotiations. This estimate does not account for valuation differences in negotiations concerning energy distribution ROWs and energy ROWs that do not provide local service.

One tribe sought to gauge energy companies' perceptions of the business risks related to interactions with tribes by reviewing Security and Exchange Commission (SEC) filings and the notations of risk in those filings.[158] The tribe found that in most years, all of the 18 Western energy companies studied from 2001 to 2005 described challenges associated with energy infrastructure construction and/or operation. However, it also found that over the 5-year period, only three companies characterized the negotiation or renegotiation of tribal ROWs as a material concern in annual reports to the SEC.

6.1.2. Departmental Analysis

The Chairman of 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 about 6 percent of its delivered cost and about 1 percent of the delivered cost for petroleum products.[159] The cost of electric transmission is also a small portion of a consumers' electric bill. In 2006, the EIA found that transmission costs for electricity are in a range of about 10 percent of total delivered electricity costs.[160]

These Federal Government statistics are in keeping with data from the energy industry. Testifying at the same hearing as the FERC Chairman, Williams Pipeline Company testified that pipeline transportation and storage "is the smallest part of the cost of natural gas delivered to residential and commercial customers—typically about 10 percent of the total retail cost of natural gas."[161] In addition, consistent with these consumer statistics, a report prepared for EEI entitled *Why Are Electricity Prices Increasing?* found that transmission and distribution costs accounted for about 4 percent of an electric utility's operational costs and 8 percent of its maintenance costs, and that these costs remained relatively flat from 2002 to 2005.[162]

Although some commenters indicated that some tribes require compensation for energy ROWs on their lands in excess of the lands' *market value* for other purposes, the effects do not appear to be large enough to have a significant impact on overall energy transportation costs and the total cost of delivered energy paid by consumers.

These first two results are supported by a review of filings with FERC requesting increases in the oil, natural gas, or electric rates that a FERC-regulated utility can charge consumers. Typically, if a regulated utility incurs a prudent cost, then that cost is generally passed on to customers. However, a survey of hundreds of rate increase cases that were protested or set for trial over the last 5 years, and discussions with FERC trial staff, revealed only three instances for which tribal ROW costs were cited in the case as a reason for requesting a rate increase. One of these cases is still pending.[163] The remaining two cases resulted in some rate increases, but the (a) tribal ROW fees were not always or not entirely passed on to consumers, (b) increases involved nontribal

factors, and (c) overall rate increase was not deemed to be significant by the parties or FERC. In one of these cases, the tribal energy ROW fees are considered a regulatory asset that will be depreciated,[164] and in the other case, the tribal ROW fees were not fully passed on to consumers or directly raised by the company filing for the rate increase.[165] Although these are complicated matters, these cases provide examples that fees for ROWs on tribal lands do not always result in increases in overall costs to consumers. Moreover, the lack of rate case filings that cite to fees for ROWs on tribal lands supports the Departments' analysis that energy ROWs on tribal lands represent a very small portion of energy costs and infrastructure.

There is no evidence to date that any of the difficulties associated with ROW negotiations have led to adverse impacts on the reliability or security of energy supplies to consumers. Information has been provided that indicates there are increased costs to companies and consumers and other consequences associated with some of the recent protracted negotiations for energy ROWs across tribal land. However, 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.

6.1.3. Departmental Findings

As a result of our analysis, the Departments have found that (a) total energy transportation costs are a small component of overall consumer energy costs; (b) in general, a relatively small percentage of the energy transportation infrastructure is on tribal lands; and (c) as of now, no difficulties associated with ROW negotiations have led to security or reliability impacts that affect consumer cost.

6.2. Decreasing Energy Rights-of-Way Term of Years and Increasing Negotiation Periods

6.2.1. Public and Tribal Comments

Industry generally noted that the term of years for energy ROWs is decreasing and that the 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. Some from industry voiced concern that in cases where there is a transition in a tribe's leadership, the lack of a consistently applied valuation methodology and negotiation process can also result in prolonged or delayed ROW negotiations. Industry also commented that these factors, either individually or taken together, "add to the uncertainty which utilities must consider in their investment and planning processes."[166] This uncertainty is cited as a growing concern by industry, especially when the expected increase in the number of ROW negotiations in the next decade is taken into account.

Tribes also commented on the length of negotiations. One tribe observed that negotiations took from 6 months to 8 years, but that most of the time, the parties worked in good faith to resolve their differences. Tribes noted that each energy ROW over tribal lands has unique characteristics that can affect negotiation times. Some factors that may increase or decrease negotiation times, include these:

- Length of the ROW and diversity or continuity of the affected land area or land owners,
- Impacts on lands of cultural or religious significance,
- Impacts on agricultural lands,
- Provision of utility services to reservation residents and access to tribal natural resources,
- Number of individual landowners affected, and
- Requirements associated with an environmental assessment.[167]

It was also conveyed to the Departments that some companies (particularly those that entered into business partnerships with Indian tribes) found that energy ROW agreements on tribal lands are completed more efficiently than agreements with other nontribal land owners.

6.2.2. Departmental Analysis

As presented by both industry and tribal parties, there is an indication that negotiations are taking longer and that the term of the agreement is shorter. This situation may be due to a number of factors, including the complexity of modern negotiations, the fact that many tribes are assuming additional self-determination and self-governance responsibilities and have become more engaged in managing tribal business opportunities, and the Federal Government's approval processes.

6.2.3. Departmental Findings

Where it occurs, longer times taken for successful negotiations and the shorter terms for ROWs affect the costs to both industry and the tribes, with the potential for increasing overall costs. The Departments find that when comprehensive information about energy ROWs on tribal lands is developed, parties can enter into negotiations on a stronger footing, and negotiation periods can be shortened.

6.3. Uncertainty in Energy Rights-of-Way Negotiations

6.3.1. Public and Tribal Comments

Some in industry commented that the exercise of tribal sovereignty through tribal consent to energy ROWs—combined with a lack of uniform and measurable standard for valuing ROWs—create a high degree of uncertainty with regard to the Nation's energy infrastructure and the consumers' energy costs.[168] One energy company commented that "the long-term security of these [transmission] lines must be more definitively guaranteed to protect the reliability and availability of the national power grid."[169] A trade association noted that as a result of uncertainty, "necessary infrastructure may not be built."[170]

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

Some from industry expressed concern about the possibility that energy ROW agreements could expire, leaving energy facilities in trespass. A trade association raised the concern that members found in trespass could have access to their facilities curtailed or blocked, thereby limiting their ability to use and maintain lines and other facilities.[171] This trade association also stated, however, that the Administrative Procedure Act and three Federal court rulings protect a timely ROW renewal applicant from actual trespass.[172]

Tribes stated that 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 to energy delivery or threatened the reliability of the system.[173] Tribes 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. They commented that the tribes should instead be fully compensated for trespass situations. Many tribes also commented that they viewed trespass situations as a time to create opportunities for improved long-term business relationships.[174]

6.3.2. Departmental Analysis

The fundamental issue is related to the negotiating climate, which is often marked by uncertainty and lack of shared objectives—not to the valuation of a particular energy ROW. Indeed, in response to the draft report, at least one industry representative commented that uncertainty (not cost increases) was the primary concern.[175] The Departments find that uncertainties abound in the energy ROW negotiation process when:

- Energy ROWs with limited terms require renewal, but past valuation methods are unclear, are undocumented, or were developed with little tribal involvement;
- Information about the energy ROW in question is limited;
- New valuation methods lack transparency;
- The parties have widely differing cultural values;
- 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.

The significance of these factors (when compared with using some predetermined valuation method) is made clear by the comments of some energy companies. They stated that they had no problems in using the current process for obtaining an energy ROW on tribal lands when the ROWs did not cross State lines. Energy companies that built productive relationships and partnerships with tribes commented that they found the tribes to be fair negotiators for energy ROW valuation on tribal lands.[176]

The Departments also note that uncertainty occurs at all levels within the energy industry and is not primarily caused by negotiations with Indian tribes. Two reports published in June 2006 *(Why Are Electricity Prices Increasing?*[177] and *Siting Critical Energy Infrastructure)*[178] stress that uncertainty over energy ROWs stems from increased costs throughout the energy industry, needed infrastructure investments, and siting challenges at all levels of government and public involvement. These recent reports do not mention energy ROW negotiations with Indian tribes as a source of uncertainty. Moreover, despite the forward-looking nature of these reports, the cost of energy ROWs on tribal lands is also not mentioned as an upcoming or later future issue.

Why are Electricity Prices Increasing? finds that "[f]uel and purchased power expense growth essentially explains all of the 22% increase in utilities expenses from 2002 to 2005."[179] Over this period, the report notes that fuel and purchased power increased from 66 percent to 71 percent of all operation and maintenance (O&M) costs, while transmission and distribution costs were essentially flat and represented a small percentage of O&M costs.[180]

Why Are Electricity Prices Increasing? also discusses challenges associated with upgrading an aging transmission system. The report states that the "power delivery system is characterized by an aging infrastructure and largely reflects technology developed in the 1950's or earlier."[181] It notes that the strain on the system is beginning to show and that utilities have plans to reverse a 25-year-old trend of declining investments in transmission infrastructure.[182] The report also notes that costs can be imposed by local governments. In discussing the electric industry's plans to upgrade distribution networks, the report indicates that local government requirements related to aesthetics and local land use could increase costs. In particular, the report notes that requirements to put existing distribution lines underground would impose a cost of about $1 million per mile, which is a fivefold to tenfold increase over the cost of a new overhead power line.[183]

Siting challenges are discussed at length in *Siting Critical Energy Infrastructure.* The report states that large transmission projects must demonstrate (typically to State public utility commissions) that a new transmission line is the best option for addressing electricity reliability and is also the most economic solution.[184] Transmission lines must also comply with environmental reviews and address competing land uses.[185] The report finally notes that concerns about private property and property values must also be addressed.[186] To effectively overcome these uncertainties, the report suggests that "high-capacity interstate transmission projects should be designed to provide local benefits that can help justify their value to local constituencies."[187]

6.3.3. Departmental Findings

When uncertainty becomes a factor, negotiations can take longer, the parties may feel constrained by prior practices that limit creative business solutions, or the parties may lack the common ground needed to explore potential solutions. Nevertheless, the Departments note that despite these uncertainties, the vast majority of energy ROW negotiations are completed and contain mutually agreed-upon terms and conditions. This is true even if the negotiations are protracted and the method for determining the value of the energy ROW results in compensation that greatly exceeds what is perceived to be the market value of the tribal lands involved.

6.4. Risk to Investments in Infrastructure

6.4.1. Public and Tribal Comments

Industry commented that financial institutions and rating agencies could view a pattern of shorter energy ROW terms, longer negotiation periods, and escalating energy ROW rates as a source of 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."[188] Moreover, industry noted that excessive energy ROW fees and other access costs associated with tribal lands generally discourage the expansion of, and investment in, the facilities on those lands, thereby reducing tribal opportunities for job creation and development.[189]

Some in industry stated that the difficulties that companies have in renewing ROWs on tribal lands are leading them to make proactive decisions to bypass tribal land, and that the failure to adopt a reasonable process for ROW renewals will only increase the energy isolation of Indian country, discourage job creation and investment, and postpone the long-overdue economic development and national economic participation of Indian tribes.[190]

One industry representative noted, 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, all of which contribute to the volatile nature of the industry.[191] Another energy company also noted that the Section 1813 study itself, and concern about changes in the law, create uncertainty with regard to developing energy resources on tribal lands.[192]

Tribes generally commented that energy production and the number of energy ROWs granted on tribal lands are increasing over or consistent with earlier levels and do not reflect a reduction in investment. One tribe presented data on the number of natural gas pipeline and electric transmission ROWs granted on its lands since 1980 to illustrate that the granting of energy ROWs continued at earlier rates or grew with some fluctuation, depending on economic cycles.[193] Another tribe commented that over the last 20 years, it has successfully concluded negotiations for grants or renewals of interstate pipelines with a number of major pipeline companies.[194]

Tribes also noted that innovative energy ROW agreements have led to expansion of energy investment and resources on their reservations. In one case, such agreements added about 1.7 trillion cubic feet to the Nation's supply of natural gas.[195]

6.4.2. Departmental Analysis

Because energy transport companies must make ROW siting decisions that are in their (and their shareholders') best interest, they may decide to *build around* a reservation. The result is probably more economic cost to the company, lost opportunity costs to the tribe, and possibly less access to energy resources.

6.4.3. Departmental Findings

Most tribes need additional revenue sources and have reasons to seek economic development opportunities, including productive relationships with energy companies. Energy companies want to develop cost-effective options for transporting energy resources across the country. To date, these mutual interests have allowed energy ROWs to be developed across Indian lands without disrupting energy resources or imposing undue costs on the consumer. However, a reasonable certainty in the current and future negotiation process is needed to assure that these mutual benefits can be obtained and to minimize the risk associated with infrastructure investment.

6.5. Differences among Grants, Expansions, and Renewals of Rights-of-Way

6.5.1. Public Comments

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

Industry contends that "where new, non-geographically constrained facilities would be sited on tribal lands, either party can walk away from the transaction if the terms are not mutually acceptable. However, where the only practical or possible route for a new facility is across tribal land or where the term of an existing facility is being renewed, there is little constraint on what a tribe can demand for that renewal."[196] Furthermore, industry states that a build-around option is an unlikely and expensive scenario for companies that have already "invested hundreds of millions, if not billions, of dollars on existing infrastructure located on tribal lands."[197] Industry also states that if Congress provided a backstop mechanism (in the form of eminent domain authority to be exercised by a Federal authority), "there would be an increased incentive for tribes to negotiate energy rights-of-way renewals for terms and conditions that more accurately reflect the current market situations."[198]

Further, industry stated that the issue is one that will most likely become increasingly contentious in the future because, according to their information, about 90 percent of the outstanding renewals for companies have not yet occurred.

In comments made at public meetings, tribes contend that company investments in already installed infrastructure (in the case of a renewal) have largely depreciated and that companies are seeking to obtain value in negotiations for something for which they have already realized a benefit. In addition, one tribe noted that renewals of energy ROWs on tribal lands are "no different than other types of contract renewals that [the members of the energy industry]

routinely face in other settings when they come to the end of a contract and which require forward analysis of investment options and cost alternatives that ignore sunk cost and consider the renewals in the context of current market conditions."[199]

Industry asserts that most interstate natural gas pipelines still have a large amount of undepreciated investment, and they point to the annual reports filed by each pipeline with FERC. These commenters state that in general, most pipelines (including older pipeline systems) have not been fully depreciated because (a) they are continually investing in new infrastructure and (b) FERC typically requires a pipeline to depreciate its facilities in accordance with the expected life of the natural gas reserves attached to its pipeline system, which often is a period of 30 to 40 years or more for major onshore pipelines.[200]

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

6.5.2. Departmental Analysis

The Departments verified with FERC that most companies continually reinvest in their pipeline systems in many ways, such as by upgrading systems to enhance production capacity or increase safety or simply by conducting routine maintenance on aging equipment. In many cases, a pipeline system that was permitted 20 years ago may still have hundreds of millions of dollars in undepreciated investment. It would thus be a daunting proposition for a company to decide whether to sell or abandon a pipeline that was not fully depreciated.

However, these contracts were entered into with the full knowledge that they were for a fixed term and that the company would have to enter into a renewal negotiation at some time in the future. Companies that made additional infrastructure investments should have been fully aware that they would be faced with this situation. At the same time, they could have included clauses in these older contracts to deal with this situation or they could have asked to renew the ROW contract before making any additional investment.

The Departments do recognize that the negotiation posture of tribes vis-à-vis the Government has changed over time, so that the governmental role has increasingly evolved from direct involvement in the negotiation to the review and approval or disapproval of terms arrived at by direct interaction between tribes and the energy industry. However, tribal sovereignty is a known and familiar part of the business landscape in parts of the United States and should be recognized in any prudent business practice, especially over the last 25 years. Companies cannot expect that terms of contracts would remain static over time or would remain the same for contract renewals.

6.5.3. Departmental Findings

Companies continue to make significant investments in energy transmission systems over time. In many cases, they still have significant undepreciated investments in infrastructure when the renewal of an energy ROW is due. However, this situation is a result of a full and open prior

contract negotiation that the company should have anticipated when it entered into the initial contract and for which it should have made subsequent, additional investments.

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7. Congressional Approaches to Address the Issue

Under existing laws and regulations, difficulties in negotiations for energy ROWs across tribal lands can arise that are sometimes very significant to the parties and may relate to the trust relationship between the Federal Government and Indian tribes. As noted in Section 3.3 it is Congress, as Trust Settlor, who ultimately defines the nature and extent of the responsibilities of the Executive Branch as the Trustee Delegate. With that perspective in mind, the Departments determined a range of approaches (listed here) that Congress could consider if it concludes that a particular impasse merits a legislative solution. This report offers approaches that range from no Federal intervention to 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.

Because of the fiscal and time constraints on this study, the Departments did not conduct an individual benefit-cost analysis for each approach. Should Congress choose to consider any of these approaches, the Departments recommend that before any option is enacted, the first step be a benefit-cost analysis of the selected options(s) by an independent entity to determine that the overall benefits exceed the projected costs.

7.1. No Action

Under the no action approach, Congress would elect no change, allowing ROW negotiations to continue under current laws, regulations, practices, and procedures. To date, many comments from tribal parties and energy companies indicate that current policies for granting and renewing energy ROWs are generally working. This approach 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.

7.2. Congress Would Establish a Legislative Mandate for Tribal Consent

As described in Section 3.2.1, there is an existing statute that requires the consent of only those tribes organized under the Indian Reorganization Act and the Oklahoma Indian Welfare Act before an energy ROW can be authorized on tribal lands. Since 1951, there has also been a DOI regulation in effect that is applicable to all tribes and requires the consent of a tribe before an energy ROW can be authorized. Congress could emphasize the importance of the concept of tribal consent for energy ROWs by enacting a new statute applicable to all tribes that would require that the tribe's consent be obtained as a condition to the authorization of an energy ROW.

7.3. Congress Could Choose a Valuation Methodology or Authorize the U.S. Government to Determine *Fair and Appropriate* Compensation

Under this approach, Congress could either choose from one of the valuation methodologies suggested in Section 5.2 or direct the Executive Branch to establish a Federal entity to determine *fair and appropriate* compensation for *all* energy ROWs across tribal land. This entity, rather than Congress, would be responsible for developing a valuation methodology (and the attendant regulations) to calculate just compensation for the use of the land. However, each party (tribes or industry) would reserve the right to accept or reject the calculated value.

7.4. Congress Could Require Binding Valuation

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

1. Enter into binding arbitration conducted by a mutually approved third party. The third party's decision would not be subject to appeal. Either party could petition to invoke this procedure.

2. Enter into binding arbitration conducted by a third party selected by Congress. The arbiter's decision would not be subject to administrative appeal. Either party could petition to invoke this procedure.

3. Accept just compensation as determined by a Federal entity by using one of the strategies outlined in Section 5.2.

7.5. Congress Could Authorize Condemnation of Tribal Lands for Public Necessity on a Case-by-Case Basis

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

The U.S. Supreme Court has consistently affirmed that the U.S. Constitution vests Congress with plenary power over Indian affairs.[201] As recognized *supra* in Section 3.2.1, Congress has exercised this power in a variety of circumstances in the past to achieve various goals, including energy ROWs for transportation projects.[202] Consistent with this practice, Congress would be able, if it so chose, to remedy a threatened or actual energy supply interruption arising out of an energy ROW negotiation through a grant of condemnation or eminent domain authority. However, in recognition of tribal sovereignty and the United States' trust responsibility under existing treaties with Indian tribes, legislation granting such authority has been clear in expressing the intent of Congress to do so.[203]

8. Recommendation of the Departments

8.1. Departmental Observations

The principal observations from the Departments' analysis are as follows:

1. The current policy is to rely on negotiations between Indian tribes and energy companies to arrive at terms for the grant, expansion, or renewal of energy rights-of-way on tribal land. This is in keeping with long-standing Federal policies against the alienation of tribal lands without tribal consent and support for tribal self-determination.

2. Current methods of valuing energy rights-of-way—through negotiations between tribes and energy companies—are guided by and in keeping with existing Federal tribal and energy policies. In addition, recent energy legislation (EPAct 2005) supports greater independence and control by tribes over their tribal land and resources.

3. The issues concerning energy rights-of-way on tribal lands are most acute with regard to negotiations for renewals. Recently, some renewal negotiations have become more protracted, and the fees paid to the tribes for the use of their lands have risen (except for some exceptions). However, fees paid to Indian tribes for the grant, expansion, or renewal of energy rights-of-way on tribal lands are a small component of overall consumer costs for electricity or natural gas.

4. Negotiations between Indian tribes and energy companies for the grant, expansion, or renewal of energy rights-of-way across tribal lands have had no demonstrable effect on energy costs for consumers, energy reliability, or energy supplies to date. Therefore, broad changes to the current Federal policy of self-determination and self-governance for tribes—or the existing right of consent—are not warranted at this time.

5. It is possible that future unresolved conflicts over energy rights-of-way across tribal land may have a significant regional or national effect on the availability, reliability, or consumer costs of energy resources. Failure to secure tribal consent for the siting of an energy right-of-way on tribal lands, especially in geographically constrained areas, could result in a heightened regional or national energy concern. In such circumstances, the U.S. Constitution empowers Congress to strike a balance between tribal sovereignty and the greater national interest. In some cases, this may mean that the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty.

6. Increasing rights-of-way costs to energy transmission companies may also have a detrimental effect on some tribes. Decreasing term durations, increasing costs, and future uncertainty may make rights-of-way across tribal land less desirable for many companies. This is particularly likely if companies also face the uncertainty of a right-of-way renewal in 20 or 25 years, with tribes holding virtual veto power over the

renewal. If companies choose to build around tribal land where they can, tribes run the risk of losing economic opportunities and possible interconnects to energy transmission facilities.

7. In most cases, initial rights-of-way agreements are term contracts, and no guarantee or indication of renewal was given by the tribes or the Federal Government. Therefore, any renewals represent, in essence, new contracts.

8.2. Recommendation: Status Quo with Congressional Case-by-Case Intervention

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

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

Accordingly, the Departments recommend the following:

1. Valuation of energy rights-of-way on tribal lands should continue to be based on terms negotiated between the parties.

2. If the failure of negotiations involving the grant, expansion, or renewal of an energy right-of-way has a significant effect on the regional or national supply, price, or reliability of energy resources, the Departments recommend that Congress consider resolving such situations on a case-by-case basis through legislation targeted at the specific impasse, rather than making broader changes that would affect tribal sovereignty or self-determination generally.

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

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

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

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

9.1. Ute Indian Tribe of the Uintah and Ouray Reservation

The Ute Indian Tribe of the Uintah and Ouray Reservation (Northern Ute) is located in the Uintah Basin of northeast Utah. The Northern Ute Reservation now covers more than 4 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 Northern Ute 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 Northern Ute 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 Northern Ute became more actively involved in negotiations. Other examples of the Northern Ute's increasing participation in negotiations and its business model are presented in Section 9.6.6. These examples of the Northern Ute's involvement in energy ROW renewals were not included in the HRA analysis.

a. Right-of-Way 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. Right-of-Way No. H62-1978-005

In 1978, a utility company offered the Northern Ute $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 a year earlier other land used for that purpose had sold for $50 to $200 per acre. 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 land owners 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. Right-of-Way No. H62-1983-18

In November 1982, the Northern Ute 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 5-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 land owners. In 2003, the company applied for ROW renewal, offering to pay damages and compensation as determined by DOI. No further information on the ROW renewal or compensation is available, but the pipeline is included on a 2006 tribal map showing FERC-regulated pipelines.

d. Right-of-Way No. H62-1992-80

In 1991, a company wished to cross 4 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 5-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 because it had never provided compensation on such a basis before, only 2 percent of the pipeline crossed tribal lands, and it would be impossible to finalize contracts in the 2 weeks remaining before construction would start. The company countered with an offer of $2,500 per acre, an additional contribution to the scholarship fund, and a joint venture with the Northern Ute

on the gathering lines. The Northern Ute 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 Northern Ute on construction projects. Complete terms of the ROW agreement are not available, but the Northern Ute received $238,537 as payment for the pipeline, compressor station, and gathering lines for a 20-year ROW.

9.2. 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 Southern Ute's lands contain oil and gas reserves and coal beds.

In the 1950s and 1960s, the Southern Ute 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 Southern Ute became more involved in oil and gas leasing, and in 1980, the Tribal Council formed an Energy Resource Office to help gather information on the Southern Ute's energy potential and monitor compliance with existing leases. The forms of ROW compensation became more varied, including contributions to scholarship funds, annual rental fees, land trades, throughput fees, and investment opportunities.

In the 1990s, the Southern Ute formed the Red Willow Production Company[204] 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 was negotiated between the Southern Ute and energy companies, and the Tribal Council would accept or reject ROW proposals. The BIA would then approve the ROWs to which the council had consented. Appraisals were seldom done, since the Southern Ute 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 case studies demonstrate the movement made by the Southern Ute from the 1950s to the present day to manage its energy resources.

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 rate of $1 per rod.

b. Mid-American Pipeline Company

By the late 1970s, the Southern Ute 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 7 miles of tribal land. Total compensation under the offer was $33,571. After the Southern Ute 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 Southern Ute were involved in renewal negotiations. The Southern Ute 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 Southern Ute 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 Southern Ute suggested compensation of $374,810 for a 25-year term, which was based on Mid-America's expected profits but was to be paid as an annual rental that would be based on the pipeline's projected throughput.

Negotiations for a renewal began in 1985, 5 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 Southern Ute 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 Southern Ute 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 (CPI)(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 Southern Ute $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 Southern Ute 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 percent increase in per rod costs because of decreased sales and inflation that was lower than expected. The Southern Ute 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 Southern Ute refused the offer and requested compensation based on alternative valuations such as throughput. The Southern Ute 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 Southern Ute and for the Southern Ute 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 Southern Ute 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 Southern Ute entered into a partnership with Stephens Group, Inc. (an investment group) to bid on it. The bid was initially rejected but then reconsidered when it was made clear that the Southern Ute 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 Southern Ute created the Red Cedar Gathering Company (a joint venture). Stephens contributed all of WestGas's assets to Red Cedar, and the Southern Ute 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 5 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.

9.3. 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 Morongo Reservation got larger and smaller with subsequent Executive Orders and allotment activity. In 2003, the Reservation encompassed 32, 402 acres, of which 31, 115 acres were tribal lands. The Morongo Band did not organize under the IRA.

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

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

a. Right-of-Way 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-mile easement.[205] In 1966, the Band 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. Right-of-Way 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, 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 Band 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 had a starting date of July 1, 1945.

SCE initiated the renewal process in 1992, 3 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. Both parties have since entered into an agreement that calls for negotiations to begin in 2008 and conclude by 2010.

c. Right-of-Way No. 378-Morongo-47

In 1959, when the California Electric Power Company (CEPC) applied for a 150-foot ROW for two 115 kV transmission lines on 4.73 miles of the Reservation, the Morongo Band suggested that the company provide electric service to Reservation homes in addition to a damage fee.[206] CEPC was amenable to this and offered payment of $21,000 and the 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 percent 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 percent of appraised 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. Right-of-Way No. 378-Morongo-277

SCE's 33 kV Banning-Palm Springs electric distribution line had been licensed by FPC 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 percent of market value for lines with voltages of less than 220 kV, SCE offered $7,155 for about 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.

9.4. 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 through DOI as a Federal corporation under Section 17 of the IRA and ratified by the Navajo Nation Council in 1998.[207] Five years later, NOG began developing energy resources on tribal lands by granting new oil and gas leases.[208]

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 Navajo 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 that had been agreed upon earlier were included in the agreement. One of the stipulations called for damages of $1 per lineal rod. The payment of damages 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 $0.03 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."[209] The Navajo were involved in the approval process.

In December 1991, consistent with the ROW terms, APS submitted a payment of $108,176.47 ($6.98 per rod) to BIA for the Navajo Nation to renew the ROW associated with the 500 kV line, but it also indicated its willingness to discuss other considerations for renewal. The Navajo Nation rejected that payment and asked the BIA to return the check to APS. The payment was resubmitted to BIA in March 1992; the check was cashed without being returned to APS.[210]

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.[211]

By late December 1993, the Hopi Nation and 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 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.[212]

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's ROW renewal application was submitted to BIA without Navajo Nation consent. The BIA rejected the application determining that the Navajo Nation's consent was required by the Navajo Treaty of 1868 and applicable Federal regulations. Transwestern sued in Federal court to have the rejection of its application overturned, but the Navajo Nation's right to consent was upheld, and Transwestern returned to negotiations with the Navajo Nation.[213]

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

Transwestern and the Navajo Nation agreed to a subsequent MOU in 1991 that gave the company an option to acquire 79.5 miles of additional ROWs. Under the MOU, 25 percent 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 market value of the land was $25 per lineal rod.

Transwestern and the Navajo Nation agreed to an extension of the ROWs to November 2009. Transwestern's other rights would expire at that time, and the parties wanted all ROWs to have the same renewal and expiration dates.[214] 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 that were 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 percent on the basis that the ROWs accounted for only about 50 percent of the land's value. The appraiser also stated that 8 percent of the value of the land taken would be a just 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 5 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, 4 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 Navajo 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 3 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. However, all the easements shared the same expiration date. The agreement states that this was done to ease the administrative burdens on both parties.[215]

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 were extended to December 31, 2006.

9.5. Survey Information

EEI and INGAA conducted surveys on their members' experiences in negotiating energy ROWs on tribal lands.

9.5.1. Edison Electric Institute

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

In its survey, EEI sought (a) information about the costs, terms, and conditions of energy ROW renewals; (b) data on the appraised value of lands included in the ROW; (c) comparative data on the terms and conditions of the ROW contract that immediately preceded the renewed ROW contract; and (d) 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 5 years. EEI aggregated the survey results to protect the confidentiality of all parties involved.

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

Following this verification, EEI corrected the few differences that were found and then reaggregated the data and submitted a survey addendum dated June 21, 2006. Since several of the energy ROW renewals included in the survey had occurred more than 5 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).

The following data were extracted from the revised comments dated June 21, 2006, unless otherwise noted. Information presented in the following tables and in the text that expands on the information in those tables has been verified as accurately reported by EEI, unless specifically noted below.

A preliminary EEI screening survey of its 75-member base revealed that 28 companies had jurisdictional territories that overlapped tribal reservation lands, and 20 of those 28 companies had ROWs on tribal land. Eight of the 20 companies had completed renewal transactions within the past 5 years, and only one of the eight declined participation in the survey. Information was gathered on 20 energy ROWs, seven of which were renewed before 2001.

The EEI survey data showed 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	No. of ROWs	No. of Years in Duration		
		Avg.	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

In Table 2, EEI compares the fair market value of land associated with existing ROWs to the cost paid for that ROW. EEI defines *fair market value* as the "economic (i.e., competitive) value of the land."[216] To arrive at this fair market value, EEI calculated the market value of the land. In that calculation, EEI took into account the variation in terms of years of the renewals and whether the market value of the energy ROW was presented in a survey response as fee simple or easement.

Energy ROW prices were adjusted by EEI 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 percent in one calculation and 70 percent in another to obtain the easement value.

On the basis of a 50 percent discount, EEI calculated that the average multiple of market value was 31 for energy ROWs renewed within the last 5 years; the average multiple was 21 on the basis of a 70 percent discount. The average multiples for the full data set were 115 on the basis of the 50 percent discount and 83 on the basis of the 70 percent discount. When an outlier (1,624 times the 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 market value for energy ROW renewals are presented in Table 2.

TABLE 2 ROW Renewal Compensation as Multiple of Market Value				
Data Set	No. of ROWs	Multiple of Market Value of 50%/70%		
		Avg.	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

EEI reported that of the 12 energy ROW renewals completed within the past 5 years, when easements were assessed at 50 percent of the fee simple value, the market value was (a) paid in two cases, (b) between 2 and 4 times the market value in four cases, and (c) between 11 and 25

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

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

Another measure of energy ROW renewals used by EEI was per mile cost. EEI reported that the traditional all-inclusive costs (i.e., ROW and construction) of high-voltage, overhead transmission facilities are about $500,000 per mile for rural land and about $1 million per mile for suburban land. Lower-voltage transmission and distribution lines generally are hundreds of thousands of dollars per mile.[217] EEI clarified that the all-inclusive cost estimates are based on easements in perpetuity and not temporary permits on tribal land.[218]

EEI reported that 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 5 years and $1,366,000 for renewals in the full data set. Additional data on per mile costs of renewals are provided in Table 3.

TABLE 3 ROW Renewal Costs on a Per Mile Basis

Data Set	No. of ROWs	Per Mile Cost ($)		
		Avg.	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

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 4 conveys the results of that analysis; however, note that (as EEI pointed out in its report) the Table 4 findings are based on relatively few data points.

TABLE 4 ROW Renewal Cost as Multiple of Previous ROW Cost				
Data Set	No. of ROWs	Multiple		
		Avg.	Median	Range
2001–2005	5	779	227	18–2,767
Full	11	863	227	10–3,812

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

TABLE 5 ROW Renewal Negotiation Periods				
Data Set	No. of ROWs	No. of Months		
		Avg.	Median	Range
2001–2005	12	23	13	6–102
Full	20	25	14	6–102

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

EEI members noted two main reasons for the length of renewal negotiations: frequent turnover in tribal governance and long lead times for BIA actions 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 (in 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 percent because of those increases.

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

The verification 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 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 that ROW negotiations took at least 2 years; others reported significantly longer periods; and one reported that they took more than 10 years.

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 described in the INGAA comments were summarized previously in Sections 9.2 and 9.4.

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.

INGAA included the following comment, which was not verified through source documents, in its May 15, 2006, submission: tribes generally began negotiations by requesting terms of less than 20 years, and 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 and 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.

9.6. Other Case Study Reports Submitted by the Participants

The following examples illustrating historic rates of compensation for energy ROWs on tribal land were selected from several submissions by tribes and the Federal power marketing administrations. These case studies were chosen because either they were fairly complete or they addressed issues raised in the Section 1813 study, including valuation methods and conflict adjudication processes.

Because of limited time and resources available, only the Bonneville Power Administration (BPA) case was verified. For the other cases included in this section, only summaries are provided; these cases were not verified by the Departments.

9.6.1. Bonneville Power Administration

In 1978, DOE's 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 5 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 Confederated Tribes exercised that option. Compensation for the future corridors would be negotiated to be consistent with prevailing economic conditions and market values.

Pursuant to the terms of the 1978 agreement, if BPA and the Confederated Tribes 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

U.S. 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.

9.6.2. Hopi Tribe

The Hopi Reservation has the second-lowest percentage of households with access to electricity in the United States: 29 percent of Reservation residents live without electricity, as opposed to the national average of approximately 1 percent.[219]

The major provider of electric services in Arizona has a 500 kV transmission line ROW across the Hopi Reservation. Under the original 25-year term of the agreement, the Hopi Tribe was paid a total of $755 for an approximately 50-mile ROW. In their submittal, the Hopi state, "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." [220]

The transmission line does not provide any electricity to Hopi Reservation residents. However, the Hopi Tribe, to encourage electrification, foregoes compensation from the electric provider for ROWs providing electrical service to the Reservation. Often the Hopi 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 Hopi Tribe reported that it 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. [221]

APS, the holder of the ROW for the 500 kV line, stated that ROW is 97.53 miles in length and that it paid the Hopi Tribe $755 per mile for a total payment of $36,818.33. The resolutions approving the ROW and payment state that the second payment for the second 25-year term will be an amount equal to the first payment. APS subsequently sent payments totaling $38,137.17.[222]

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

9.6.3. 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 about $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 compensations came to approximately $697.56 and $271.66, respectively.[223]

9.6.4. 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 San Xavier District and land to its west were acquired from the City of Tucson and Pima County for $7.50 per square foot.

The San Xavier 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.[224]

9.6.5. Shoshone-Bannock Tribes of the Fort Hall Reservation

The Fort Hall Reservation has 19 electric transmission lines and 3 natural gas pipelines on its 545,000 acres. One of the earliest energy ROWs was the 50-year, 1941 grant to the Utah Power Company for a 26-mile transmission line. BIA and the company conducted negotiations for the ROW, which led to a damage assessment of $6 per pole and a proposed $5 per mile annual rental fee. The Shoshone-Bannock Tribes received $177 in damages; records do not confirm that the per mile annual rental fee was ever paid.

The transmission line ROW expired in 1991. The company did not request its renewal until 2001 when, in response to an Idaho Public Utilities Commission hearing on Utah Power's proposed merger with another company, the Shoshone-Bannock Tribes testified that the company was in trespass. Within a week of the hearing, after a brief period of negotiations, the company filed a renewal that was approved for a 20-year term for an undisclosed fee.[225]

Two electric transmission line ROWs on the Reservation are held in perpetuity. The fees for these ROWS were $15,050 for a 138 kV line and $33,950 for a 345 kV line. The former ROW is 15.28 acres, and the latter is 183.56 acres.[226]

9.6.6. Ute Indian Tribe of the Uintah and Ouray Reservation

In addition to the case studies prepared by HRA and summarized in Section 9.1, the Northern Ute submitted additional examples of its more recent practices in consenting to energy ROWs.[227] Each of the case studies involved situations in which energy companies had existing energy facilities on a ROW but conducted new negotiations for access. Negotiations were needed to resolve disputed instances of trespass or remedy disputes over past performance under existing agreements. All negotiations resulted in agreements on renewals or replacement agreements. In addition, the agreements expanded the scale and the scope of the Northern Ute's and companies' energy-related activities on the Reservation.

In one case, the Northern Ute and an energy company developed several incentives to accomplish their mutual business objectives: (1) throughput fees of $0.05 per mcf for a ROW renewal, (2) capacity priority position for the Northern Ute's royalty in-kind gas, (3) an overriding royalty to provide a ROW for each well location; (4) a commercial right for the Northern Ute to participate in any pipeline expansion and a right for it to participate in any new drilling in the area, and (5) preferential transportation cost for any third-party commercial gas.

In another case, the Northern Ute offered an energy company a concession agreement that would allow the company to manage all its ROWs on the Reservation under one master agreement. The fee for the concession agreement had a floor and ceiling to be reset on the basis of a specified index. The parties agreed that binding arbitration would be used for certain disputes if they could not resolve them amicably. The Northern Ute granted a limited waiver of sovereign immunity and agreed to submit to jurisdiction of outside legal courts for enforcement of arbitration awards.

Through negotiations in a third case, the Northern Ute was able to resolve several long-standing disputes, maintain throughput as the basis for a ROW renewal, and increase its energy development opportunities. Though characterized as tough negotiations, the outcomes created partnerships and aligned the parties' economic interests.

9.6.7. Rosebud Sioux Tribe

In 1974 and 1976, BIA signed easements for a 15-mile, 115 kV transmission line through the Rosebud Sioux Reservation. Despite statutory provisions[228] that ROWs over reservation lands are not to exceed a period of 50 years, the ROWs were granted in perpetuity.

The Tribal Council consented to the ROWs on the basis of the understanding that the transmission line would supply an additional source of electric energy throughout the area that would benefit the Reservation. The fees for the 1974 and 1976 ROWs were $14,484 and $10,520, respectively, to be paid to the Rosebud Sioux and the individual land owners whose property the ROWs crossed. The Rosebud Sioux does not have any documentation on the appraisals made for the ROWs or the distribution of payments for them.[229]

Endnotes

[1] *See, e.g.*, Comments of the Edison Electric Institute 5–6 (Sept. 4, 2006); Comments of the Fair Access to Energy Coalition (FAIR) 19 (Sept. 4, 2006).
[2] Comments of FAIR 19 (Sept. 4, 2006).
[3] Id.
[4] Comments of the Edison Electric Institute 6 (Sept. 4, 2006).
[5] Id.
[6] Id.
[7] Comments of FAIR 21 (Sept. 4, 2006).
[8] Comments of the Isleta, Zia, and Sandia Pueblos 6 (Sept. 1, 2006).
[9] Id. (emphasis in the original).
[10] Public Testimony of the Jicarilla Apache Nation 1 (Mar. 7–8, 2006).
[11] Id.; Comments of the Jicarilla Apache Nation 9 (May 12, 2006).
[12] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 19 (May 11, 2006) (emphasis was in the original).
[13] Comments of the Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 13 (Jan. 20, 2006).
[14] Id. (citing U.S. Dep't of Energy, Energy Consumption and Renewable Energy Development Potential on Indian Lands ix (April 2000) (*available at* http://www.eia.doe.gov/cneaf/solar.renewables/ilands/ilands.pdf) (using information from the 1990 Decennial Census).
[15] Id. at 14 (citing U.S. Dep't of Commerce, Bureau of the Census, Statistical Brief, Housing of American Indians on Reservations — Equipment and Fuels 3, table (April 1995) *(available at* http://www.census.gov/apsd/www/statbrief/sb95_11.pdf).
[16] Id. at 12.
[17] National Energy Policy Development Group, National Energy Policy viii (May 2001).
[18] Id. at vii.
[19] Id. at 7-1.
[20] Id.
[21] Id. at 7-7 and 7-8.
[22] Id. at 7-5.
[23] Id.
[24] Id. at 7-6.
[25] Id. at 7-7 and 7-8.
[26] Id. at 7-12.
[27] Id.
[28] Id.
[29] Id.
[30] Id. at 7-9.
[31] Id. at 7-8 to 7-9.
[32] Id. at 7-9.
[33] 16 U.S.C. § 824p.
[34] 16 U.S.C. § 824p (a) (2).
[35] 42 U.S.C. § 15926 (a).
[36] 42 U.S.C. § 15926 (b).
[37] 42 U.S.C. § 15926 (d).
[38] 16 U.S.C. § 824p (e).
[39] 25 U.S.C. § 3502.
[40] 25 U.S.C. § 3504 (e).
[41] 25 U.S.C. § 3504 (b).
[42] 25 U.S.C. § 3504 (a) and (b).
[43] 71 Fed. Reg. 48626.
[44] 25 U.S.C. § 3504 (c).
[45] Indian Right-of-Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323–328.
[46] The primary allotment act, which was 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 were then to 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 in Indian-held land, for a variety of reasons. It decreased from 138 million acres in 1887 to 48 million in 1934. Federal policy reversed this 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).

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

[48] *See generally* COHEN's HANDBOOK OF FEDERAL INDIAN LAW 204–220 (2005 ed.).

[49] Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 6 (April 29, 2006).

[50] *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).

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

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

[53] *See, e.g.*, Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 3–6 (April 29, 2006) (citations omitted).

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

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

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

[57] Comments of the Pueblo of Santa Ana 5 (May 15, 2006).

[58] *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).

[59] Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 5 (Sept. 4, 2006).

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

[61] 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).

[62] Act of March 2, 1899 (30 Stat. 990).

[63] Id.

[64] 25 U.S.C. § 321.

[65] Id.

[66] Act of March 4, 1911, codified at 43 U.S.C. § 961.

[67] Id.

[68] 25 U.S.C. § 323.

[69] 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."

[70] 25 U.S.C. § 324.

[71] 25 U.S.C. § 326.

[72] 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).

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

[74] 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").

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

[76] 16 Fed. Reg. 8578 (1951).

[77] 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).
[78] In 1967, DOI published a proposal to allow the Secretary to grant rights-of-way over lands of tribes that had not organized under the tribal organization statutes, without tribal consent. The House of Representatives Committee on Government Operations issued a report which concluded, "[T]he Secretary's proposal for granting rights-of-way over tribal land without consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation." HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, DISPOSAL OF RIGHTS IN INDIAN TRIBAL LANDS WITHOUT TRIBAL CONSENT. H. Rep. No. 91-78, at 304 (1969). The proposal was subsequently withdrawn.
[79] 25 U.S.C. § 461.
[80] 25 U.S.C. § 450a.
[81] 25 U.S.C. § 450 (a) (2).
[82] 25 U.S.C. § 3502.
[83] Presidential Proclamation 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).
[84] Presidential Proclamation 7956, 70 Fed. Reg. 67635 (Nov. 7, 2005).
[85] Executive Order No. 13175, 65 Fed, Reg. 67429 (Nov. 9, 2000).
[86] BLACK'S LAW DICTIONARY 1402 (7th ed. 1999).
[87] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 205 (Aug. 2005 ed.).
[88] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
[89] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 390 (Aug. 2005 ed.).
[90]United States v. Lara, 541 U.S. 193, 200 (2004), citing Washington v. Confederated Bands and tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979); Negonsott v. Samuels, 507 U.S. 99, 103 (1993); and United States v. Wheeler, 435 U.S. 313, 323 (1978).
[91] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 398 (AUG. 2005 ed.)
[92] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).
[93] In Santa Clara Pueblo et al. v. Martinez et al., 436 U.S. 49 (1978), the Court stated that Title I of the Indian Civil Rights Act represented an exercise of Congress' "plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess." Id. at 57-58.
[94] *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968); Santa Clara Pueblo et al. v. Martinez et al., 436 U.S. 49, 58 (1978); United States v. Dion, 476 U.S. 734, 738–39 (1986); and South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).
[95] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 214 (Aug. 2005 ed.).
[96] COHEN'S 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).
[97]A trust relationship may arise when the United States is required by statute to manage or operate Indian lands or resources. See United States v. Mitchell, 463 U.S. 206 (1983) (specific duties defined by statute and regulation). In order for a trust to exist, the three common-law elements of a trust must be present: a trustee (the United States), a beneficiary, and a corpus (timber, lands, funds, etc.).
[98] 25 C.F.R. § 169.12.
[99] Comments of the Confederated Salish and Kootenai Tribes of the Flathead Nation 2 (April 25, 2006).
[100] Comments of the Shoshone-Bannock Tribes 8 (May 12, 2006).
[101] For the case of the Ute Indian Tribe of the Uintah and Ouray Reservation, HRA prepared the request memorandum during the site visit. For the other reservations, the request was circulated prior to HRA's visit.
[102] 33 Fed. Reg. 19807 (Section 161.12).
[103] Comments of the Interstate Natural Gas Association of America 7 (May 15, 2006).
[104] Comments of the Edison Electric Institute 9 (Feb. 5, 2007).
[105] *See, e.g.*, Comments of FAIR 2 (May 15, 2006); Comments of the Edison Electric Institute 14 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 12 (May 15, 2006).
[106] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 2 (Feb. 5, 2007).
[107] *See, e.g.*, Comments of the Interstate Natural Gas Association of America 2 (May 15, 2006).
[108] Comments of the Edison Electric Institute 14 (May 15, 2006).
[109] Comments of FAIR 2 (May 15, 2006).
[110] Comments of Idaho Power Company 3 (Feb. 15, 2006).
[111] Comments of FAIR 5 (May 15, 2006).
[112] *See, e.g.*, Comments of the Edison Electric Institute 10–11 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 2 (May 15, 2006).

[113] Comments of FAIR 2–3 (May 15, 2006).
[114] Id. at 7-10.
[115] *See, e.g.*, Comments of the Idaho Power Company 4 (Feb. 15, 2006); Comments of the Edison Electric Institute 14 (May 15, 2006).
[116] *See, e.g.*, Comments of the Idaho Power Company 4 (Feb. 15, 2006); Comments of the Edison Electric Institute 10 (May 15, 2006).
[117] Comments of the Interstate Natural Gas Association of America 9 (May 15, 2006).
[118] *See* Comments of the Williams Company (Feb. 5, 2007).
[119] Id.
[120] *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).
[121] *See generally* Comments of the Jicarilla Apache Nation 17–21 (May 12, 2006).
[122] *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).
[123] *See, e.g.*, Id.; Comments of the Confederated Tribes of the Warm Springs Reservation of Oregon 3 (May 15, 2006).
[124] *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).
[125] *See, e.g.*, Comments of the Pechanga Band of Luiseño Mission Indians 5 (May 15, 2006).
[126] *See generally* Seneca Leasing Act of 1950, 64 Stat. 442 (Act of Aug. 14, 1950), and Seneca Nation Land Claims Settlement Act of 1990, 25 U.S.C. § 1774.
[127] *See, e.g.*, Comments of the Isleta, Zia, and Sandia Pueblos 16 (May 15, 2006).
[128] Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 5 (Sept. 4, 2006).
[129] Municipal Administrative Services, Inc., 5 and 7 (May 12, 2006) (submitted with comments of the Navajo Nation (May 13, 2006)).
[130] Id.
[131] Id. at 2.
[132] *See, e.g.*, Comments of the Manzanita Band of Diegueno Mission Indians, St. Regis Mohawk Tribe, and Mandan, Hidatsa, and Arikara Nation 6 (April 29, 2006) (citing Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989); Comments of the Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes, and the Pueblo of Zia 24 (Jan. 20, 2006).
[133] *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).
[134] *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).
[135] *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).
[136] *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).
[137] WINNING NEGOTIATIONS THAT PRESERVE RELATIONSHIPS 3 (Harvard Business School Press, 2004).
[138] Uniform Appraisal Standards for Federal Land Acquisitions 30 (5th ed., 2000).
[139] *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.).
[140] 16 U.S.C. § 803 (e).
[141] Id.
[142] 18 C.F.R. § 11.4 (a).
[143] Comments of Sempra Energy 2 (May 15, 2006).
[144] Comments of the Edison Electric Institute 5 (May 15, 2006).
[145] *See generally* Comments of the Interstate Natural Gas Association of America (May 15, 2006); Comments of the Edison Electric Institute (May 15, 2006).
[146] Comments of the Edison Electric Institute 12 (May 15, 2006 and Sept. 4, 2006).

[147] Comments of the Edison Electric Institute 8 (June 21, 2006); Comments of the Interstate Natural Gas Association of America 8–10 (May 15, 2006).
[148] Comments of the Edison Electric Institute 8 (May 15, 2006).
[149] Comments of the Shoshone-Bannock Tribes 9 and 15 (May 12, 2006); Comments of the Isleta, Zia, and Sandia Pueblos 6–7 (May 15, 2006); Comments of the Ute Mountain Ute Tribe 2 (May 15, 2006); Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 87 (May 11, 2006).
[150] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 67 (May 11, 2006).
[151] Comments of the Ute Mountain Ute Tribe 3 (May 15, 2006).
[152] 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)).
[153] Id.
[154] 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)).
[155] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 36-46 (May 11, 2006).
[156] Id.
[157] Comments of FAIR 9 (June 16, 2006).
[158] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 47–50 (May 11, 2006).
[159] Testimony of Federal Energy Regulatory Comm'n Chairman Joseph Kelliher, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, Summary and 6 (Nov. 2, 2005).
[160] Energy Information Administration, U.S. Dep't of Energy, Annual Energy Outlook 147 (2006).
[161] Testimony of Philip D. Wright, Williams Pipeline Company, House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality, 2 (Nov. 2, 2005).
[162] The Brattle Group, Why Are Electricity Prices Increasing? 10 (June 2006) (percentages calculated from operation and maintenance costs shown in Figure 2-1) (*available at* http://www.eei.org).
[163] *See* Federal Energy Regulatory Comm'n, Docket No. RP05-442.
[164] *See* Federal Energy Regulatory Comm'n, Docket No. RP06-72; settlement approved see 117 F.E.R.C. ¶ 61,217 (Nov. 21, 2006).
[165] *See* 95 F.E.R.C. ¶ 61,059.
[166] Comments of the Edison Electric Institute 5 (May 15, 2006).
[167] *See, e.g.*, Comments of the Shoshone-Bannock Tribes 15 (May 12, 2006).
[168] *See, e.g.*, Comments of the Edison Electric Institute 2 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 3 (May 15, 2006); Comments of Idaho Power Company 2 (May 15, 2006).
[169] Comments of Idaho Power Company 2 (May 15, 2006).
[170] Comments of the Interstate Natural Gas Association of America 3 (May 15, 2006).
[171] Comments of the Edison Electric Institute 5 (May 15, 2006).
[172] Id. At 5 n. 2 (citing 5 U.S.C. §§ 551(8) and 558(c), as interpreted by Swinomish Tribal Community v. Federal Energy Regulatory Comm'n, 627 F.2d 499, 506 (D.C. Cir. 1980); Miami MDS Co. v. Federal Communications Comm'n 14 F.3d 658, 659-60 (D.C. Cir. 1994); and Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency, 859 F.2d 156, 213 (D.C. Cir. 1988)).
[173] *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).
[174] *See, e.g.*, Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 74 (May 11, 2006).
[175] Comments of the Edison Electric Institute 3 (Sept. 4, 2006).
[176] *See, e.g.*, Comments of Questar Southern Trails Pipeline Company 2 (May 15, 2006); Comments of the Bill Barrett Corporation 1 (March 8, 2006).
[177] The Brattle Group, Why Are Electricity Prices Increasing? (June 2006) (*available at* http://www.eei.org).
[178] National Commission on Energy Policy, Siting Critical Energy Infrastructure (June 2006) (*available at* http://www.energycommission.org).
[179] The Brattle Group, Why Are Electricity Prices Increasing? 9 (June 2006) (*available at* http://www.eei.org).
[180] Id.
[181] Id. at 52.
[182] Id. at 52–55.
[183] Id. at 64.
[184] National Commission on Energy Policy, Siting Critical Energy Infrastructure 18 (June 2006) (*available at* http://www.energycommission.org).

[185] Id.
[186] Id.
[187] Id.
[188] Comments of the Edison Electric Institute 12 (May 15, 2006).
[189] *See, e.g.,* Comments of Western Business Roundtable 1 (Jan. 20, 2006); Comments of Idaho Power Company 2 (May 15, 2006); Comments of the Edison Electric Institute 13 (May 15, 2006); Comments of the Interstate Natural Gas Association of America 3 (May 15, 2006).
[190] Comments of the Edison Electric Institute 5 (Sept. 4, 2006).
[191] Comments of the New Mexico Oil and Gas Association 1 (Jan. 20, 2006).
[192] Comments of the Bill Barrett Corporation 2 (Mar. 8, 2006).
[193] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 61–62 (May 11, 2006).
[194] Comments of the Southern Ute Indian Tribe 4 (May 15, 2006).
[195] Id. at 8.
[196] Comments of the Edison Electric Institute 4 (Sept. 4, 2006).
[197] Comments of the Interstate Natural Gas Association 4 (Sept. 3, 2006).
[198] Comments of the Edison Electric Institute 10 (Sept. 4, 2006).
[199] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 109 (May 11, 2006).
[200] Comments of Greenberg Traurig 2 (Oct. 11, 2006).
[201] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564–67 (1903); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56–57 (1978); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.")
[202] *See* United States v. Celestine, 215 U.S. 278, 285 (1909); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56–57 (1978); United States v. Dion, 476 U.S. 734, 738–39 (1986); and South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).
[203] *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968); United States v. Dion, 476 U.S. 734, 738–39 (1986); and South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).
[204] Page 50 of the HRA Report states that the Southern Ute assigned operation of 21 acquired wells to Red Willow and retained royalty interests in 30 other wells. The Southern Ute states that it retained royalty interests in all wells on the Reservation operated by Red Willow. Comments of the Southern Ute Indian Tribe 6 (Sept. 2, 2006).
[205] Comments of the Morongo Band of the Mission Indians 6 (Sept. 3, 2006) (the unit of measure stated in the HRA Report is acres, but it should be miles).
[206] Comments of the Morongo Band of the Mission Indians 6 (Sept. 3, 2006) (the unit of measure stated in the HRA Report is acres, but it should be miles).
[207] Comments of the Navajo Nation 8 (Sept. 1, 2006).
[208] Id. at 9. Page 113 of the HRA Report states that the Navajo Nation had refused all offers to develop its energy reserves from 1978 to 2003. The Navajo Nation states that it granted rights to 254,000 acres to Chuska Energy Company for oil and gas exploration and development under an operating agreement signed in 1987 and that it had prior agreements with the company in 1983 and 1984.
[209] HRA (Historical Research Associates, Inc.), Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006 127 (July 7, 2006).
[210] Comments of Arizona Public Service Company 2–3 (Sept. 3, 2006).
[211] HRA (Historical Research Associates, Inc.), Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006 129 (July 7, 2006).
[212] Id. at 131. The HRA Report states that the easement has not been renewed. APS states that it considered the ROW renewed when the check it submitted was cashed. Comments of Arizona Public Service Company 2-3 (Feb. 5, 2007).
[213] Comments of the Navajo Nation 7–8 (Sept. 1, 2006).
[214] Id. at 8.
[215] Id.
[216] Comments of the Edison Electric Institute 6 (May 15, 2006).
[217] Id. at 9 (May 15, 2006).
[218] Comments of the Edison Electric Institute 17 (Sept. 4, 2006).
[219] U.S. Department of Energy, Energy Consumption and Renewable Energy Development Potential on Indian Lands (2000) (*available at* http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html).
[220] Comments of the Hopi Tribe 3 (May 14, 2006).
[221] Id.

[222] Comments of Arizona Public Service Company 3–4 (Sept. 3, 2006).
[223] Comments of the Pueblo of Santa Ana 3 (May 15, 2006).
[224] Comments of the San Xavier District of the Tohono O'odham Nation 1 (May 15, 2006).
[225] Comments of the Shoshone-Bannock Tribes of the Fort Hall Reservation 9 (May 12, 2006).
[226] Comments of the Shoshone-Bannock Tribes of the Fort Hall Reservation attachment (May 12, 2006).
[227] Comments of the Ute Indian Tribe of the Uintah and Ouray Reservation 77–85 (May 11, 2006).
[228] 43 U.S.C. § 961.6.
[229] Comments of the Rosebud Sioux Tribe 3–6 (May 15, 2006).

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Appendix A

The 2006 HRA document, *Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948–2006,* is an appendix to this report. The HRA document is available on the included CD.

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Appendix B

EPAct Section 1813 Study Commenters

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

Affiliated Tribes of Northwest Indians
Agua Caliente Band of Cahuilla Indians
Ak Chin Indian Community Council
Andrews Davis Corporation
Appraisal Institute
Arizona Corporation Commission
Arizona Public Service Company
Arizona Tribal Energy Association
Arkansas Riverbed Authority
Association of Oil Pipe Lines
Association of Property Owners and Residents of the Port Madison Area
Augustine Band of Cahuilla Indians
Avista Utilities
Bill Barret Corporation
Birdbear, C.
Blackfeet Nation
Blackfeet Tribal Business Council
Brooks, Steve
Burton, Steven
Chambers, Reid
Cheyenne River Sioux Tribe
Chickasaw Nation
City of Toppenish (William Rogers)
Colorado Office of Consumer Counsel
Colorado River Indian Tribes
Confederated Salish and Kootenai Tribes of the Flathead Nation
Confederated Tribes of the Colville Reservation
Confederated Tribes of the Goshute Reservation
Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs Reservation of Oregon
Coquille Indian Tribe
Cornell, Stephen
Council of Energy Resource Tribes
Dawson, Marlene
Eastern Shoshone Tribe
Edison Electric Institute
El Paso Natural Gas Company
Fair Access to Energy Coalition

Fallon Paiute-Shoshone Tribe
Fond du Lac Band of Lake Superior Chippewa Indians
Fond du Lac Reservation Business Committee
Fuelleman, Lisa
Frye, Paul
Governor Bill Owens (Colorado)
Governor Bill Richardson (New Mexico)
Hardy, Rogers and Antonia
Harvey, Carol
Havens, Bill
Honorable Ben Nighthorse Campbell
Hopi Tribe
Hualapai Nation
Idaho Power Company
Interstate Natural Gas Association of America
Inter Tribal Council of Arizona
Intertribal Monitoring Association on Indian Trust Funds
Jemez Pueblo
Jicarilla Apache Nation
Kinder Morgan Energy Partners
Kiowa Tribe
Kooros, Ahmed
Lac Courte Oreillies Band of Lake Superior Ojibwe
Leech Lake Band of Ojibwe
Mandan, Hidatsa and Arikara Nation
Manzanita Band of Diegueno Mission Indians
Marek, Joanna F.
Meloy, Charles
Montana Wyoming Tribal Leaders Council
Morongo Band of Mission Indians
National Congress of American Indians
Navajo Nation
New Mexico Oil and Gas Association
Nez Perce Tribe
Oneida Tribe
Organized Village of Kake
Paul, Chris A.
Pechanga Band of Luiseno Mission Indians
Plains Pipeline
Public Service Company of New Mexico
Pueblo de San Ildefonso
Pueblo of Acoma
Pueblo of Isleta
Pueblo of Jemez
Pueblo of Laguna
Pueblo of San Felipe

Pueblo of Sandia
Pueblo of Santa Ana
Pueblo of Zia
Quechen Indian Tribe
Questar Southern Trails Pipeline Company
Quileute Indian Tribe
Rosebud Sioux Tribe
Sac and Fox Nation
Sachau, B.
Salt River Pima-Maricopa Indian Community
Salt River Project
San Diego Gas & Electric/Southern Cal Gas Co
San Xavier District of the Tohono O'odham Nation
Santa Clara Pueblo
Sempra Energy
Senate Chamber, State of Colorado
Senator Wayne Allard (Colorado)
Seneca Nation of Indians
Severud, Timm
Shipps, Thomas H.
Shoshone Business Council
Shoshone-Bannock Tribes
Skokomish Indian Tribe
Southern Ute Indian Tribe
St. Regis Mohawk Tribe
Tanana Chiefs Council
Taos Pueblo
TDX Power (Ron Philemonoff)
Tohono O'odham Nation
Town of Aurelius (Edward Ide)
Tribal Council of the Northern Cheyenne Tribe
Tribes of the Mni Sose Intertribal Water Rights Coalition
Tulalip Tribes
Ute Energy
Ute Indian Tribe of the Uintah and Ouray Reservation
Ute Mountain Ute
Western Business Roundtable
White Mountain Apache Tribe
Williams Energy
Williams Four Corners LLC
Yakima Nation
Yazzie, Vincent
Zuni Tribe

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