

1 from 69 kV to 115 kV, and the installation of two new distribution switchgear and control
2 houses. Additionally, the project relocated and reconductored all six underground
3 distribution getaway circuits from the new switchgear equipment to the existing
4 distribution infrastructure. In total, this was a complete, in-place, rebuild of EPE's
5 Scotsdale substation.

6
7 Q. WHY WAS THIS PROJECT NEEDED?

8 A. Prior to the execution of this project the two, 30 MVA, substation transformers serving the
9 six Scotsdale distribution circuits were both approaching full capacity during the summer
10 months. The distribution switchgears (one for each transformer) that connect the
11 distribution circuits had reached the end of their useful life and both had already suffered
12 multiple internal cabinet breaker faults. This project was needed to regain the operational
13 reliability load serving capability of the substation.

14
15 Q. WAS PROJECT DT229 – SCOTSDALE TRANSFORMER & SWITCHGEAR
16 REPLACEMENTS A REASONABLE, NECESSARY, AND PRUDENT
17 INVESTMENT?

18 A. Yes, this project is reasonable and necessary and was constructed prudently. This
19 substation improvement is needed to replace aging equipment and increase capacity to
20 provide reliable service to EPE customers.

21
22 **D. Project Number 4 – DT220**

23 Q. WHAT IS PROJECT DT220 – SANTA FE TRANSFORMER, SWITCHGEAR, AND
24 REGULATOR REPLACEMENT?

25 A. Project DT220 is an \$8.8 million project that completely rebuilt, in-place, EPE's Santa Fe
26 Substation in downtown El Paso. This substation, one of EPE's oldest 14 kV distribution
27 substations, was constructed over the remains of the coal-fuel storage yard for a 1910 -
28 1920s era coal-fired power plant. Unfortunately, the groundwork for the construction of
29 this substation was not adequate for a site that previously served as a coal-fuel storage yard.
30 After 70 or 80 years of service, EPE was starting to have some serious ground settling
31 problems in the substation. And, being a central El Paso substation, in a long-established

1 neighborhood, there were no viable options for relocating the substation. This substation
2 had to be completely rebuilt, in place, beginning with the subsurface foundation work.

3 This project included the installation of a new 30 MVA Load Tap Changing
4 ("LTC") transformer to eliminate the existing three-phase regulator, replacement of
5 switchgear, replacement of all underground cable from the new switchgear into the
6 getaways, a new control house, and new protective relaying within Santa Fe substation and
7 the adjacent connecting substations (Dallas and Sunset).
8

9 Q. WHY WAS THIS PROJECT NEEDED?

10 A. The physical ground structure underneath this substation was collapsing under the
11 substation equipment. Santa Fe substation housed one transformer with seven distribution
12 feeders, including four feeders which are dedicated to the downtown underground network.
13 The equipment replaced at Santa Fe substation was at the end of its useful life. Due to
14 aging equipment and expected load increases in the downtown area, the upgrade of the
15 substation was needed.
16

17 Q. WAS PROJECT DT220 – SANTA FE TRANSFORMER, SWITCHGEAR, AND
18 REGULATOR REPLACEMENT A REASONABLE, NECESSARY, AND PRUDENT
19 INVESTMENT?

20 A. Yes, this project is reasonable and necessary and was constructed prudently. This
21 substation rebuild was needed to re-establish a firm ground foundation for the substation
22 and to replace aging equipment to provide reliable service to EPE customers.
23

24 **E. Project Number 5 – DT186**

25 Q. WHAT IS PROJECT DT186 – LEO SUBSTATION 115 kV CONVERSION &
26 GETAWAY UPGRADE?

27 A. DT186 is an \$8.53 million project that constructed a new substation, Lea substation,
28 directly across the street from EPE's existing Leo substation in Northeast El Paso. This
29 project, DT186, is a companion project to the previously described transmission capital
30 project TL231 – MILAGRO – LEO 69 KV TO 115 KV UPGRADE. Simply stated: the
31 transmission project TL231 converted the transmission line between Milagro and

1 Leo substations from 69 kV to 115 kV, and this project, DT186, converted Leo substation
2 from a 69/13.8 kV substation to a 115/13.8 kV substation. Unfortunately, there was not
3 enough space in the original Leo substation footprint to rebuild the substation on that site.
4 Fortunately, a new site directly across the street from Leo substation, was vacant and
5 became the site of the new Leo-East (or LEA) substation. The new 115 kV substation has
6 two 30 MVA, 115/13.8 kV transformers, two switchgears, and six distribution feeders. All
7 of the 69 kV rated equipment of the Leo substation was removed and now the substation
8 functions with two new 13.8/4.16 kV pad-mounted transformers that provide service to the
9 old 4 kV distribution feeders that serve the area.

10
11 Q. WHY WAS THIS PROJECT NEEDED?

12 A. This project was needed for two reasons:

- 13 1. Project TL231 converted the Milagro to Leo transmission line from 69 kV to 115 kV
14 to support the increased load in the area of Leo substation. To complete EPE's load
15 support plan, this project, DT186, converted Leo substation from a 69/13.8 kV to a
16 115/13.8 kV substation.
- 17 2. To improve load serving capability in the area by adding more substation capacity and
18 two additional feeders out of the new substation. This additional capacity and the
19 additional feeders help eliminate the feeder loading issues between this substation and
20 EPE's Dyer substation and improve feedback options under emergency situations.

21
22 Q. WAS PROJECT DT186 LEO SUBSTATION 115 KV CONVERSION AND GETAWAY
23 UPGRADE A REASONABLE, NECESSARY, AND PRUDENT INVESTMENT?

24 A. Yes, this project is reasonable and necessary and was constructed prudently. The additional
25 feeders out of the new substation and the upgrade to 115 kV are needed for load growth
26 and reliability for EPE customers in this area.

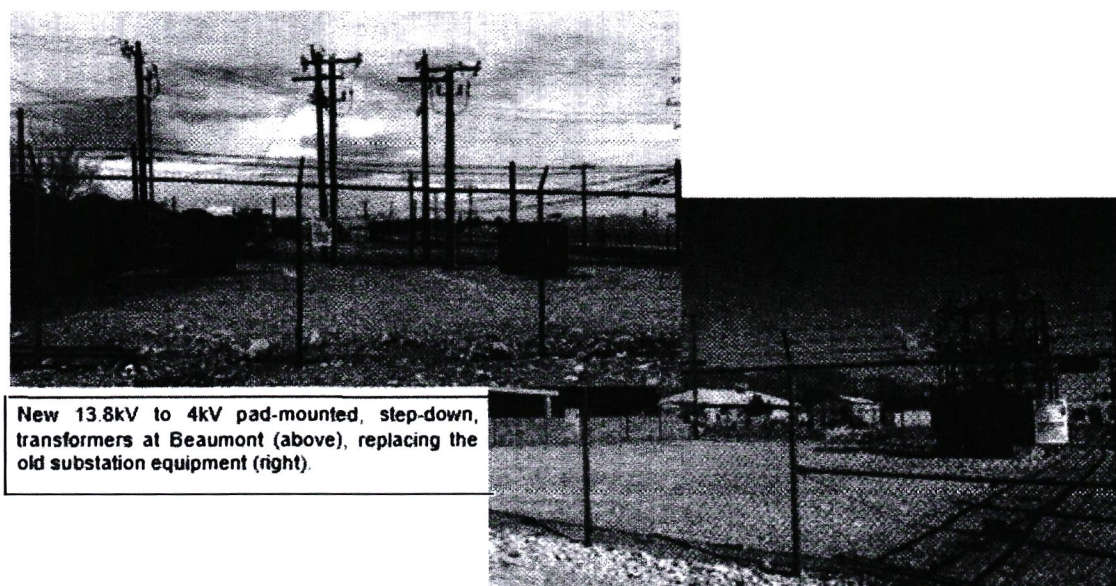
27
28 **F. Project Number 6 – DT189**

29 Q. WHAT IS PROJECT DT189 –TEXAS AREA 4 kV CONVERSIONS?

30 A. This is a project to upgrade and convert aged and overloaded 4 kV facilities (substations
31 and feeders) in the Texas area. Conversions include upgrading 4 kV distribution systems

1 to 14 kV systems and 4 kV substation-type equipment (transformers, regulators, and
2 bus-work) to pad-mounted systems. The project amounts closed to plant-in-service
3 between October 1, 2016 and December 31, 2020 include conversion work at Beaumont,
4 Cinecue, Coronado, Fabens, Kemp, Leo, Morning Side, Mulberry, Parkland, Santa Fe,
5 Sunset, and Tobin substations and feeders. An example of conversion work is shown in
6 the figure below.

7
8 **Figure RCD-4**



21 Q. WHY WAS THIS PROJECT NEEDED?

22 A. The EPE system has a sizable number of legacy 23.9/4 kV and 13.8/4 kV substations
23 supplying an average of 1,500 kVA to 2,500 kVA of mostly residential loads. These 4 kV
24 substations are spread throughout the service territory in the older neighborhoods. Many
25 of these substations are surrounded by residential subdivisions and, in many cases,
26 operating clearances are limited, and safety issues may exist. In addition to these issues,
27 the replacement parts for these substations are no longer available, and as a result, EPE
28 substation maintenance crews are finding it impossible to repair or replace worn or
29 damaged equipment in these substations. Studies performed on the grounding systems in
30 these substations have identified additional challenges in converting these substations
31 resulting in increased costs and construction delays.

Accordingly, the EPE Distribution Systems team has developed and implemented a design to replace the old 4 kV transformers, which have exposed primary and secondary terminations, with pad-mount transformers that have equivalent load supplying capacity. Pad-mount equipment used for these installations has "dead front" terminators housed in a metal enclosure. This type of installation substantially reduces the risk of the public encountering energized parts. Protective equipment from the existing substations is removed and replaced by a recloser with a programmable logic controller. Conversion of adjacent stations to the newer pad-mount configuration is ongoing because the new and the old transformers do not phase, and the substations cannot be tied together in switching operations. Converting two adjacent 4 kV substations ensures one of the substations can be used to back up the other, thereby creating a reasonable level of redundancy. In cases where it is not feasible to convert to a 4 kV pad-mount substation, 4 kV feeders are being converted to either 23.9 kV or 13.8 kV where feasible.

Q. WAS PROJECT DT189 –TEXAS AREA 4 kV CONVERSIONS A REASONABLE, NECESSARY, AND PRUDENT INVESTMENT?

A. Yes, this project is reasonable and necessary and was constructed prudently. As described above, these conversions are needed to replace aging equipment and upgrade the distribution system to provide consistent reliability to EPE customers.

G. Project Number 7 – DT365

Q. WHAT IS PROJECT DT365 – SPARKS T2 TRANSFORMER, SWITCHGEAR, AND VOLTAGE REGULATORS?

A. DT365 is a \$4.37 million project to add a second 50 MVA, 115/13.8 kV transformer and a new distribution switchgear to Sparks substation in the Southeast area of El Paso. The project also involved an expansion of the 115 kV bus-work and new voltage regulators to accommodate an additional three distribution feeders out of this substation.

Q. WHY WAS THIS PROJECT NEEDED?

A. The Far East side of El Paso's service territory continues to experience substantial load growth. To support growth in the Horizon and Sparks substation areas, a second

1 transformer, Sparks T2, was placed into service in early 2018. Three new feeders extend
2 from Sparks substation to intercept Horizon and Americas substation feeders and thereby
3 provide offload and back-feed support. The addition of a second transformer at Horizon
4 (T2) is planned to be in service by peak of 2021 with three new Horizon feeders.

5
6 Q. WAS PROJECT DT365 – SPARKS T2 TRANSFORMER, SWITCHGEAR, AND
7 VOLTAGE REGULATOR A REASONABLE, NECESSARY, AND PRUDENT
8 INVESTMENT?

9 A. Yes, this project is reasonable and necessary and was constructed prudently. As previously
10 described, this project is needed for load growth and reliability for EPE customers in the
11 southeast area of El Paso.

12
13 **H. Other Distribution Projects**

14 Q. WHAT OTHER DISTRIBUTION PROJECT COSTS ARE INCLUDED IN THIS CASE?

15 A. The remaining distribution projects and their associated costs are presented in
16 Exhibit RCD-10 with project descriptions for all projects with a cost greater than
17 \$1 million but less than \$4 million. For those projects described as "Multi-Year" projects,
18 the amount shown in the table is the dollar value of the investment portion of the multi-year
19 project placed into service by the end of the Test Year.

20
21 **X. Other Capital Projects**

22 Q. ARE YOU SUPPORTING ANY OF THE INTANGIBLE CAPITAL PROJECTS THAT
23 ARE LISTED IN EPE WITNESS LARRY J. HANCOCK'S EXHIBIT LJH-2?

24 A. Yes. I support Project SS183 - WORK MGMT SYSTEM (A.R.M.) FOR
25 TRANSMISSION, SUBSTATION, AND RELAY.

26
27 Q. PLEASE DESCRIBE PROJECT SS183 - WORK MGMT SYSTEM (A.R.M.) FOR
28 TRANSMISSION, SUBSTATION, AND RELAY AS LISTED IN EPE WITNESS
29 HANCOCK'S EXHIBIT LJH-2.

30 A. This software system project extended the Asset Resource Management ("ARM") work
31 management system functionality to EPE's Transmission Substation and Relay ("TSR")

1 work. EPE has used the ARM work management system to plan, document, track,
2 schedule, close and record distribution system work orders for more than seven years with
3 great success. This project added additional modules to EPE's ARM software system to
4 extend some of the work planning, tracking, and scheduling capabilities to our TSR work.
5 In addition to the software modules of ARM to facilitate TSR work management, this
6 project required detailed documentation and review of the TSR work order processing
7 procedures.
8

9 Q. WAS PROJECT SS183 – WORK MGMT SYSTEM (A.R.M.) FOR TRANSMISSION,
10 SUBSTATION, AND RELAY PRUDENT, REASONABLE AND NECESSARY?

11 A. Yes. The ARM work management software, since it was deployed over seven years ago,
12 has been key to supporting EPE's ability to plan, document, track, schedule, close, and
13 record distribution system work orders. On an average annual basis, EPE's Distribution
14 Design Construction and Maintenance Department accepts and processes over
15 2500 different types of distribution system work requests (new service for customer,
16 system maintenance, state Department of Transportation relocations, system repair, etc.).
17 The ARM work management software system has been the key to managing all activity
18 from contact, to design, to scheduling, to construction, to GIS mapping, and to closing. It
19 has been the use of ARM that has allowed EPE to drive productivity and efficiency without
20 sacrificing customer satisfaction and response. Deploying some of the ARM modules to
21 Transmission, Substation, and Relay work order processing was a natural extension of
22 work management capabilities. This software system is also used by a number of other
23 larger utilities including Dominion Energy, Consolidate Edison, Duke Energy, and Westar
24 Energy. The expansion of ARM to TSR work (SS183) was prudent, reasonable, and
25 necessary.
26

27 Q. ARE YOU SUPPORTING ANY OF THE GENERAL PLANT CAPITAL PROJECTS
28 THAT ARE LISTED IN EPE WITNESS LARRY HANCOCK'S EXHIBIT LJH-2?

29 A. Yes. I support Project DT030 - the Distribution General Plant Acquisition project.
30

1 Q. PLEASE DESCRIBE PROJECT DT030 - DISTRIBUTION GENERAL PLANT
2 ACQUISITION AS LISTED IN EPE WITNESS HANCOCK'S EXHIBIT LJH-2.

3 A. Per EPE's 2021 Capital Budget Guidelines, individual assets with a unit cost greater than
4 \$1,000 should be capitalized. These items include furniture, power operated tools, shop
5 and garage equipment, and testing equipment which meet the unit cost requirement.
6

7 Q. HOW DOES THE COMPANY MANAGE COSTS ASSOCIATED WITH THE
8 DISTRIBUTION GENERAL PLANT ACQUISITIONS PROJECT?

9 A. Acquisitions for this project were undertaken in accordance with the Company's
10 purchasing policies and procedures. In addition, options are evaluated from initial
11 acquisition cost and ongoing maintenance perspectives, and, when feasible and
12 appropriate, different technologies are considered.
13

14 Q. WAS PROJECT DT030 - DISTRIBUTION GENERAL PLANT ACQUISITION
15 PRUDENT, REASONABLE, AND NECESSARY?

16
17 A. Yes. These types of general plant assets are replaced when they have reached the end of
18 useful life or can no longer be operated safely but are still needed to support utility
19 operations.
20

21 **XI. Transmission Operations and Maintenance**

22 Q. HOW MUCH IS INCLUDED IN TEST YEAR PERIOD O&M EXPENSE FOR
23 TRANSMISSION?

24 A. O&M expense in the Test Year for transmission on a total Company basis is \$23,716,836,
25 as adjusted and as presented in the testimony of EPE witness Jennifer I. Borden and listed
26 in Schedule G-15.
27

28 Q. WHAT ACTIVITIES CREATE THE TRANSMISSION O&M EXPENSE?

29 A. The transmission O&M expense consists primarily of the cost of employees operating the
30 transmission system and associated materials and services necessary and reasonable for

maintaining the system, including vegetation management, repair work, replacement, and general upkeep.

Q. DOES EPE HAVE COST CONTROL MEASURES IN PLACE TO MANAGE ITS TRANSMISSION O&M COSTS?

A. Yes. There are two major cost control mechanisms in place to manage these costs. As with the T&D capital projects, materials and services for transmission O&M projects are solicited through a formal competitive bidding process. Transmission O&M projects are subject to the same processes for obtaining competitive bids as I described previously. The expense also goes through a budgeting process that requires management approval. EPE has reasonable measures in place to manage these costs, and the costs for the Test Year are reasonable.

Q. HOW DOES EPE'S TRANSMISSION O&M EXPENSE COMPARE TO OTHER REGIONAL UTILITIES IN RECENT YEARS?

A. The figures below illustrate EPE's comparative transmission O&M cost per mile of transmission line with those of the other regional investor owned utilities (SPS, PNM, and TEP).

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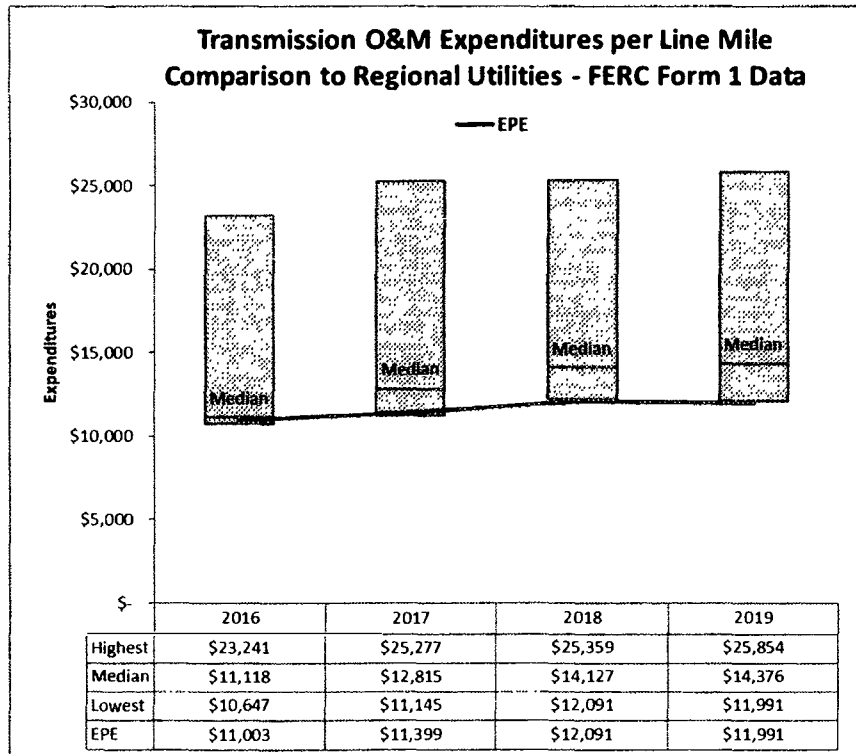
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Figure RCD-5



Q. DOES A FAVORABLE COMPARISON OF EPE'S TRANSMISSION O&M COSTS TO OTHER REGIONAL UTILITIES PROVE THAT EPE'S COSTS WERE REASONABLE AND NECESSARY?

A. Not by itself. Each company faces its own unique circumstances. A favorable comparison would simply show that EPE's efforts achieved results for its customers that are within the range of the other utilities' transmission costs, which they are. As I have discussed above, the facts show that EPE has cost control processes in place to allow it to effectively manage its transmission operations and to provide reliable electric service to its retail customers, which in part can be demonstrated by the relatively low swings in EPE's O&M costs over the years. Accordingly, the transmission O&M costs EPE incurred during the Test Year should be found reasonable and necessary.

XII. Distribution Operations and Maintenance

Q. WHAT IS THE TEST YEAR O&M EXPENSE FOR DISTRIBUTION?

1 A. The total Distribution O&M expense for the Test Year is \$26,381,814, which includes
2 adjustments presented by EPE witness Borden and listed in Schedule G-15.

3
4 Q. WHAT ACTIVITIES ARE INCLUDED IN DISTRIBUTION O&M EXPENSE?

5 A. Total Distribution O&M expense consists of the cost of (1) employees operating the
6 distribution system and any associated materials and equipment and (2) maintaining the
7 system, such as vegetation management, repair work, replacement, and general upkeep.

8
9 Q. DOES EPE HAVE COST CONTROL MEASURES IN PLACE TO MANAGE
10 DISTRIBUTION O&M COSTS?

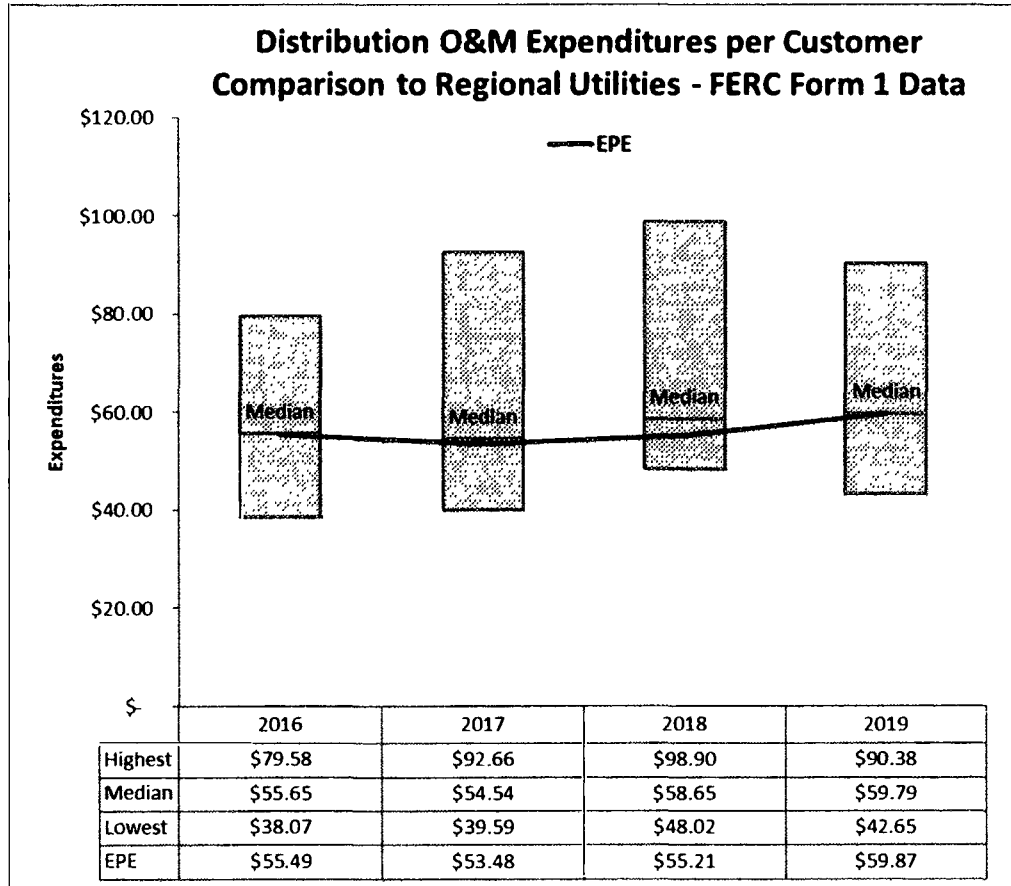
11 A. Yes. There are two major cost control mechanisms in place to review and manage these
12 costs. As with Transmission O&M costs, materials of value over \$50,000 for Distribution
13 O&M projects are solicited through a formal competitive bidding process. Distribution
14 O&M projects are subject to the same processes for obtaining competitive bids as I
15 described earlier for transmission and distribution capital projects. The expense also goes
16 through a budgeting process that requires management approval. The Test Year
17 Distribution O&M costs are reasonable.

18
19 Q. HOW DOES EPE'S DISTRIBUTION O&M EXPENSE COMPARE TO OTHER
20 REGIONAL UTILITIES IN RECENT YEARS?

21 A. The chart below illustrates EPE's comparative O&M cost per customer served with those
22 of the other regional investor owned utilities (SPS, PNM, and TEP).

23 /
24 /
25 /
26 /
27 /
28 /
29 /
30 /
31 /

Figure RCD-6



Q. DOES A FAVORABLE COMPARISON OF EPE'S DISTRIBUTION O&M COSTS TO OTHER REGIONAL UTILITIES PROVE THAT EPE'S COSTS WERE REASONABLE AND NECESSARY?

A. Not by itself. Each company faces its own unique circumstances. A favorable comparison would simply show that EPE's efforts achieved results for its customers that are within the range of the other utilities' distribution costs. And, as I have discussed above, the facts show that EPE has cost control processes in place to allow it to effectively manage its distribution operations and to provide reliable electric service to its retail customers. Accordingly, the distribution O&M costs EPE incurred during the Test Year should be found reasonable and necessary.

XIII. Changes to EPE Line Extension Policy

Q. WHAT IS THE PURPOSE OF THIS SECTION OF YOUR TESTIMONY?

A. This section of my testimony supports EPE's proposed revisions to the Company's Line Extension Policy, which is provided as Exhibit RCD-11. I describe the rationale for each of the changes to the Line Extension Policy below.

Q. WHAT IS THE PURPOSE BEHIND THE ADDITIONAL DEFINITIONS IN THE LINE EXTENSION POLICY?

A. The definitions were increased in order to make the document easier to understand. For the most part, the new definitions are merely providing a formal definition to items that were already in the Line Extension Policy. For example, terms like "Revenue Guarantee Obligation", "Revenue Deficiency", and "Ending Revenue Deficiency" were made into defined terms for clarity. Others, such as "Revenue Period", were added to simplify their wordier predecessors (e.g., "Revenue Period" replacing "forty-eight months from the date of the Line Extension"). Due to this, throughout the policy, there are changes that replace existing language with the definitions. It is also important to note that new terms were also added to accommodate the new section to the Line Extension Policy that allows customers to self-construct a line extension, which I discuss in more detail below.

Q. WHY WAS PARAGRAPH A.6 ON SHEET NO. 5 ADDED TO THE LINE EXTENSION POLICY?

A. That addition was intended to clarify that EPE should have the right to recover costs it has invested into building a line extension in the event a customer cancels their request. Such a cancellation not only results in an unnecessary diversion of Company funds but also wasted manpower that otherwise could have been used to serve EPE's customers.

Q. WHY WAS PARAGRAPH A.7 ON SHEET NO. 5 ADDED TO THE LINE EXTENSION POLICY?

A. This addition is a rewording of what was formerly Paragraph B.2.b.(4)⁵ of Sheet No. 5.

⁵ It also should be noted that EPE corrected a numbering problem that existed within Paragraph B.2. of Sheet No. 5. The current Line Extension Policy did not contain a Paragraph B.2.b.(2), and so Paragraphs B.2.b.(4) and b.(3) should in fact be B.2.b.(2) and b.(3).

1 The language was revised to more closely align with that of 16 Texas Administrative Code
2 § 25.22(7). The paragraph's current location could be viewed as implying that the clause
3 only applies to Paragraph B of Sheet No. 5, and EPE wanted to make it clear that the
4 paragraph applies to any situation where a line extension is required to be built to serve a
5 customer and the customer is required to either pay a Contribution in Aid to Construction,
6 a prepayment, or sign a contract with a term greater than one year.

7
8 Q. CAN YOU PLEASE GENERALLY DESCRIBE THE NEW SECTION OF THE POLICY
9 THAT ALLOWS CUSTOMERS TO BUILD THE LINE EXTENSION REQUIRED TO
10 SERVE THEIR PROPERTY?

11 A. Yes. "Option 2: Line Extensions Built by the Customer" found in Sheet No. 5 of the Line
12 Extension Policy allows customers to have a competent and qualified electrical contractor
13 construct the entirety of, or only the underground structural portion of, the requested line
14 extension. Upon acceptance by the Company of the completed line extension, the customer
15 will sell the line extension to the Company for \$1.00. The Company will return any
16 revenue generated by the line extension over the four years after its completion.

17
18 Q. WHY DID THE COMPANY ADD THIS OPTION TO THE LINE EXTENSION
19 POLICY?

20 A. The Company has afforded customers in New Mexico this option for many years, which
21 led customers in our Texas service territory to request the same ability. Real estate
22 developers are particularly interested in building their own extensions as it affords them
23 the ability to move up or delay the extension's construction as circumstances dictate.
24 Additionally, it will maximize the amount of revenue to be generated during the four-year
25 revenue recovery period that begins after the work is completed on the line extension and
26 is accepted by EPE.

27 To understand that last point, you need to understand EPE's current line extension
28 policy. The policy requires a customer to provide a cash payment in advance of
29 construction or some form of security if the projected revenue to be generated by the
30 Company from the line extension is less than the estimated cost of the line extension.
31 Additionally, under the current EPE-built policy, any revenue generated by electricity

1 usage facilitated by the extension for four years after EPE has completed its work on the
2 line extension will be used to determine whether the Company has recovered its costs and
3 whether the Company will either refund the customer for any funds paid in advance of
4 construction or release the security the customer provided.

5 It is important to note that the completion of the line extension work and the start
6 of the four-year revenue recovery period does not necessarily coincide with the customer's
7 completion of the total project. In most cases the customer's project completion date will
8 happen some amount of time after the line extension is completed. And again, in most
9 cases, electric meters cannot be installed (to start recording revenue) until the customer's
10 total project is complete. In every case, however, the customer will want to limit the span
11 of time between the completion of the line extension (and the start of the revenue recovery
12 period) and the completion of the total project (when electric meters can be installed) to
13 maximize the number of months in which revenue is generated during the four-year
14 (48-month) revenue recovery period. For example, if the customer completes their project
15 (and is ready for meter installation) two months after EPE completes its work on the line
16 extension, the customer will only have 46 months of actual revenue generation out of the
17 revenue recovery period's 48 months.⁶ With that in mind, it is easy to see why a customer
18 who has the means and ability to construct their own line extension would: They want to
19 control construction on both sides of the meter to ensure that all 48-months of the revenue
20 recovery period are generating revenue to offset the line extension's cost.

21
22 Q. WHAT ASSURANCES DOES THE COMPANY HAVE THAT THE LINE
23 EXTENSION WILL BE CONSTRUCTED TO EPE'S STANDARDS?

24 A. EPE has built multiple protections into the Line Extension Policy to ensure that the final
25 line extension is up to EPE's standards. First, EPE is still designing the line extension in
26 order to ensure that the design meets the Company's standards. Second, the materials and
27 equipment utilized will be specified by the Company and must also adhere to the
28 Company's construction standards. Third, the contractor hired by the customer to construct
29 the extension must be properly qualified and licensed to perform the work. Fourth, the

⁶ EPE's line extension does allow for up to a two-year extension at the end of the four-year revenue recovery period if, and only if, certain requirements are met in the fourth year of the four-year revenue recovery period. For ease of explanation, I chose not to add such a discussion to the example.

1 customer shall obtain from the contractor and transfer to EPE at the closing of the sale of
2 the Line Extension a one-year workmanship warranty as well as any standard equipment
3 warranties for the Line Extension's components. Fifth, a construction inspector will be
4 utilized by EPE to verify that the work done by the customer is in compliance with EPE's
5 design, materials and equipment standards, and any other necessary requirements. The
6 inspector will have the authority to accept or reject any work done and materials for the
7 line extension. And sixth, the customer shall be liable for the direct and indirect
8 consequences of any defects or failures of the line extension for a period of one year starting
9 from the date of acceptance by EPE of the line extension.
10

11 Q. ON SHEET NO. 5, PARAGRAPHS C.A.1.(1) AND C.A.1.(2), WHY WAS THE
12 MAXIMUM DISTANCE OF 100 FEET FOR AN OVERHEAD SYSTEM RUN AND
13 150 FEET FOR AN UNDERGROUND SERVICE RUN REMOVED FROM AND
14 REPLACED WITH "MAXIMUM RUN" IN THESE PARAGRAPHS?

15 A. The maximum distance of 100 feet was removed because span distance are standards of
16 construction that are subject to change based on industry standards. EPE proposes these
17 changes for flexibility and consistency with the implementation of its Line Extension
18 Policy.

19 The maximum distance of 150 feet was removed for clarification. The Company
20 can allow this maximum distance of 150 feet for services of 200 amps or less only if the
21 service run is a straight line from the Company's pullbox or service enclosure to the
22 customer's service and meter location. As set forth in the Company's Distribution
23 Standards Handbook, maximum service runs are less for larger services and other variable
24 situations.
25

26 Q. ON SHEET NO. 5, PARAGRAPH C.A.1.(1), WHY WAS THE LANGUAGE STATING
27 THAT THE COMPANY WOULD BUILD OUT SERVICE CONDUCTORS BEYOND
28 100 FEET IF THE CUSTOMER COVERED THE EXTRA COSTS FOR DOING SO
29 REMOVED?

30 A. EPE's standards for maximum service runs are set by EPE based on sound engineering and
31 construction principles and standards. As such, it makes more sense to require customers

1 to build out their point of delivery to be within EPE's maximum run than to have EPE alter
2 its standards and potentially be responsible for issues that result from a variance to its
3 standards.

4
5 Q. WHY WERE THE SECOND AND THIRD PARAGRAPHS OF SHEET NO. 5,
6 PARAGRAPH C.A.1(1) REMOVED?

7 A. The second paragraph was removed because it is extraneous. The paragraph that
8 constitutes the proposed Sheet No. 5, Paragraph C.A.1(1), already states that the Company
9 will be responsible for the installation of the pole riser and the service pedestal and that the
10 customer will cover the associated costs. As such, the removed paragraph's coverage of
11 instances where more than one customer may be served by the underground extension is
12 superfluous as the allocation of responsibilities and costs is the same as that in the first
13 paragraph.

14 The third paragraph was removed because the Company's proposal to not build out
15 beyond its maximum run made the paragraph superfluous. Had the third paragraph
16 remained and been updated to account for EPE not building beyond the Company's
17 maximum run, it would read the same as the proposed first paragraph.

18
19 Q. ON SHEET NO. 5, PARAGRAPH C.A.5., WHY WAS THE REQUIREMENT THAT A
20 CUSTOMER CONTRIBUTION MUST BE MADE IF THE SERVICE CONDUCTOR
21 RUN IS IN EXCESS OF THE COMPANY SET MAXIMUM RUN REMOVED?

22 A. This requirement was removed for the same reason that the first paragraph of the original
23 Sheet No. 5, Paragraph C.A.1(1) was modified: It makes more sense to require customers
24 to build out their point of delivery to be within EPE's maximum run than to have EPE alter
25 its standards and potentially be responsible for issues that result from that variance.

26
27 Q. ON SHEET NO. 5, PARAGRAPH C.A.5(1), WHY DID THE COMPANY CHANGE
28 THE LANGUAGE SO THAT THE COMPANY IS NOW RESPONSIBLE TO SUPPLY
29 AND INSTALL THE SECONDARY RISER AND ITS RELATED FACILITIES FOR A
30 RESIDENTIAL CUSTOMER-REQUESTED CONVERSION OF AN OVERHEAD
31 FACILITY TO AN UNDERGROUND FACILITY?

1 A. EPE believes that it is more efficient for EPE to supply and install the secondary riser and
2 the facilities related thereto. Although EPE is now supplying and installing those items,
3 the related costs are still borne by the customer requesting the conversion of an overhead
4 facility to an underground facility.

5
6 Q. ON SHEET NO. 5, PARAGRAPH C.A.5., WHY WAS THE MAXIMUM DISTANCE
7 OF 100 FEET FOR THE CONVERSION OF AN EXISTING OVERHEAD SERVICE
8 DROP TO AN UNDERGROUND SERVICE REMOVED AND REPLACED WITH
9 MAXIMUM RUN?

10 A. This was done for the same reason that a similar change was made to Sheet No. 5,
11 paragraphs C.A.1.(1) and C.A.1.(2). The maximum distance of 100 feet was removed
12 because span distances are standards of construction that are subject to change based on
13 industry standards. EPE proposes these changes for flexibility and consistency with the
14 implementation of its Line Extension Policy.

15
16 Q. ON SHEET NO. 5, WHY WAS PARAGRAPH E.2., "PRIMARY VOLTAGE SERVICE"
17 ADDED?

18 A. The revision is made to correct a clerical oversight. The Company does offer the option
19 for customers to take service at one of the Company's primary voltages if the customer
20 meets all Company requirements and specifications. The Company included this revision
21 to clarify and ensure that customers are aware this option is available to them.

22
23 Q. ON SHEET NO. 5, PARAGRAPH E.3, WHY WAS THE MAXIMUM SPAN LENGTH
24 OF 125 FEET AND THE 30-FOOT WOOD POLE REMOVED?

25 A. Maximum pole length and span distance are standards of construction that are subject to
26 change based on industry standards. EPE proposes these changes for flexibility and
27 consistency with the implementation of its Line Extension Policy.

28
29 Q. CAN YOU EXPLAIN THE PROPOSED CHANGES TO PARAGRAPH G OF SHEET
30 NO. 5?

1 A. Yes. The changes were made for clarity. First, the Company wanted to clearly state its
2 policy that the cost of removing or relocating Company facilities will include the cost of
3 providing electric service to new or additional loads if the request for removal and relocation
4 also includes a request for new or additional service. The combination is done for
5 administrative ease. Second, the Company wanted to make it clear that it will not expend
6 resources to remove or relocate Company facilities merely as a matter of Customer
7 preference or for aesthetic reasons.
8

9 Q. ARE EPE'S PROPOSED CHANGES TO THE LINE EXTENSION POLICY
10 REASONABLE AND PRUDENT?

11 A. Yes, the changes proposed by the Company to its Line Extension Policy are reasonable and
12 prudent.
13

14 **XIV. Conclusion**

15 Q. PLEASE SUMMARIZE YOUR CONCLUSIONS.

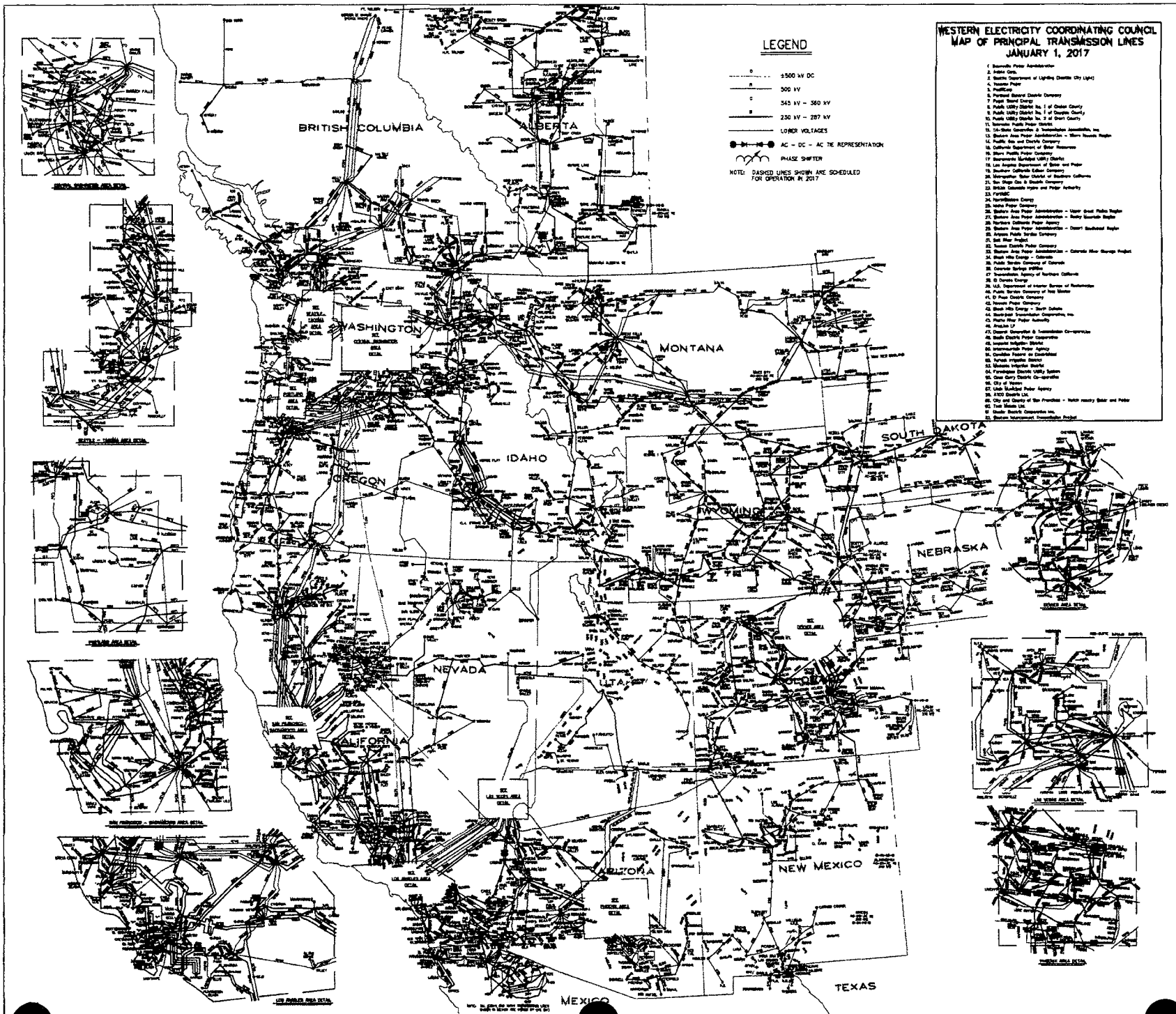
16 A. EPE's capital investments and Test Year cost of service for transmission and distribution
17 operations are reasonable, necessary, and prudent to provide safe and reliable service. EPE
18 requests the Commission find the additions to rate base of transmission capital investments
19 in the total Company amount of \$114,618,871 and \$296,135,245 for distribution capital
20 investments in Texas to be reasonable, necessary, and prudent. EPE's Test Year
21 transmission O&M expenses are \$23,716,836 and total Test Year distribution O&M
22 expenses are \$26,381,814. The Test Year costs are reasonable and necessary for safe and
23 reliable service in Texas. All facilities I present in my direct testimony are in service and
24 used and useful. Additionally, EPE's proposed changes to its Line Extension Policy should
25 be approved.
26

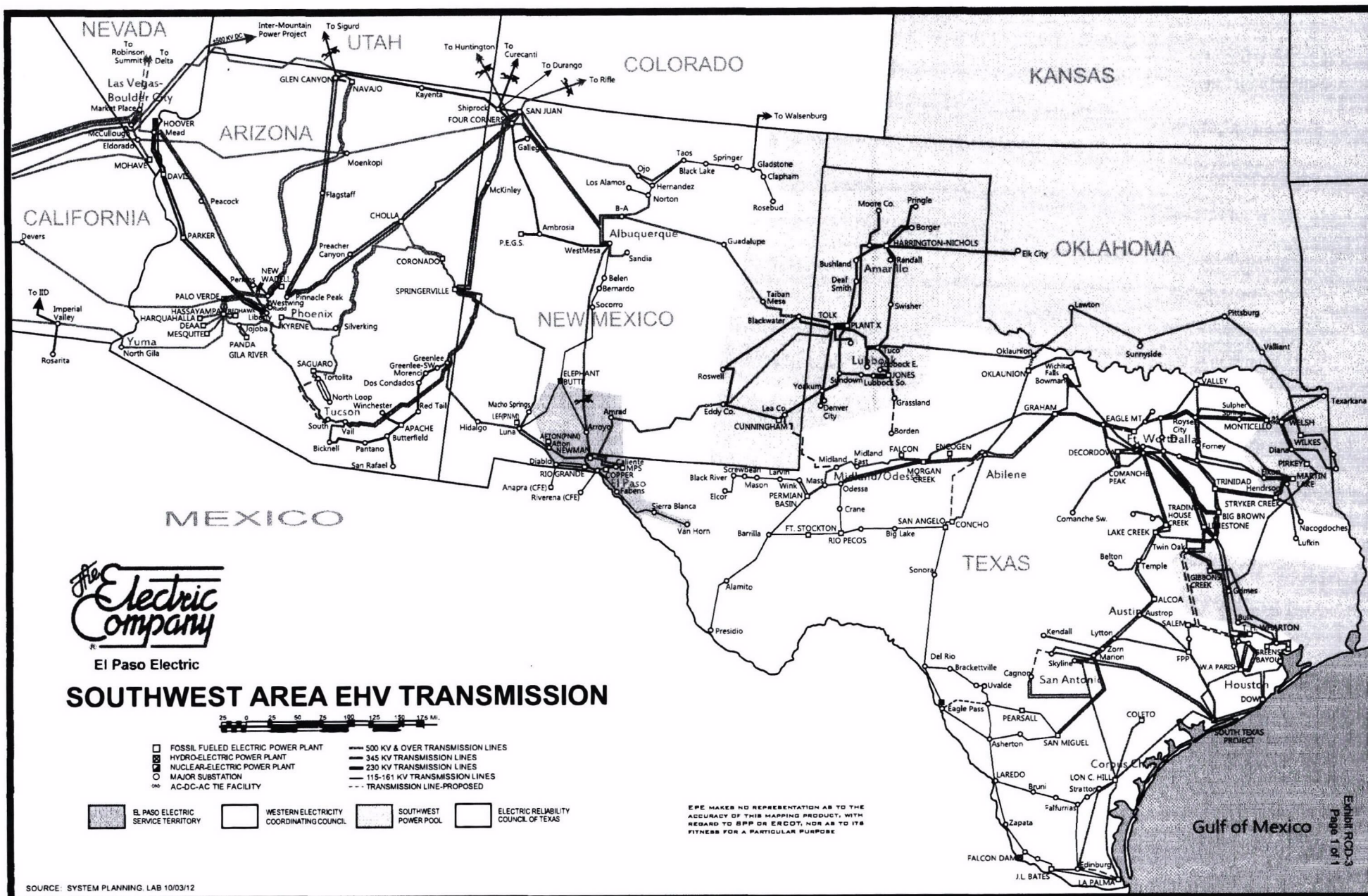
27 Q. DOES THIS CONCLUDE YOUR TESTIMONY?

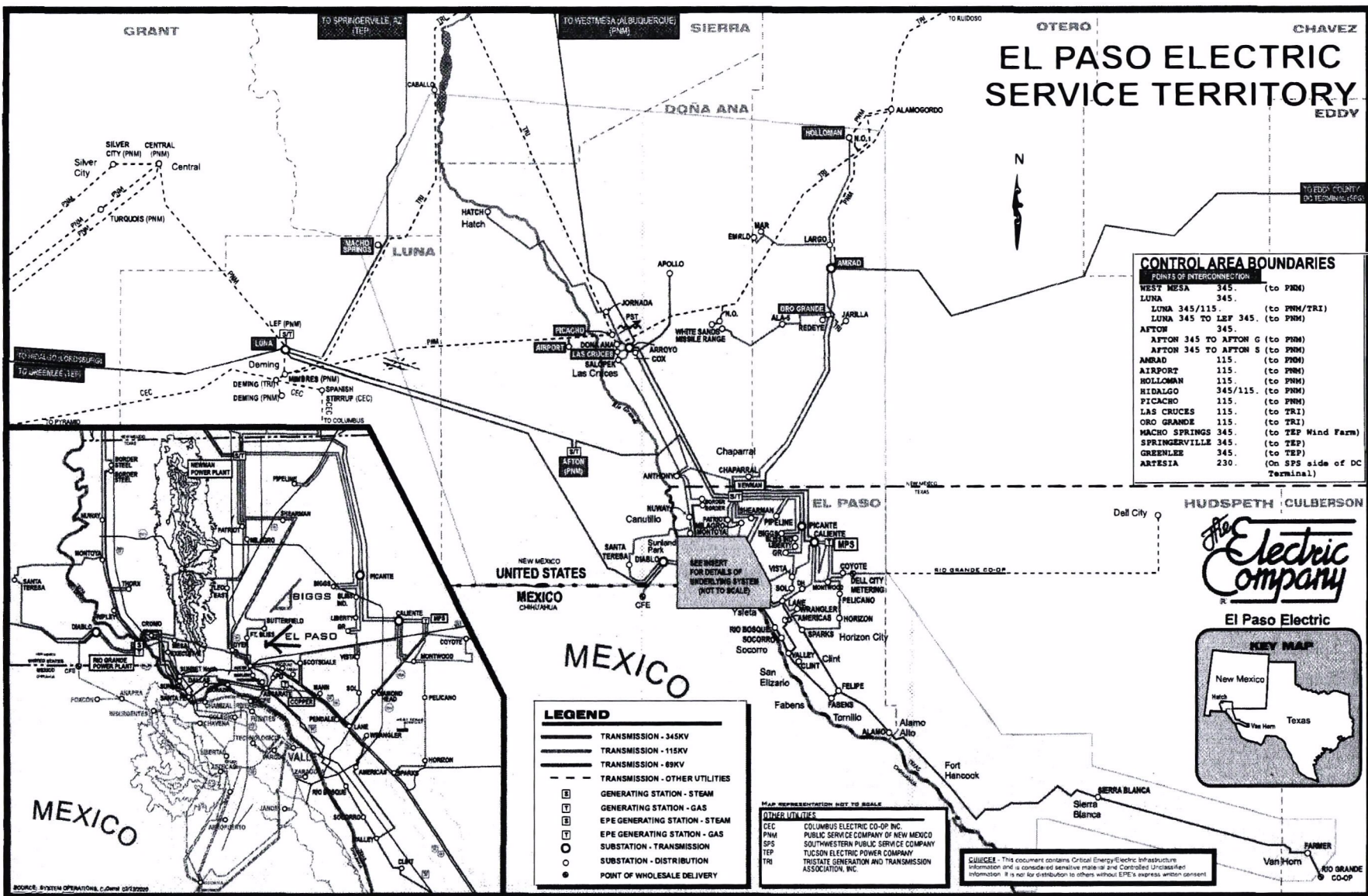
28 A. Yes, it does.

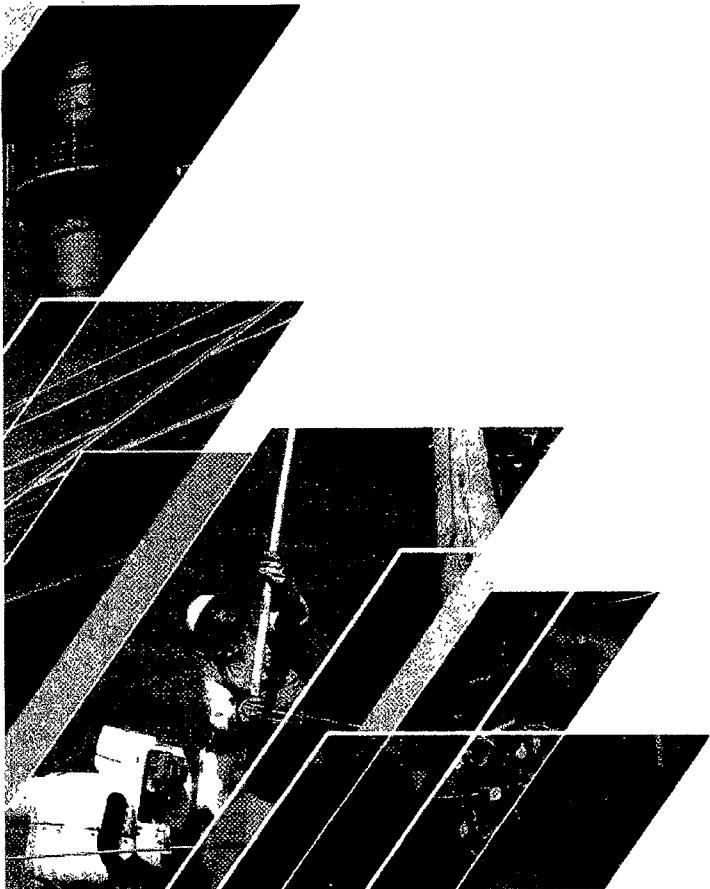
SCHEDULES SPONSORED BY R.C. DOYLE

Schedule	Description	Sponsorship
H-13.1	QUALITY OF SERVICE INFORMATION	Sponsor
H-13.1a	VOLTAGE SURVEYS	Sponsor
H-13.1b	CIRCUIT BREAKER OPERATIONS	Sponsor
H-13.1c	QUALITY OF SERVICE COMPLAINTS	Sponsor
H-13.1d	TREE TRIMMING PROGRAM	Sponsor
H-13.1e	QUALITY OF SERVICE IMPROVEMENTS	Sponsor
H-13.2	IE-24 REPORTS (FORM 417-R)	Sponsor
H-13.3	CONTINUITY OF SERVICE	Sponsor
H-14.1a	AVAILABLE CAPACITY WHEELING	Sponsor
H-14.1b	PLANNED CAPACITY WHEELING	Sponsor
H-14.2	WHEELING INFORMATION	Sponsor





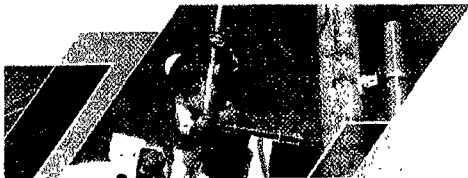




Right of Way Extension Update

Right of Way Extension Update

- Easement with the Isleta Pueblo is for a 345 kV West Mesa – Arroyo electric transmission line identified as part of the WECC Path 47 expires July 17, 2017
- Originally granted in July 1967 for a term of 50 years for \$4,398.75
- Easement is 8.44 miles in length and 100' Wide
- Current request is for a renewal of an additional 25 years
- EPE entered into a Confidentiality Agreement with the Isleta Pueblo
- EPE has had various discussions with the Isleta Pueblo



Right of Way Extension Update

Wall Street Journal Article (April 28, 2014) – Indian Tribes' New Negotiating Power Costs Utilities

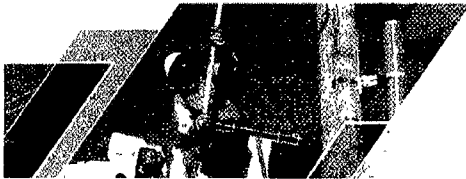
"Armed with lawyers and consultants – and emboldened by a federal law that prohibits the use of eminent domain to access Indian trust land – tribes across the west are commanding substantial payments from utilities and energy companies to renew right-of-way agreements."

"... tribes are leaving energy companies with little choice but to pay the fees they request because rerouting power lines, pipelines and other infrastructure around the reservation is prohibitively expensive."

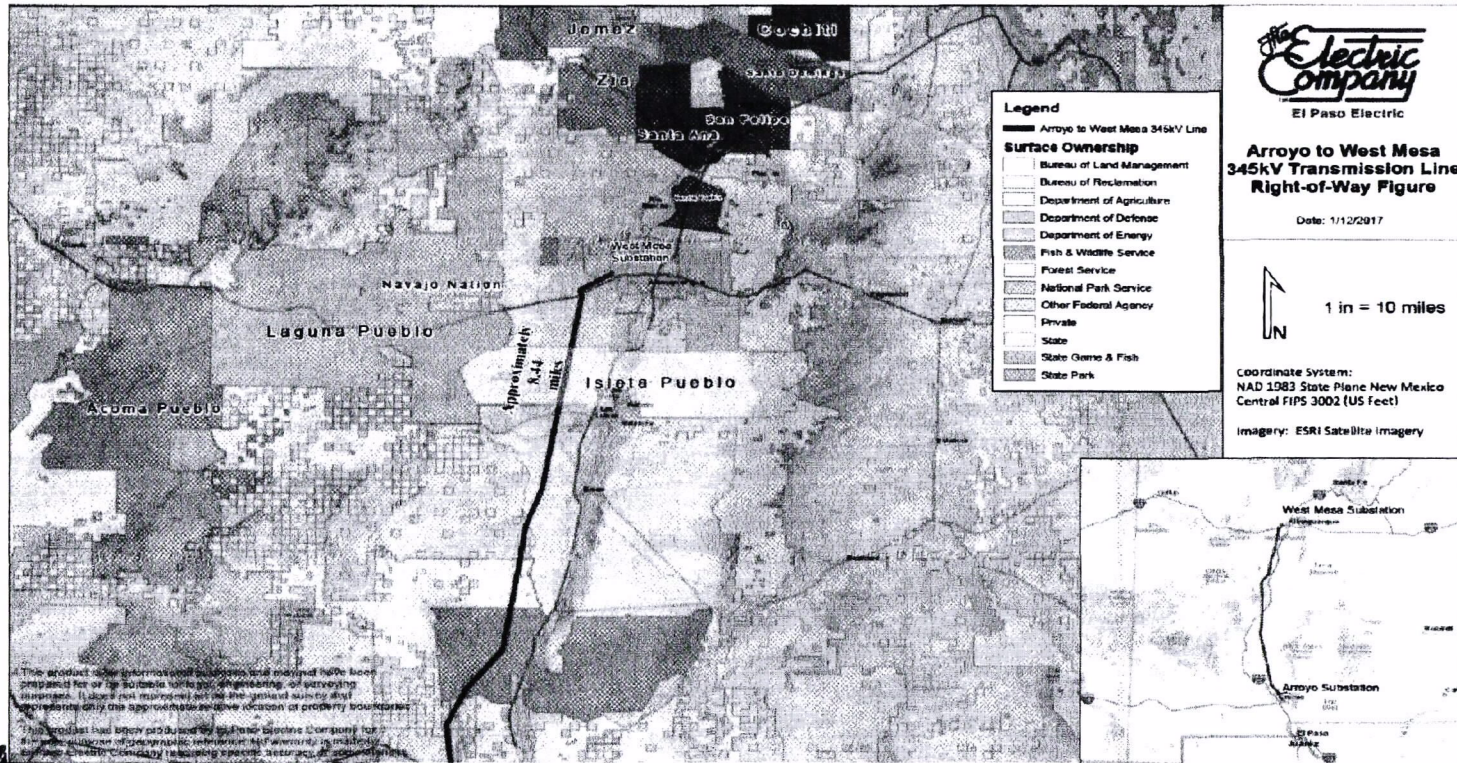
"Tribal representatives say the higher payments are not only fair but overdue, arguing that many original easements on Indian land should have netted higher value and that appraisals were conducted haphazardly, if at all. Utilities have expressed frustration at the steep fee increase but say they recognize them as a cost of doing business in the West."

"The Indian Right-of-Way Act of 1948 required tribal consent on right-of-way deals and mandated that energy companies pay at least fair-market-value"...however..."there is nobody regulating how much can be negotiated and what is fair..."

"Before 1990, Indian trust land was generally valued at \$10 to \$100 an acre a year; now, tribes garner \$4,000 to \$7,000 an acre a year."



Right of Way Extension Update



Right of Way Extension Update

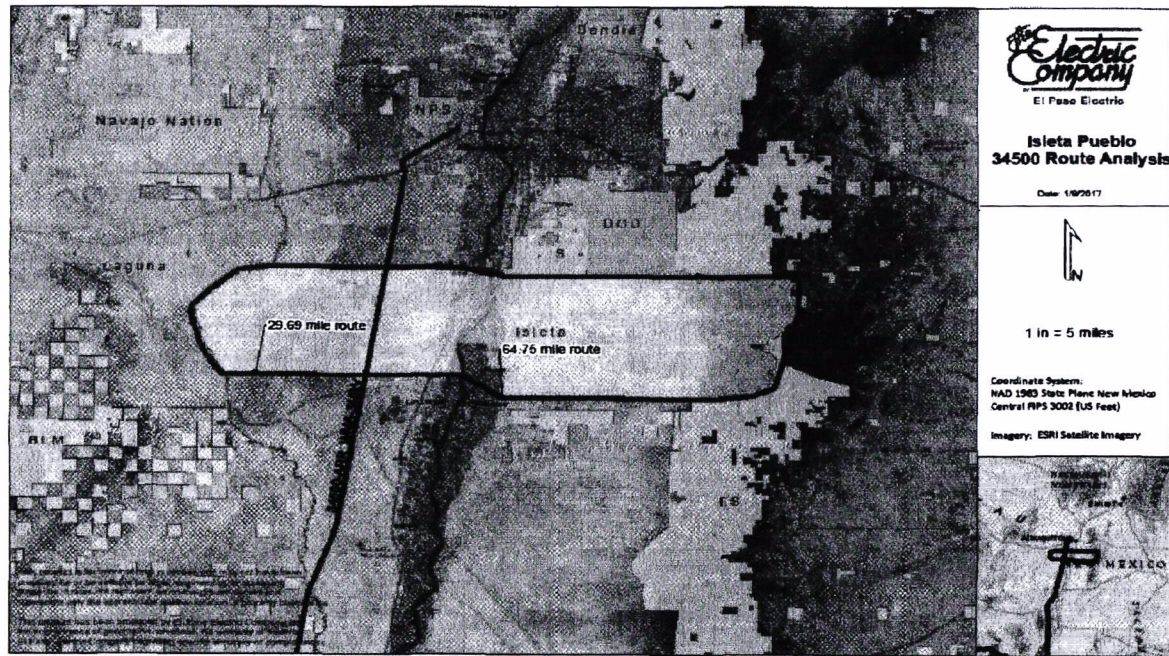
System Impact of West Mesa-Arroyo Abandonment

- El Paso Import Capability reduced from 1,040 MW to 520 MW
- Peak load serving capability would be reduced to approximately 1,600 MW
 - EPE could not meet peak transmission planning standards – firm load obligations under N-1 contingency
 - Loss of any critical element in peak months would likely result in rolling blackouts
- Third Party Contracts Impacted
 - Agreements with PNM & Tri-State would require renegotiation
 - Loss of annual transmission revenues of approximately \$6 MM



Right of Way Extension Update

No Feasible Re-Route Options



6

The Electric Company
El Paso Electric

Exhibit RCD-5
Page 6 of 6

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

U.S. Department of the Interior

May 2007

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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	<i>Code of Federal Regulations</i>
Cong.	Congress, Congressional
CPI	consumer price index
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
EEI	Edison Electric Institute
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	<i>Federal Register</i>
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	<i>U.S. Statutes at Large</i>
TERA	Tribal Energy Resource Agreement
U.S.C.	<i>United States Code</i>
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 (EPAAct). 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 EPAAct 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 EPAAct, which amends Section 2601 of the Energy Policy Act of 1992. This definition mandated by Congress is as follows: “tribal land—means any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States.”

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

Section 1813(b) requires the Departments to submit a report to Congress on the findings of the study, including but not limited to 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 EAct, 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,
- EAct provisions related to transmission,
- EAct 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 EAct. Industry commented that both NEP and EAct 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 EAct 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 EPO Act 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 EAct Title V, discussed in Section 2.3.1, a number of other EAct provisions address the Nation's energy infrastructure (particularly the electric transmission system) and may have some general application to tribal lands. EAct 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 EAct provide administrative tools for facilitating the siting and construction of needed energy transmission facilities.

EAct 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 EAct 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 EAct—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 EAct 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 EAct 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. EAct 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 EAct Title V, energy ROWs on tribal lands are governed by the 1948 Act⁴⁵ 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 EAct. 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—EAct 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 Policies 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 EPA 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 the 1970s 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 than 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 option(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 (EPAAct 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 Company²⁰⁴ 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.