ANALYSIS GROUP
ECONOMIC, FINANCIAL and STRATEGY CONSULTANTS

# Energy Policy Act Section 1813 Comments:

## Report of the Ute Indian Tribe of the Uintah and Ouray Reservation for Submission to the US Departments of Energy and Interior


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**In Cooperation With The**
**Ute Indian Tribe of the Uintah and Ouray Reservation**



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# EXECUTIVE SUMMARY

> "This administration intends to restore tribal governments to their rightful place among governments of this nation and to enable tribal governments, along with State and local governments, to resume control over their own affairs"
>
> President Ronald Reagan, *Statement on Indian Policy*, 1983[1]

## INTRODUCTION AND RECOMMENDATIONS

Financial compensation for access to tribal lands for energy rights of way is the apparent subject of this "Section 1813" white paper. But the real story is more complex and in the end more important than that nominal subject. What this white paper is about is how tribes in Indian Country are finding their own paths to economic development through the exercise of self-determination; and in turn, how these paths are leading to enhanced access to the lands and resources of Indian Country for the benefit of tribes, their energy business partners, and the nation. These outcomes are consistent not only with the nation's energy policy, but also with best policies toward Indian Country.

After setting the context for this issue within the framework of US energy market conditions and policies, this paper addresses the four topics raised in the Section 1813 "study scope:" the historic and contemporary terms and conditions of compensation for energy rights of way on tribal lands; factors to consider in thinking about "appropriate" standards for such compensation; considerations about how these issues relate to tribal self-determination and sovereignty; and linking these issues back to national energy and energy-transportation policies.

In short, we conclude that:

- The fundamental tenet of Indian Country economic development, advancement of the basic health and welfare of tribal members, cultural preservation on tribal lands, and harmonization of Indian land energy resource development with national energy needs and policy is tribal sovereignty and the right to self determination.

- The foundation of Indian sovereignty and self-determination, in the context of energy ROW, is the tribal right to consent. In our review of the energy issues facing our nation, of the history of tribal-energy company negotiations, and of the other issues related to Section 1813 of the Energy Policy Act of 2005, we have found no justification for compromising the tribal right to consent. To the contrary, the evidence suggests that compromising the tribal right to consent would not only harm

[1] 19 Weekly Comp. Press Doc., 98 (January 24, 1983).

Indian Country but also impede the efficient development of energy resources on tribal lands, in contravention of U.S. energy and Indian policy.

- Tribes have recently begun to empower themselves by entering into partnerships with energy companies and other industries. This relatively new, active approach to tribal fiscal and resource management flows from the tribe's right to consent to requests to use its lands by others. It also stems from U.S. government policies encouraging Indian self determination. The history of right-of-way (ROW) compensation to the Ute Indian Tribe and other tribes reveals both the grave injustice of past compensation procedures, and the positive influence – on tribes and on energy development goals – of recent, active and cooperative resource management approaches enabled by tribal sovereignty and the right of consent.

- ROWs are a component part of complex negotiations. In this context, energy industry participants have come to recognize the value of engaging in positive, mutually-beneficial partnerships with tribes through negotiations over new or renewal ROWs and associated mineral resource development agreements. The process of negotiations does not appear to be chilling access to tribal lands; in fact, energy companies are being able to renew their ROW agreements and obtain new ones as well. We have found evidence of this in the substantial growth in tribal agreements with industry for energy-related ROW in recent years (based on research on tribal data), in a number of case studies reviewed for this report, and in the positive comments made during the Section 1813 consultation process by representatives from a number of energy companies. Given this point of view, the Section 1813 study prepared and sent to Congress by the Departments of Energy and Interior should recommend – enthusiastically – that it is good policy to retain tribal consent and the negotiating process as the means to determine fair compensation for using tribal land for energy rights of way.

- Yet not all energy companies and trade associations agree that retaining negotiations to obtain tribal consent is the right policy. Some of the most actively engaged companies on this ROW issue are those that express, on the one hand, their respect for Indian rights to sovereignty, while seeking "only" "reasonable," "objective" and "uniform" standards for determining compensation for use of tribal land for ROW. This position cannot be seen as anything but an attempt to eliminate tribal consent and put in its place some sort of enforceable or "backstop" approach for determining compensation for use of tribal land for energy ROW. Compromising this critical legal, institutional, and U.S. policy foundation for Indian sovereignty and self-determination would be a policy failure of the highest order – a failure of energy policy, and a critical failure of tribal policy.

- We have also noticed certain industry participants suggest that tribal ROW compensation is a matter of significant interest from the perspectives of gas and electric reliability, consumer prices, and company risk profiles. We have extensively reviewed tribal ROWs vis-à-vis U.S. energy infrastructure and energy policy challenges, prices for electricity and gas, and company declarations of material risk in annual filings at the Securities and Exchange Commission (SEC). Based on these

analyses, we strongly conclude that such statements are inaccurate when they portray tribal ROW compensation as materially and adversely affecting the risk profile and cost of capital for energy companies in general, the prices faced by retail consumers of energy prices, or the security and reliability of electricity or natural gas supply.

It is ironic, to say the very least, that in some statements to the Departments, certain companies are actually bold enough to question whether Indian tribes can be trusted to stand by the terms and conditions of commercial agreements they may sign with those wishing to do business on tribal land. Yet through regulatory and, presumably, political channels, these same companies are for all practical purposes trying to undo a long-standing legislated commitment of the U.S. Congress to tribes providing them the right of consent.

In light of the extensive research we have compiled in this effort, we have only one threshold recommendation to the Departments: tribal consent must stand. Tribal consent engages tribes, allows for self-determination, encourages active fiscal management of tribal resources, builds tribal nations, fosters economic growth on tribal lands, improves the health and welfare of Indians, strengthens tribal communities, creates incentives for innovative problem-solving, provides for mutually beneficial agreements with energy companies, and fosters the efficient development of tribal energy resources in a manner strongly consistent with U.S. energy policy goals. Tribal consent is also the standing word of the U.S. government on its policy to provide for the sovereignty and self-determination of American Indians.

Beyond this threshold requirement, we can imagine several procedures that the Departments could recommend to contribute positively to ROW negotiation processes, and to foster the continued growth in positive relationships between Indians and energy companies. Specifically, the Departments could implement on their own or include as recommendations in their report the following:

- Support for the growth in independent tribal data collection and management, including the formal organization of existing Bureau of Indian Affairs (BIA) records.
- Foster inter-tribal discussions on positive energy negotiation experiences and the sharing of "best practices."
- Support the development of guidelines/handbook for productive negotiation of ROW on tribal lands to support existing and future negotiations.
- Offer support of facilitation and/or non-binding mediation services when requested by the tribes.
- Publish and maintain a manual of types of arrangements and contracts for energy resource development and ROW land access on tribal lands.

Below we summarize our research and findings that are described in more detail throughout the report. These address (a) the energy policy context (including the nexus

to energy transportation issues), and the significance of tribal ROW compensation in energy pricing and risk; (b) ROW historical experience and context; (c) tribal sovereignty and self-determination, and (d) valuation standards and procedures.

## THE ENERGY POLICY CONTEXT

Section 1813 is part of a much larger and more complex piece of energy legislation, which was drafted to respond to very real and serious energy challenges facing our country. Prices are high. Supplies are tight. Economic growth requires diverse energy options. And around the country, various parties are looking for ways to remedy this situation. Not surprisingly, energy issues are once again front page news.

But tribal ROW compensation is *not* front page news. Nor should it be. Tribal ROWs are not a central "energy challenge." An extremely small portion of the country's energy infrastructure – electric transmission lines, natural gas pipelines, etc. – sits on tribal land. The infrastructure sitting on tribal land has operated reliably for decades. There is no reason to believe that tribal requirements for fair ROW compensation will interfere with energy security and reliability, or have a noticeable impact on consumer prices. On the other hand, development of the domestic petroleum and natural gas resources on tribal lands has helped reduce U.S. dependence on foreign sources, is often cited as being easier than development on some non-tribal lands, and is continuing apace with new and innovative tribal-energy company partnerships. *If anything*, energy resources on tribal lands and the tribes' interest in providing access to them on fair terms represent a bright spot in a dreary national energy picture.

The concept of tribes as an energy "challenge" thus pales in the face of the very real other energy challenges the nation does face. Indeed, the past two years have seen a major increase in the prices of all energy products throughout the country tied in part to these fundamental energy supply/demand conditions in domestic and global energy markets.

In many regions of the country – including those experiencing the greatest growth in demand for energy products – the combination of high population densities, public health and environmental concerns, and strong preferences expressed politically render the process of energy supply and infrastructure development very difficult and costly. There are numerous examples of energy supply (e.g., power plants of various forms) and delivery infrastructure (e.g., high-voltage transmission, natural gas pipelines and terminals for liquefied natural gas (LNG)) facing siting and permitting challenges that force project delays, high costs, and cancelled projects. This compares poorly to many experiences in Indian Country.

In our research, we have discovered that:

(1) ROW costs in general are a minor component of regulated electric transmission and gas transportation rates, regardless of how land value changes by location or with time;

(2) A very small portion of gas pipeline and electric transmission line total mileage in the U.S. is on tribal land;

(3) When viewed from the perspective of *end-use* consumer prices, the costs to acquire rights of way – all ROW, not just ROW on tribal land – are *de minimis*; in the case of gas markets and competitive electricity markets, changes to such costs generally affect commodity supplier profits, not retail prices;

(4) Within this context of total ROW costs, *tribal* ROW costs are a small fraction, consistent with the relatively small portion of ROW that are on tribal land, and the historic under-compensation of tribes for energy ROW. Tribal ROW costs are a minuscule component of transmission/transportation tariffs, and an even smaller fraction of delivered retail electricity and gas prices. For the Western interstate gas companies we studied, tribal ROW costs make up a tiny share of pipeline costs, equaling around 2/1000$^{th}$ of 1% (for El Paso Natural Gas Company) to 34/1000$^{th}$ of 1% (for Mojave Pipeline Company). We estimate conservatively that tribal ROW represent no more than thousandths of a percent of the retail price of natural gas and hundredths of a percent of the retail price of electricity in regions most likely to have infrastructure crossing tribal lands. We conservatively estimate the impact on the average household in California to be equally small, ranging from 0.1 cents to 1.6 cents per month (out of a monthly average bill of roughly $47 for natural gas. For electricity consumers, we conservatively estimate the cost to be from 1 to 6 cents per month (out of monthly average bills ranging from roughly $50 to $200, depending on the utility). This is equivalent to 1/25$^{th}$ of 1% to 1/50$^{th}$ of 1% - or an amount barely visible to consumers.

(5) Consistent with these *de minimis* costs for tribal ROW, energy companies in the West (where such costs might be highest) do not appear to consider ROW acquisition a meaningful business risk. Based upon our review of 86 separate annual SEC 10K filings, representing 18 separate companies with operations in states with significant tribal lands, we found that (a) virtually all companies, in all years reviewed, contain description of regulatory and siting risk related to the need to pursue rate recovery, permits, grants, etc. from federal, state and local governmental agencies related to energy company operations; (b) many of the companies – in approximately 40% of the filings we reviewed – report circumstances associated with ROW for pipeline, or transmission operations, in their 10K filings; but we found that over the five-year period 2001 – 2005, only 3 of the companies have *ever* characterized the negotiation – or renegotiation – of tribal ROW as a material issue in annual reports to the SEC. In short, our analysis reveals that regulatory/approval factors *in general* are considered a significant source of company business risks, and often these factors are associated with negotiations or approvals associated with obtaining or maintaining ROW for company capital investments. But – consistent with our earlier observations that the costs of crossing tribal lands are insignificant in the context of overall energy infrastructure and energy prices – the energy companies we studied *rarely* identify tribal land ROW issues as a significant material risk in SEC disclosures.

And recall that the companies we studied are a sample that would be relatively likely to face this issue.

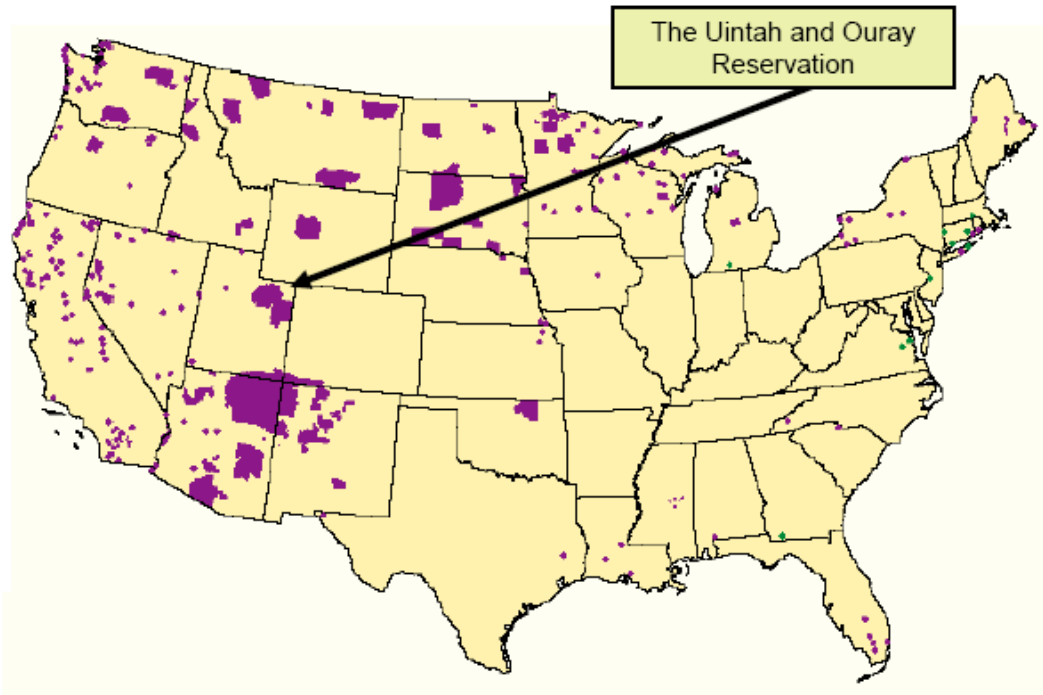
(6) No one has suggested that tribes have ever impeded the flow of electricity or gas (or other hydrocarbons) across tribal lands under existing ROW agreements, and never have tribal ROW issues jeopardized the reliability of energy supply;

(7) Rather than being one part of an energy supply and infrastructure *challenge* facing the U.S., tribes' provision of access to their lands stands as an important contributor to helping to meet the nation's energy needs.

## ENERGY RIGHT-OF-WAY HISTORY AND APPROACH: THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

Over the past half century at least, the Ute Indian Tribe's land has been used for a variety of purposes by energy companies. This tribe is also known as the Northern Utes. Its reservation, the Uintah and Ouray (U&O) Reservation, is approximately 120 miles across, 120 miles from top to bottom, and 150 miles diagonally, has exterior boundaries covering 4.4 million acres in Northeastern Utah, and comprises over 8% of the surface of the State of Utah.

**Figure ES-1**




Source: US Census Bureau. Available at http://www.census.gov/dmd/www/pdf/512indre.pdf

# Executive Summary

Surface and subsurface areas of the U&O Reservation are subject to an intricate system of ownership, interests and rights, including the common occurrence of split estates throughout the Reservation. Similarly they suggest an equally intricate set of arrangements, legal agreements, leases, grants of access – all of which fall into the meaning of a "right of way" on to and across Tribal lands for a variety of purposes. All of these factors complicate the task of land management. They also underscore the challenges of addressing in a straight-forward way the Section 1813 language calling for a "study of issues regarding energy rights-of-way on tribal land" and "an analysis of historic rates of compensation paid for energy rights-of-way on tribal land".

Over the years, Ute tribal land has been accessed by energy companies through various legal instruments including rights of ways, grants of access, leases and other agreements. This activity is recorded in physical and electronic files in the possession of the Tribe and the Bureau of Indian Affairs (BIA).

Our review of the historical data on and recent cases involving energy ROW on Ute Indian Tribe's lands points to a number of important trends and lessons learned. Rather than revealing a serious problem warranting a change in national policy or law, this evidence strongly suggests that the process is working well for both the Tribe's economic development as well as the nation's energy supplies. The Tribe has used its sovereign right to consent as an important tool for tribal self-determination in positive ways. Controlling the terms and conditions of access to their lands is critical to enabling tribes to control their economic destiny. If tribes lost this control, it would seriously injure their prospects for sustainable economic development.

There are many lessons learned from the Ute Indian Tribe's practices and approaches to the energy right of way issue:

(a) Energy companies have long gained access to tribal lands for energy ROW.

(b) The Ute Indian Tribe has approved – and continues to approve – access for many companies, many purposes, and much acreage.

(c) The Tribe has transitioned from a "passive management" approach to a more "active management" methodology for determining how to oversee and manage its natural, energy, economic and financial resources.

(d) With a recent investment of several million dollars in its data, systems, oversight, and management capabilities, the Tribe has a far better understanding of its own resources, obligations, commitments, and opportunities than it had in the past.

(e) These systems also give the Tribe information on which to build viable economic development activities for the Tribe, its members, and parties seeking access to the resources located within the Reservation for their own commercial interests.

(f) This transition has meant not only greater involvement of the Tribe in determining the conditions under which it is willing to grant access, but also greater transparency in the process for "doing business on the U&O Reservation."

(g) This transition has not led to a pattern of denials of grants of access to Tribal lands, nor has it impeded the issuances of consent for ROW on these lands.

(h) Recent grants of access to Ute tribal land have involved creative business solutions, offering the promise of providing enhanced access to energy resources on the U&O Reservation and investment aimed at developing and transporting those resources to commercial energy markets.

(i) In the process of negotiating ROW agreements as part of these commercial solutions, the Tribe has included various provisions in its agreements that align the counterparty's business interests with the Tribe's, reduce contract risk, and enhance the status of the tribe as a commercially viable business partner.

(j) The alignment of tribal and company business interests in energy partnerships has served as an effective incentive to improve the Tribe's resource management in general, and individual project maintenance and administration in particular. This result improves production efficiency and output, and fuels the formation of additional partnerships for development of resources on the Tribe's lands.

(k) The Ute Indian Tribe has exercised its sovereignty and consent authority in ways that benefit the Tribe as well as energy companies and the customers they serve. Without the right of consent, the creativity of the negotiation process to produce mutually beneficial outcomes would be seriously diminished.

(l) Finally, other tribes are approaching their ROW agreements with similar creativity and "best practices," with positive outcomes for self-determination.

(m) Given these positive outcomes for both tribes *and* energy companies, if tribes were to lose their right of consent as a part of a national policy change adopting a "formulaic" or "common" or "uniform" standard approach to setting compensation for access to tribal lands, such "certainty" would come at a large price – one that would strip away incentives to find ways to develop resources on tribal lands for the benefit of the tribes and their members as well as energy companies and their customers.

## IMPLICATIONS FOR TRIBAL SOVEREIGNTY AND SELF-DETERMINATION

There are many positive outcomes from adoption of such "best practices." For the Ute Indian Tribe, these approaches have helped the Tribe determine and chart its own economic development path and support its long-term goals for its people and the use of their natural and other resources.

The Tribe views its movement to actively manage its resources as the key to long-term economic success. These resources include its land and the rights associated with it; the Tribe's mineral resources and rights; its sovereign ability to issue or withhold its consent to use any of its assets; its people; its culture; and many other resources. As the Tribal

Business Committee stated when it adopted its Financial Plan several years ago, the plan's goal is:

> …to provide the Tribe with an economic strategy that will fund a core government and baseline Tribal Member benefits, while at the same time optimizing available Tribal resources to achieve greater socio-economic well-being for both current and future Tribal Members. (Ordinance 01-007, Paragraph 5.) … The new, active "management methodology" is key to the goal of maximizing "the Tribe's resources and achieve optimal implementation and execution of the Financial Plan."[2]

The Ute Indian Tribe members agreed with this strategy and approved the Financial Plan by referendum, thus giving it the highest status under the Tribe's constitutional authority.

The Tribe has charted and is now navigating its course. This involves leveraging and making best use of its resources and the revenues they generate to fund its core government services, as well as health, retirement, housing, education, and other benefits for its members. The Tribe's approach exemplifies the best democratic norms and standards, where a citizenry empowers its government to decide how to organize the country's affairs for the public and private benefits of its people. In fact, the Tribe is doing nothing different from what shareholders of a corporation expect their company's board of directors and management to do on their behalf. In all of these cases, an organization's tangible and intangible resources – its raw materials, its people, its know-how, its leverage in community affairs, its will – are used to meet the short-term and long-term aspirations and needs of its members.

The recent Indian Country literature suggests that what we've observed in the Utes' recent history of "active management" of its natural resources is similar to other recent "success stories" among the tribes. For example, a recent study of different approaches to economic development on American Indian reservations concludes that "One Works, the Other Doesn't." The one that works bears a close resemblance to the Ute Indian Tribe's "active management" methodology for its natural and financial resources. The study describes the process "that works" as one in which a successful tribe has

> backed up its ambitions with changes in government and policy that made the reservation a place where both outsiders and tribal members wanted to invest. This was the beginning of an economic renaissance….a much bigger story—the revolution that is underway in Indian Country. As much of the world knows, American Indian nations are poor. What much of the world doesn't know is that ….a number of those nations have broken away from the prevailing pattern of poverty. They have moved aggressively to take control of their futures and rebuild their nations, rewriting constitutions, reshaping economies, and reinvigorating indigenous community and culture. Today, they are creating sustainable, self-determined economies and building societies that work.

[2] Ordinance 01-007, Paragraphs 6-9.

> ….These [are] two very different approaches — the old and the new — to reservation economic development. Not only do these approaches differ, but they have produced dramatically different results. In short, one works, and the other doesn't. The one that doesn't work we call the "standard" approach. Our version of it is broadly based on federal and tribal practices developed during the twentieth century and still prevailing today. The one that works we call the "nation-building" approach.[3]

This literature is highly relevant to the situation that has led to this Section 1813 study – that is, tribes' recent efforts to assert their sovereignty in the context of considering whether and under what terms to approve energy ROW on their lands. While certainly a *change* for energy companies and the tribes alike, this new effort is providing meaningful and positive results for tribes, even as it is shown to have minuscule impacts on consumers' energy prices, and offers the opportunity for greater access to and development of energy resources located on tribal lands.

What are the critical success factors for "self determination" and "nation building" as they have been expressed in the Utes' experience with ROW management?

- The Ute Indian Tribe's ability to move to actively manage its land and other natural resources could not have occurred without the element of tribal consent to granting access to its lands. Without it, the concern would be that another entity's issuance of grants of access would be treated only as something narrowly necessary for the energy companies and their consumers, and not something that should also be used by a tribe to help it determine its own economic destiny consistent with its own values.

- The issue of tribal consent provides incentives for creative problem solving. Needing to find middle ground motivates the parties to stay at the negotiating table to find mutual accommodation, rather than treating such negotiations as merely a stepping stone on the way to a "real" venue for decision, which would be more likely to occur if there were another entity actually having the final decision on ROW access issues.

- Tribal consent and its exercise in mutually acceptable ROW agreements between tribes and energy companies has the potential to play an important role in the very

[3] Stephen Cornell and Joseph P. Kalt, "Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't," JOPNA No. 2005-02, 2006, page 1-3. By contrast with the "process that works," which is described above, the authors describe the one that "doesn't work" as having the following attributes: "Characteristics of the Standard Approach This approach has five primary characteristics: it is short-term and non-strategic; it lets persons or organizations other than the Indian nation set the development agenda; it views development as primarily an economic problem; it views indigenous culture as an obstacle to development; and it encourages narrowly defined and often self-serving leadership. …Characteristics of the "nation-building" approach, thanks to its dual focus—conscious or unconscious—on asserting tribal sovereignty and building the foundational, institutional capacity to exercise sovereignty effectively, thereby providing a positive environment for sustained economic development. Once again, we can generalize from a variety of cases and details to identify five primary characteristics of the nation-building approach: it involves comprehensive assertions of sovereignty or self-rule; it involves backing up sovereignty with effective governing institutions; it matches those institutions to indigenous political culture; it has a strategic orientation; and it involves a leadership dedicated to nation building. " *Ibid*., pages 4, 11.

political and institutional stability that both parties seek from the other side. Having tribal leaders make ROW decisions based on their determination of what is in the best interests of the tribe enhances political stability, as contrasted with forcing tribal leaders to accept a ROW agreement adopted and/or imposed on the tribe by others and then to defend it in the event of tribal disapproval.

- Tribal control of surface access is only one component of a set of rights that accrue to tribes as sovereign. Not coincidentally, surface access issues are part of more thorough and nuanced negotiations between tribes and energy companies.

- In the pursuit of mutually beneficial agreements between tribes and energy companies, both parties may be motivated to be creative and to think outside the box in order to find common ground. This may involve bring other types of company personnel (e.g., commercial business personnel, as opposed to simply ROW agents and real estate personnel) and other types of partners (e.g., other parts of the energy company's organization, or third parties) who may be able to be part of the solution.

- Given the successes seen in recent years as tribes have adopted the "approach that works," if the federal government were to take away from tribes their right to consent to uses of their lands by others, then the Congress would be taking a giant step backward and away from "creating sustainable, self-determined economies and building societies that work." Taking away a tribe's control over access to its lands would deprive tribe of one of their most valued resources: their land and all that it provides to them. Tribal control over the terms and conditions of others' access to tribal lands is a lever for economic development, without which a tribe will be disarmed and profoundly weakened in their pursuit of self determination.

Where tribes are given the opportunity to exercise their sovereignty in a way that aligns their interests with those of companies trying to use their land for energy development, supply or transport, it can create a win-win situation. It supports tribal economic development *and* self-determination. It provides energy companies with access to tribal lands and the opportunity to have long-term, mutually productive partnerships to develop energy resources (as compared to contentious access struggles). It provides the tribe with incentives aligned with the goals of efficiency and productivity in resource management and administration. It provides consumers with the benefit of access to greater North American energy resources through and located on/under tribal lands. And economically viable tribal enterprises provide economic benefits to the region and communities beyond Indian Country in many remote and rural parts of the nation.

## VALUATION STANDARDS AND PROCEDURES FOR RIGHTS OF WAY ON TRIBAL LAND

What does all this mean for the task before the Departments – namely, how to characterize the status of Indian energy ROW, and whether to suggest any changes to current practices? Our evidence shows that there is no reason to change current policy.

Tribes have the right of consent to access their land. For a ROW agreement to exist, a tribe – and its counterparty – must voluntarily decide that it is in its best interests. This is essential to the concept of "fair compensation." This is also consistent with the fundamental definition of "fair market value" – that is, ""[t]he fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to but or sell and both having reasonable knowledge of relevant facts."[4] Any change in this fundamental arrangement or setting a standard rate would constitute a breach of the tribal right of consent – and would undermine the "fairness" criterion.

Are some energy companies paying more than they have paid in the past for their ROW on tribal land? Yes. The Departments should not lose sight of the fact that this reflects not only a change in demands from tribes, but also a baseline of unjust past compensation, and a fundamental change in economy and market conditions. But even with such increased payments for ROW on tribal lands, energy consumers will see *de minimus* impacts in energy costs resulting from this effect.

Consequently, the first and most important standard and procedure for valuation of energy ROW on tribal land is that tribal consent must stand. The process by which tribal land is valued for energy ROW must result from a negotiation between the tribe and potential energy partners.

Section 1813 focuses attention on approaches to "appropriately" compensating tribes for use of their lands for energy ROW. The starting point for thinking about this issue: is there any plausible rationale for establishing "standards and procedures" for negotiation of tribal ROW compensation that differs from the current approach, or that otherwise deviates from the principle of establishing fair market value through negotiation?

Many energy companies have argued that "fair market value" is implicitly or explicitly equivalent to the "appraised value of the property." Ignoring for the moment the difficult question of what constitutes an appropriate appraisal for land for which no eminent domain powers exist and for which no real estate market exists, the guidance under federal regulations governing ROW on tribal lands is that such an appraisal-based "fair market value" is the floor, and not the ceiling, for determining compensation for the use of tribal lands for rights of way. Chapter 25 of the US Code §169.12 makes this clear.

"Appropriate compensation" must reflect a tribe's fundamental right to negotiate with counterparties to establish the fair value *to the tribe* of granting access to its tribal land. There can be no other "right" compensation than that which each individual tribe is willing to accept for use of its land. For each tribe considering any specific grant of right of way at a particular time and place and for a particular counterparty, what it considers fair will vary, in light of the specific circumstances, conditions, knowledge and

[4] U.S. Internal Revenue Service, 26 CFR Ch.1, § 20.2031-1.

inclination of the tribe at the time of negotiations. Recognizing this basis for the concept of "fair and appropriate compensation" is critically important, in part because the current and historical circumstances and conditions of tribes are markedly different from that of non-tribal counterparties and in part each tribe assigns different values to its resources. Thus, other bases for determining ROW compensation – e.g., historical trend lines for compensation, or appraised valuations based on non-tribal lands, or the like – can not be considered precedential, or even appropriate or relevant, in a particular tribe's future negotiations of ROW compensation on its tribal land. Because ROW and access tends to be bundled with other issues and commercial considerations, it can be difficult to allocate overall value created in a negotiation to the ROW component in isolation.

## A NOTE ON THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, AND ON THE AUTHORS OF THIS REPORT

This report was prepared on behalf of and with the cooperation of the Ute Indian Tribe of the Uintah and Ouray Reservation (U&O Reservation), in Utah. As of the writing of this report, the tribe has 3,172 members, about half of which reside on the U&O Reservation.

Assisting in the preparation of this report were: the Tribal Business Committee and its Chairman; the staff of the Ute Indian Tribe Energy & Minerals Department; Mr. Cameron Cuch of Ute Energy, LLC; and Mr. Cleve Pike of the Jurrius Ogle Group.

The principal authors of this report are Susan Tierney, Ph.D. and Paul Hibbard. Dr. Tierney, Managing Principal at Analysis Group, served previously as Assistant Secretary for Policy at the U.S. Department of Energy; Secretary of Environmental Affairs for the Commonwealth of Massachusetts; Commissioner of the Massachusetts Department of Public Utilities; Executive Director of the Massachusetts Energy Facilities Siting Council; Senior Economist at the Massachusetts Executive Office of Energy Resources; and Assistant Professor at the University of California at Irvine. She is a commissioner on the National Commission on Energy Policy, and has a Ph.D. from Cornell University. Mr. Hibbard, Vice President of Analysis Group, spent more than ten years developing state energy and environmental policy in Massachusetts, at the Department of Environmental Protection and Department of Public Utilities. He has published on U.S. energy policy and energy facility siting policies. He has an M.S. in Energy and Resources from the University of California, Berkeley, and a B.S. in Physics from the University of Massachusetts, Amherst.

# BACKGROUND: EPACT SECTION 1813

On August 8, 2005, the Energy Policy Act of 2005 ("EPAct" or "Act") was signed into law. EPAct contains hundreds of pages of financial measures and regulatory changes intended to address major challenges posed by current and expected U.S. energy supply and demand conditions.

This report on behalf of the Ute Indian Tribe responds to a single section of the Act – Section 1813 – that does not institute any changes to existing policy, but rather requires that the Departments of Energy and Interior ("DOE" and "DOI," respectively, or together, "Departments") study certain issues related to energy rights of way ("ROW") on Indian lands. Specifically, Section 1813 requires in relevant part:

> SEC. 1813. Indian Rights of Way.
>
> (a) STUDY:
>
> (1) IN GENERAL.-The Secretary and the Secretary of the Interior (referred to in this section as the "Secretaries") shall jointly conduct a study of issues regarding energy rights-of-way on tribal land (as defined in section 2601 of the Energy Policy Act of 1992 (as amended by section 503)) (referred to in this section as "tribal land").
>
> (2) CONSULTATION.-In conducting the study under paragraph (1), the Secretaries shall consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers.
>
> (b) REPORT.-Not later than 1 year after the date of enactment of this Act, the Secretaries shall submit to Congress a report on the findings of the study, including—
>
> (1) an analysis of historic rates of compensation paid for energy rights-of-way 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 rights-of-way 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 rights-of-way on tribal land; and
>
> (4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.[5]

This report addresses all four elements of the Section 1813 scope, as well as relevant information related to the national energy context within which the study takes place. Given the study scope, the subject of financial compensation for access to tribal lands for energy rights of way is nominally the focus of this report; however, the real story is more

[5] Energy Policy Act of 2005, Section 1813.

rich and complex, and in the end more important than that nominal subject. What this white paper is about is how tribes in Indian Country are finding their own paths to economic development through the exercise of self-determination; and in turn, these paths are leading to enhanced access to the lands and resources of Indian Country for the benefit of tribes, their partners, and the country. These outcomes are consistent not only with the nation's energy policy, but also with best policies toward Indian Country.

After setting the context for this issue within the framework of US energy market conditions and policies, this paper addresses the four topics raised in the Section 1813 "study scope": the terms and conditions of compensation for energy rights of way on tribal lands; factors to consider in thinking about "appropriate" standards for such compensation; considerations about how these issues relate to tribal self-determination and sovereignty; and linking these issues back to national energy and energy-transportation policies.

# THE U.S. ENERGY POLICY CONTEXT

## OVERVIEW: THE NATIONAL ENERGY CHALLENGE AND ROLE OF TRIBES

Energy issues are once again front page news. Prices are high. Supplies are tight. Economic growth requires diverse energy options. And around the country, various parties are looking for ways to remedy this situation.

In some ways, this is a long-standing challenge. The nation has always needed an array of energy infrastructure – the energy production and delivery systems to extract and process resources, and connect supplies with consumer markets in different regions. The normal cycles of supply investment and demand, combined with the long-lead time of energy infrastructure development, mean that the balance of energy supply and demand typically follows "lumpy" patterns of excess and deficiency, with rising and falling prices reflecting these conditions. But many analysts believe that current conditions underlying energy supply fundamentals suggest a sense of urgency in addressing energy infrastructure problems in the U.S. – namely, the declining productivity of natural gas extraction in the continental U.S. and Canada, the growing reliance on crude oil imports, the current lack of spare domestic refining capacity, over-reliance on the Gulf Coast for fossil energy supplies, and the existence of electricity transmission bottlenecks in several regions. Indeed, the past two years have seen a major increase in the prices of all delivered energy products throughout the country tied in part to these fundamental energy supply/demand conditions in domestic and global fossil fuel energy markets.

Our energy challenges are compounded by the fact that in many regions of the country – including those experiencing the greatest growth in demand for energy products – the combination of high population densities, public health and environmental concerns, and strong preferences among energy choices render the process of energy supply and infrastructure development very difficult and costly. There are numerous examples of energy supply and processing (e.g., power plants, refineries) and delivery infrastructure (e.g., high-voltage transmission, LNG terminals, natural gas pipelines) facing siting and permitting challenges that force project delays, high costs, and cancelled projects.

It is this combination of energy supply, delivery, price, and siting challenges that led to the passage last year of EPAct.[6] The first comprehensive national energy legislation in over a decade, EPAct responds to the energy challenges through numerous major

[6] This combination of energy challenges continues to drive ongoing discussions in Congress for additional energy legislation, within just one year of passage of EPAct. Also, as price and supply challenges arose across the country in the past two years, many states have passed laws as well, providing for demand reduction, transportation efficiency, and supply incentives.

initiatives, funding mechanisms, tax measures, and regulatory mechanisms to facilitate investment in and development of energy supplies and infrastructure.

In this section, we set the energy policy context by providing an overview of the important supply, demand, and siting challenges facing the nation, and the provisions of EPAct intended to address them. But within this broader context, where do tribal issues fit?

Among the 1,840 sections of the EPAct is the one that is the focus of the DOE/DOI review. Of EPAct's 550 pages, one is devoted to Section 1813. One might conclude that within the larger context of national energy supply, siting, transportation, regulation, tax and pricing issues, this provision is exactly what "study" items in federal legislation often are – an instruction to study something that otherwise does not reach the level of consensus necessary to accomplish a particular policy change. However small this Section 1813 appears within the overall context of national energy issues, it means *everything* to the prospects for Indian health and welfare, economic development, and self-determination.

Since its inclusion in EPAct, Section 1813 has taken on much larger significance that its congressional drafters may have ever intended. The Section 1813 Study has been postured by certain industry players and state representatives as addressing important energy supply challenges. At best, this is misleading; at worst, it is a blatant disregard for fact. In the following sections, our review of the pertinent energy and tribal data demonstrates certain undeniable realities that the Departments should keep at the fore in their consideration of Section 1813 issues:

- ROW costs in general are a minor component of regulated electricity transmission and gas transportation rates, regardless of how land value changes by location or with time;
- When viewed from the perspective of *end-use* consumer prices, ROW costs are *de minimus;* in the case of gas markets and competitive electricity markets, changes to such costs generally affect commodity supplier profits, not retail prices;
- A very small portion of gas pipeline and electric transmission line total mileage in the U.S. is on tribal land;
- Within the larger context of ROW costs, *tribal* ROW costs are likely to be a small fraction, consistent with the relatively small portion of ROW that are on tribal land, and the historic under-compensation of tribes for energy ROW. Tribal ROW costs are a minuscule component of transmission/transportation tariffs, and an even smaller fraction of retail electricity and gas prices;
- Consistent with these data, publicly traded energy companies apparently do not consider ROW acquisition costs on tribal lands to be a meaningful business risk. We analyzed the annual SEC filings of almost 20 electric and natural gas companies in the Western states – where one would expect such risks to loom large if they were indeed material business or financial risks. And we found that

by and large, such companies rarely mention tribal ROW costs as representing material enough risks to company operations, cost of capital, or expected financial performance to warrant disclosure to investors in these SEC filings;

- To our knowledge, no one has suggested that tribes have ever impeded the flow of electricity or gas (or other hydrocarbons) across tribal lands under existing ROW agreements, and never have tribal ROW issues jeopardized the reliability of energy supply;

- Nor have tribes unreasonably deterred development of the significant energy mineral reserves (coal, natural gas, oil) under their ground. In fact, 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.

The remainder of this section presents relevant data regarding the general U.S. energy situation and policy context – and the role of tribes within this – to establish the proper framework for consideration of Section 1813 comments, including analyses related to each of the points presented above. The review is divided into a discussion of national energy infrastructure needs and the EPAct policy response; analyses of the costs and pricing of transmission and transportation (and the contribution of tribal and non-tribal ROW) in downstream electricity and natural gas markets; and a review of utility disclosure of material risks in SEC filings related to siting and other regulatory factors in general, and tribal ROW in particular.

## NATIONAL ENERGY INFRASTRUCTURE NEEDS AND CHALLENGES

It is no secret that our nation's economy, and our residents' well-being, depends on the reliable flow of energy in various forms, primarily refined petroleum products, natural gas, and electricity. It is also no secret that portions of our current infrastructure for meeting the demand for energy is stressed – not by negotiations over new or renewal ROW on tribal land, but by the aging of production and transportation infrastructure; by consumer demand that is surging here and abroad while domestic supply productivity is struggling; by an increasing reliance on crude oil from unstable regions of the world; by a lack of spare refining capacity; and by disproportionate reliance within the U.S. on energy production, treatment, and distribution infrastructure in the Gulf Coast region.

While in some sense the challenge of balancing energy supply and demand is not new, one need only visit the front pages to realize that it is growing more and more difficult, and more and more visible to the public and policymakers alike. Numerous studies over the past several years have documented these major challenges in energy infrastructure, including reports issued by governmental and non-governmental organizations. These

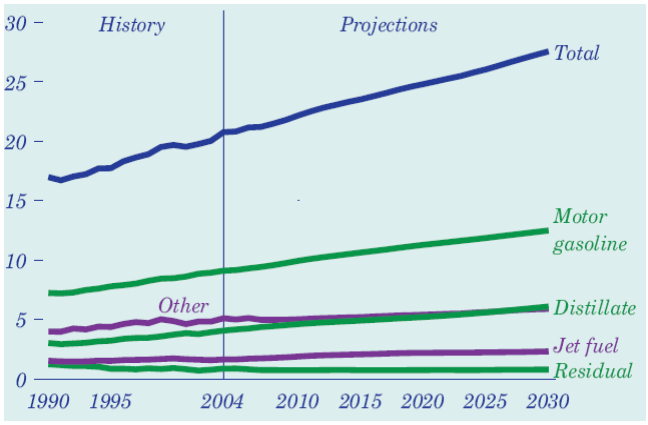
reviews have identified a number of critical infrastructure needs which are summarized in the sections that follow.[7]

## Petroleum

Crude oil is a global commodity, with the U.S. increasingly dependent on foreign crude, and increasingly subject to price volatility stemming from the changing global market conditions. The global market in crude oil is only the first piece of the nation's supply and price picture. Crude oil must be converted into gasoline, jet and home-heating fuel, and other products at refineries, then shipped to market via pipeline, boat, truck, and train. While in at least the last 30 years the global market in crude historically has been the most important determinant of the availability and price of refined products, refining and transport are significant contributors as well. Constraints or vulnerabilities at any of these stages add to the risks of shortages and price spikes in downstream refined-product markets.

**Figure 1**

**Consumption of Petroleum Products, 1990-2030 (million barrels per day)**




Source: EIA AEO 2006, Figure 9.1.

U.S. consumption of petroleum products in 2004 averaged roughly 21 million barrels per day (MBD), a new high for U.S. consumption, with growth of 3.5% over 2003 levels, and 24% over 1991 consumption.[8] The Energy Information Administration (EIA) projects U.S. petroleum product consumption to continue to grow at an annual average growth rate of 1.1%, increasing to 28 MBD in 2030.[9] See Figure 1. Prices for crude oil have risen significantly over the past couple years, most often attributed to strong demand growth in China and India and, more recently, supply uncertainties such as Iranian threats to withhold supply and other disturbances in oil-producing nations.

[7] Much of the background discussion on energy infrastructure benefits from two recent surveys of energy trends contained in Paul J. Hibbard, "US Energy Infrastructure Vulnerability – Lessons From the Gulf Coast Hurricanes," March 2006, and Paul J. Hibbard, "U.S. Energy Infrastructure, Demand, Supply, and Facility Siting," November 2004, both papers prepared at the request of the National Commission on Energy Policy.

[8] U.S. Energy Information Administration (EIA), *Petroleum Supply Annual 2004*, Volume I (PSA 04), June 2005, Table S1.

[9] EIA, *Annual Energy Outlook 2006* (AEO 06), February 2006, Table A11.

# Energy Policy Context

While the U.S. has long been a net importer of crude oil (a trend that is expected to continue in the coming decades), domestic refinery capacity has been the source of nearly all of the refined products consumed within the country. In 2004, the U.S. imported roughly two thirds, or 10 MBD, of the crude inputs to refineries in the U.S. Domestic refineries combined these imports with 5.5 MBD of domestic crude production to generate 16.5 MBD or 91% of refinery product consumed in the U.S. Net imports of refined products equaled approximately 1 MBD, or 9% of U.S. consumption.[10]

Petroleum products move to consumers via a complex transportation web, involving movement of crude from producing wells (including those on tribal lands) and import terminals to refineries and crude storage; and transportation of refined products to refined product storage and local markets. The high geographic concentration of crude production and import terminals, and supply and refinery production – particularly in the Gulf of Mexico – means that most of our petroleum supply requires shipping of some sort. Three quarters of crude oil moved domestically occurs via pipeline, as do roughly three fifths of refined products.[11] Most of the remainder is moved by water carriers.[12]

Thus the ability to turn crude oil into energy products for consumers involves a web of oil infrastructure facilities: terminals, production facilities, refineries, pipelines, and so forth. These facilities are necessary to transform a raw energy resource into useable forms, but they are also important because the geographic configuration of the facilities can influence the distribution and local severity of impacts associated with events that strike a single region – such as the hurricanes did this summer. Major factors and challenges for the U.S. associated with petroleum supply, processing, and delivery include the following:

- In general, the U.S. is heavily dependent on imports, and strongly dependent on Gulf of Mexico petroleum infrastructure, for crude oil supplies, both from the standpoint of domestic production, and from the standpoint of imports.

- Unlike its reliance on imported crude oil, the U.S. has historically produced nearly all finished petroleum products at domestic refineries. U.S. refinery production has generally kept pace with increases in U.S. demand for refined products over the past several decades through increasing the average size and capacity of refineries, the efficiency of refineries, and the capacity utilization of existing refineries.[13] However, the U.S. has not built a new refinery since 1976,

[10] Most of the remaining 2.5 MBD of petroleum products consumed in the U.S. in 2004 was associated with domestic production of natural gas liquids.

[11] Association of Oil Pipe Lines, "Pipelines and Water Carriers Continue to Lead All Other Modes of Transport in Ton-Miles Movement of Oil in 2003," May 16, 2005, Tables 2 and 3.

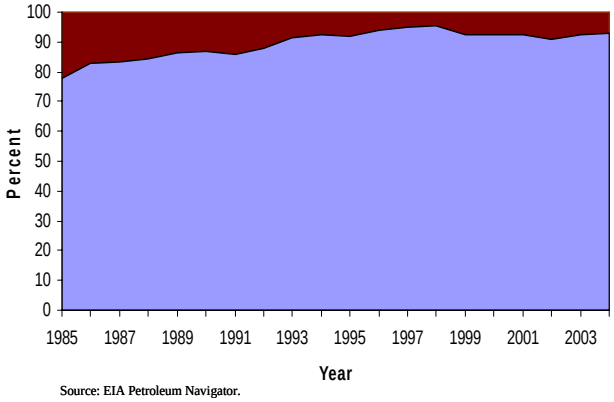
[12] Less than 1% of crude, and 10% of refined products, are shipped domestically via motor carriers and railroads. Id.

[13] Federal Trade Commission, "Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition," June 2005, pages 49-57.

and current capacity utilization at existing refineries is in excess of 90% (see Figure 2). Our vulnerability to disruptions in refinery operations stems from the combination of (a) the industry running close to its production margins (having reached historic lows with respect to excess available operating capacity), and (b) the high geographical concentration of domestic refinery capacity.

**Figure 2**

**U.S. Percent Utilization of Refinery Operable Capacity**




Source: EIA Petroleum Navigator.

- The concentration of crude production/import and refinery operations requires that a huge amount of crude and refined product move around the country via liquid pipelines, barges, trucks and trains. Two thirds of crude oil and three fifths of domestic refined products moves over the petroleum product pipeline network. Most of the rest involves barge shipments from the gulf, or along the coasts.

- This domestic pipeline infrastructure is an extensive network of large- and small-diameter pipelines designed to move liquid petroleum from the Gulf to other regions, and to a lesser extent to move petroleum between other regions, within each region, and from Canada to the U.S..[14] See Figures 3 and 4. Figure 3 shows the major trunkline systems that move crude oil imports from Canada and overseas to U.S. refineries; and crude oil from domestic Gulf production to refineries in the Gulf and in the Midwest. Figure 4 shows the major refined petroleum product trunkline systems in black,[15] primarily moving product from the Gulf Coast refineries to markets on the East Coast and in the Midwest. Blue lines reflect the smaller diameter pipelines that move refined products shorter distances within and across regions.[16]

- In addition to these interregional distribution systems, there is an extensive network of short-haul supply pipes that bring crude oil product from on-shore and off-shore wells to central hubs for collection and transport, or for delivery to refineries for processing. The supply of domestic crude across the country relies on this network of short-haul supply lines.

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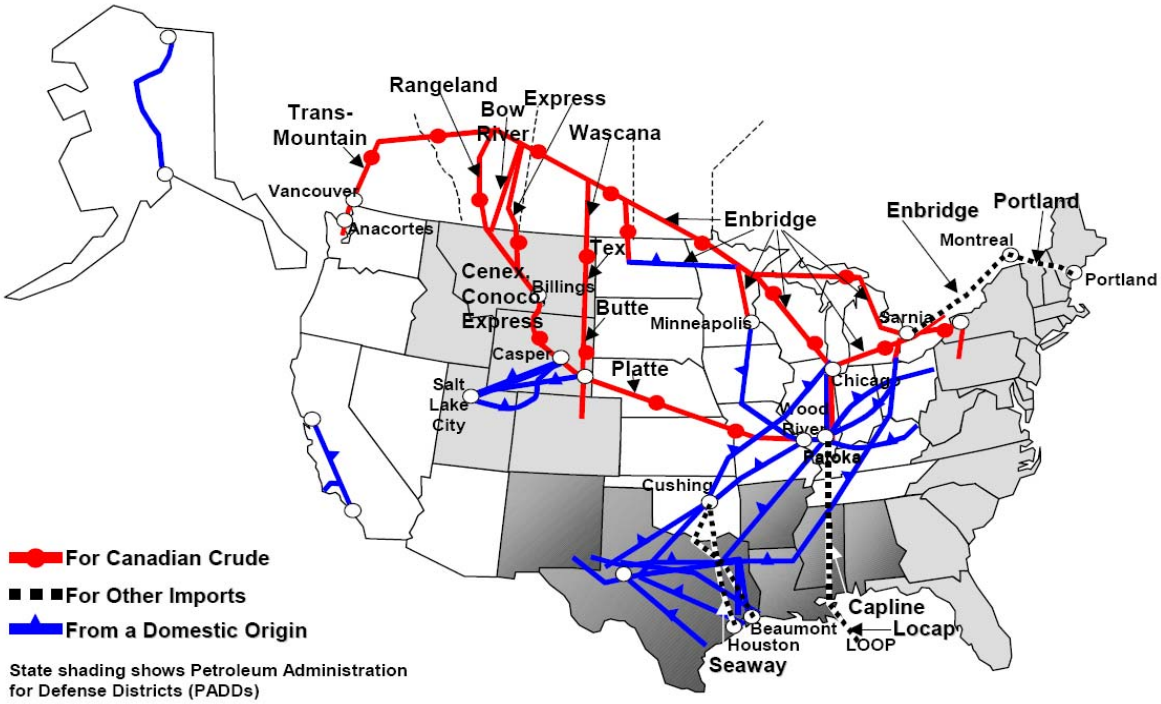
[14] Data on shipments from: Association of Oil Pipe Lines, "Pipelines and Water Carriers Continue to Lead All Other Modes of Transport in Ton-Miles Movement of Oil in 2003," May 16, 2005, Tables 2 and 3. Figures 3 and 4 from: Allegro Energy Group, "How Pipelines Make the Oil Market Work – Their Networks, Operation and Regulation" (Allegro), December 2001.

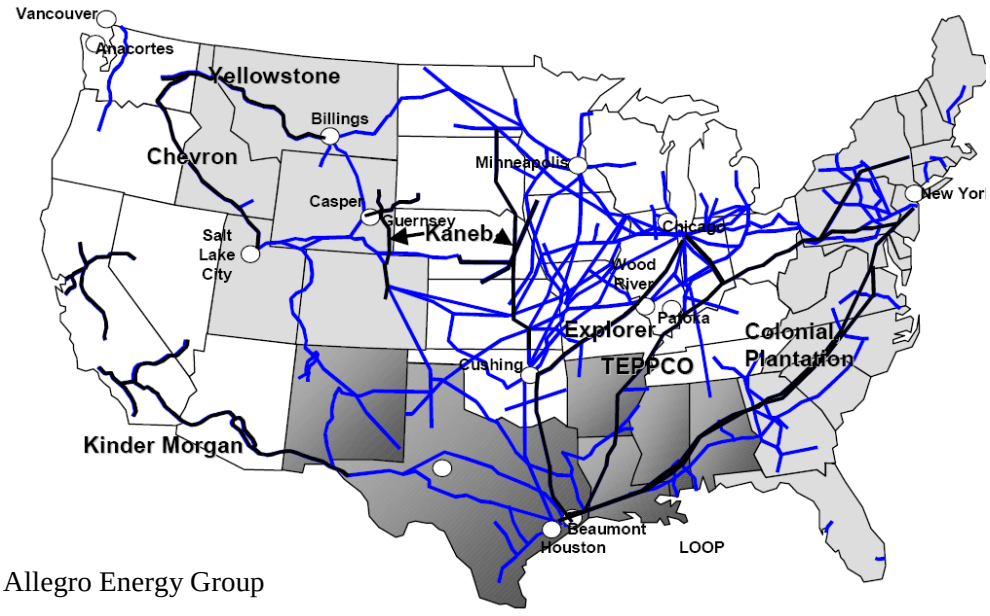
[15] In black/white reprints of this report, these are the pipeline systems shown with proper names.

[16] In black/white reprints of this report, these pipelines do not have proper names on this Figure. Allegro, pages 9-10.

## Figure 3
## Selected Crude Oil Trunkline Systems




## Figure 4
## Major Refined Product Pipelines

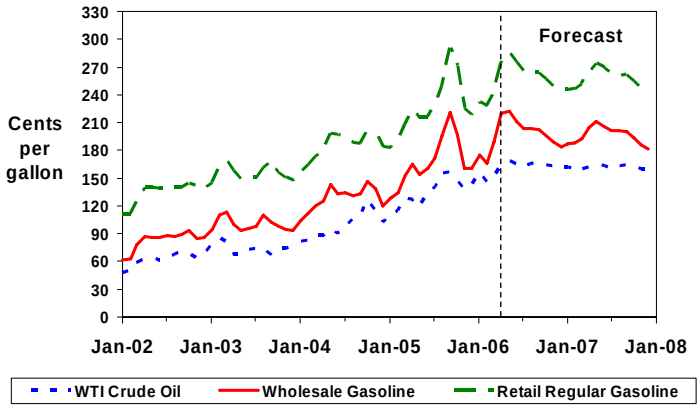



From Allegro Energy Group

- Current and expected future price conditions for petroleum products reflect fundamental global supply and demand conditions and uncertainties for crude oil, and the tightness in domestic refinery production capacity. Starting around 2000, these conditions began to change, and prices have risen relatively steadily since then. Most recently, projections of short-term oil pr ices reveal expectations for sustained high prices for the next few years. Figure 5 indicates historical and projected prices for crude oil and gasoline, as forecast by the federal government.

**Figure 5**

**Gasoline and Crude Oil Prices (¢/gallon)**




Source: EIA Short Term Energy Outlook, January 2006.

As a result of all of these influences and conditions, the U.S. has significant challenges to reliably and affordably meet its demand for refined petroleum products. But tribal ROW issues are not one of them. To the contrary, significant crude resources and pipelines are on tribal land, and tribes have been a positive contributor to meeting the goal of reducing our dependence on foreign oil. Specifically, it is estimated that over the past 20 years Indian lands have contributed roughly 11% of U.S. onshore oil and natural gas production, and that 890 million barrels of oil exist beneath tribal lands.[17]

## Natural gas

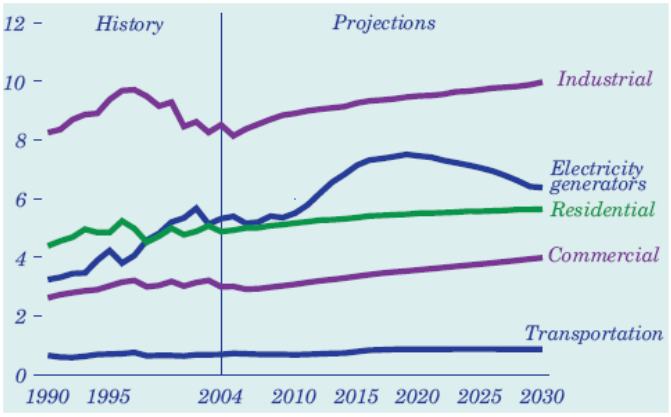
The natural gas picture looks similar to the oil landscape, in some ways. The U.S. is increasingly dependent on natural gas for home, commercial and industrial process needs and electric power generation. Our reliance is projected to grow in importance over the next 20 years. Historically, gas customers have been added when new sources of domestic supply and other sources from within North America became available at attractive prices. Thus, the nation's natural gas demand was relatively in balance with supply. This picture has changed in recent years, as low gas prices in North America led to unprecedented new demand for natural gas in new power plants built in various regions around the U.S. Increasingly, the U.S. is looking outside the traditional North American supply basins to meet this need. It is widely expected that in the future

[17] Appleby, Nancy J., Gregory G. Hawn and Nancy A. Wodka, "Opportunities in Indian Country," *Oil and Gas Investor*, oilandgasinvestor.com, April 2006 (hereafter "Appleby"), page 75.

domestic production will come more from non-conventional sources, primarily in the Rocky Mountain basins, and increasing imports will provide the swing supplies to meet growing demand in the face of an overall decrease domestic productivity.

**Figure 6**

**Natural Gas Consumption by Sector, 1990-2030 (trillion cubic feet)**



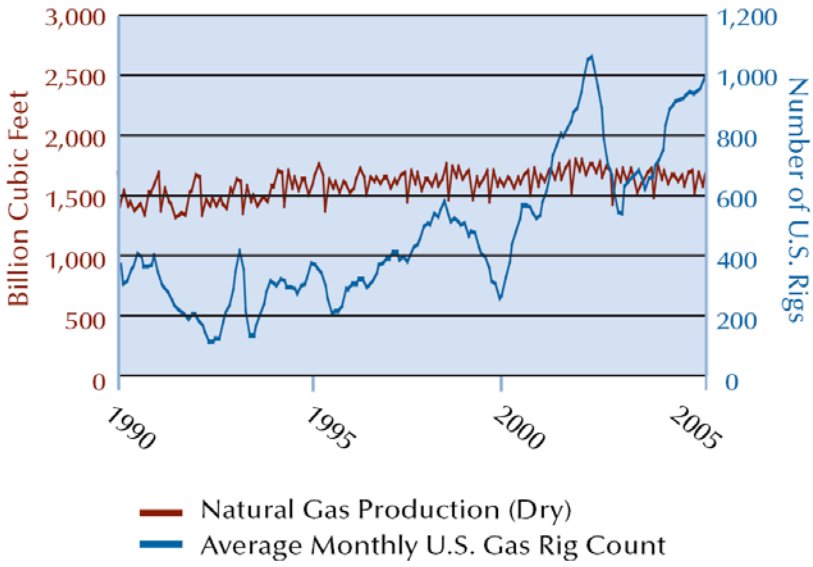

Source: EIA AEO 2006, Figure 7.1.

In 2004 the U.S. consumed roughly 22.4 trillion cubic feet (TCF) of natural gas – 7.8 TCF (35%) in the residential and commercial sectors, 7.4 TCF (33%) in the industrial sector, and 5.4 TCF (24%) for electricity generation.[18] U.S. production nearly matched that amount, totaling roughly 18.9 TCF – or 84% of U.S. demand – for the year. Most of the remainder needed to meet demand in 2004 was imported via pipeline from Canada.[19] In recent years, the U.S. has met nearly all of its demand in this way via pipelines from continental sources of gas in the U.S. and Canada, with small (but important, particularly during winter peak seasons) contributions from existing LNG import facilities.

For the future, EIA projects natural gas demand in the U.S. to grow to 26.9 TCF in 2030, with demand growth initially dominated by the electric generation sector, followed by a decline in its requirements towards the end of the forecast period. See Figure 6.

**Figure 7**

**Monthly Natural Gas Production and Rig Count**




Source: NCEP, Figure 4.4

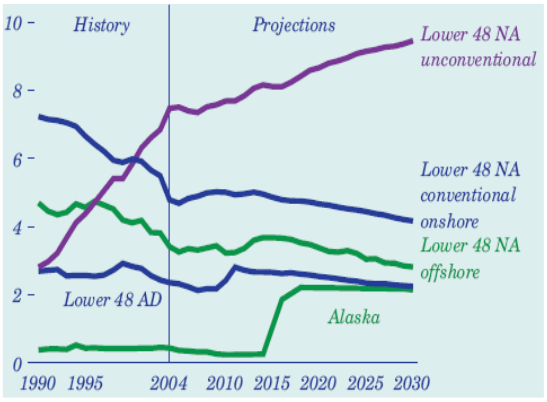
This projected strong growth in demand for natural gas comes at a time of declining productivity for the conventional continental sources of natural gas supply. While recent drilling activity has increased substantially, on

[18] The remainder – approximately 1.8 TCF – was used in gas processing, distribution, and vehicle consumption. EIA, *Natural Gas Monthly October 2005* (NGM), Table 3.

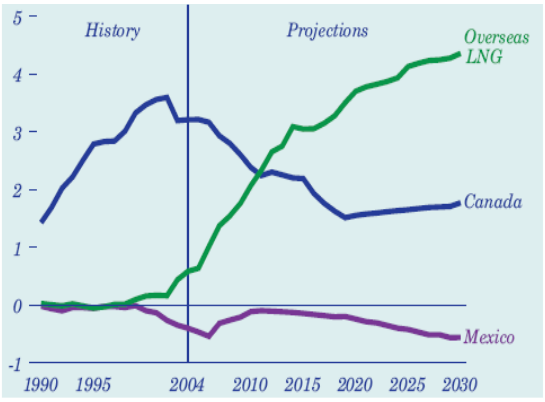
[19] EIA NGM, Tables 3 and 5.

**Figure 8**

**Natural Gas Production by Source, 1990-2030 (trillion cubic feet)**




**Net U.S. Imports of Natural Gas by Source, 1990-2030 (trillion cubic feet)**




Source: EIA AEO 2006, Figures 73 and 74.

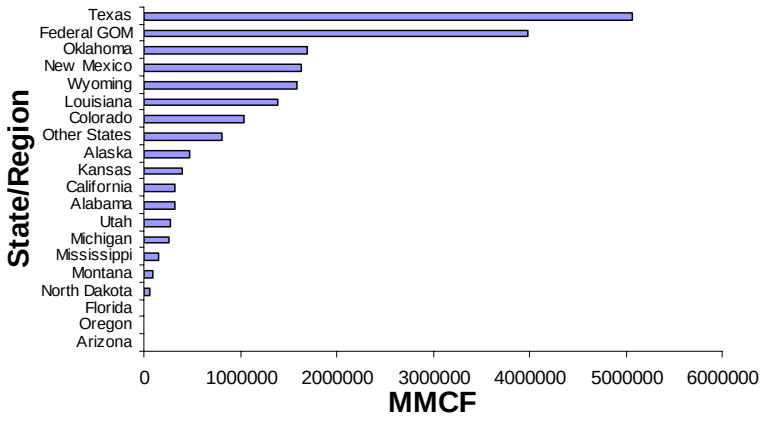
average the productivity of rigs drilled continues to decline. See Figure 7. EIA projects that in order to meet increasing demand for natural gas, the U.S. will rely more and more upon non-conventional sources of gas, primarily from the Rocky Mountain region, and on imports of LNG. See Figure 8.

For natural gas, there are important considerations associated with the location of key supply and delivery infrastructure across the U.S. The ability to meet consumer demands for natural gas involves a web of production, processing and pipeline distribution infrastructure. Major factors and challenges for the U.S. associated with natural gas supply, processing, and delivery include the following:

- The Gulf Coast region has been the most significant source of domestic natural gas production, a situation likely to continue for some time. In 2004, the offshore Gulf of Mexico region, Louisiana and Texas combined accounted for over 10 TCF, or approximately 53% of domestic marketed natural gas supplies. See Figure 9.

**Figure 9**

**Marketed Production of Natural Gas, 2004 (million cubic feet)**




Source: EIA.

- Imports from Canada are projected to decline, in light of declining productivity of gas supplies in Western Canada, less-than-expected productivity from Eastern Canadian sources, and growing gas demand in Canada. This effect could be

partially offset by the addition of new LNG import facilities proposed for Eastern Canada.

- EIA projects that unconventional sources, largely from the Rocky Mountain Region, will continue to grow in importance relative to the offshore Gulf and other U.S. sources as the leading lower-48 supply region for natural gas in the U.S. in the coming decade (see Figure 8).

- Most industry observers expect LNG imports to be the fastest growing source of natural gas supply to the U.S. in the coming decades. There are roughly three dozen applications for new LNG terminals and expansions before or recently approved by federal regulators. This represents a potential additional supply of well over 40 Bcf/d for the U.S., although no one expects that all of current proposals will be developed. It is reasonable to anticipate approval and development of enough LNG import capacity to meet EIA's projected increase in LNG-based supply in the coming decades (an increase on the order of 4 Tcf/year by 2030 – see Figure 8).

- From the perspective of utilization of existing – and construction of new – natural gas transportation infrastructure, the location of new LNG terminals will be important. Already there are indications that the Gulf region may get the lion's share of new LNG development, which would result in even further concentration of critical U.S. natural gas infrastructure. The Gulf region benefits from the availability of significant existing natural gas processing and blending capabilities (to address any issues associated with delivered gas quality), and an extensive network of supply line and interstate carrier pipeline capacity. The Gulf is also a shorter haul for shipments from several potential sources of LNG supply (e.g., from Nigeria, Trinidad, and Venezuela). In addition, many historical, cultural, and political factors create a more comfortable climate for permitting and siting large infrastructure development in the Gulf and Gulf States region as an added incentive for location of most new LNG import capability there.[20]

- In light of the continued development of Gulf sources (especially in deep offshore waters) and the likely location of a significant portion of LNG import capacity in the Gulf, it is unlikely that in the coming decade the significance of the natural gas infrastructure in the Gulf region will diminish and may actually become more important.

- Natural gas is moved throughout the U.S. over a comprehensive network of long-haul mainline systems.[21] At the close of 2004, this network included over 200

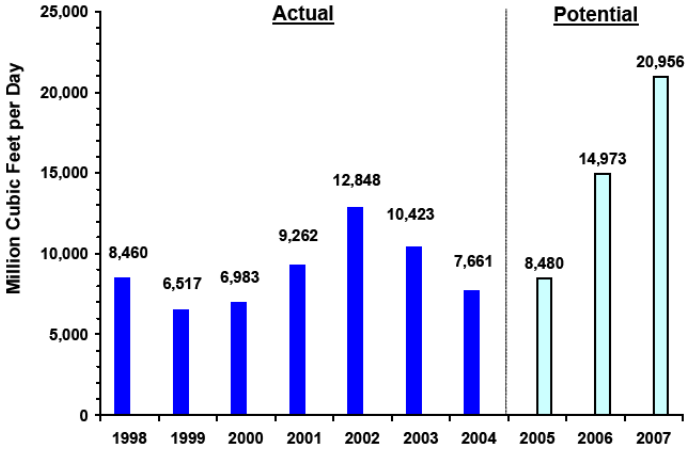
[20] Already, significant opposition to new LNG development has arisen in the context of proposal on both coasts – in California, Maine, Massachusetts and Rhode Island.

[21] Locally, gas pulled off mainline systems is moved to customers over smaller-diameter pipeline networks of the local distribution companies.

mainline inter- and intra-state systems, totaling almost 300,000 miles of pipeline,[22] with a capacity of approximately 178 billion cubic feet per day (Bcf/d).[23]

**Figure 10**

**Natural Gas Pipeline Capacity Additions, 1998-2007**



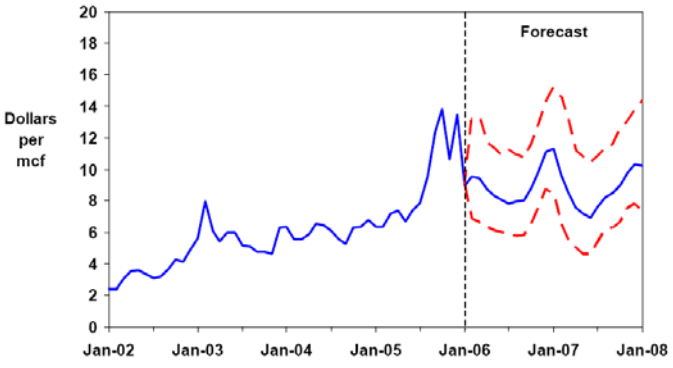

Source: EIA NGTI, Figure 2.

- Functionally, the pipeline network moves gas for consumption within regions, but more significantly from the producing areas to the major consuming areas, for example from the Gulf region to the Midwest and Northeast.

- Expansion of the pipeline network has been significant in recent years. In 2004 a total incremental capacity of 7.7 MMcf/d was added across t he U.S. The current inventory of proposals for new pipeline projects suggests there will be major growth in the pipeline network over the next few years, particularly in support of proposed new LNG facilities.[24] See Figure 10.

**Figure 11**

**Natural Gas Henry Hub Spot Prices (Base case and 95% confidence interval)**




*The confidence intervals show +/- 2 standard errors based on the properties of the model.

Source: EIA Short Term Outlook, February 2006.

- Ultimately, the number, capacity and location of pipeline projects added over the next few years will be tied closely to the success of new LNG facility proposals, and to support movement of gas from production fields in Wyoming, Colorado and Utah to consuming regions in the Midwest and West.[25]

- The tightening gas supply situation, both in the U.S.

[22] According to an INGAA spokesperson at the Denver Section 1813 meeting in April, 2006, ,only 2,500 miles of this – or less than a hundredth – are on tribal lands.

[23] EIA, *Changes in U.S. Natural Gas Transportation Infrastructure in 2004*, June 2005 (NGTI), page 4.

[24] *Id.*, page 12.

[25] *Id.*

and internationally, as described above, put pressure on gas prices starting around 2000. Prices continued to rise well above the levels that were expected during much of the robust period of development, permitting, and financing of natural-gas plants that occurred through the 1990s. Those price increases reflected the tightening of resources due to changes in market fundamentals. These increasing price trends continued in the past couple years. See Figure 11.

The US has significant challenges to reliably and affordably meet its demand for refined petroleum products. But tribal ROW issues are not one of them. To the contrary, while only a reported 1% of inter- and intra-state pipeline systems are on tribal ROW,[26] significant crude resources and pipelines *are* on tribal land, and tribes have been a positive contributor to meeting the demand for natural gas and sustaining the contribution of domestic natural gas supply. Further, there is strong evidence of their ability to negotiate ROW agreements allowing the continued flow of product across their lands. The contribution from energy resources on tribal lands is expected to increase in the future as our reliance on unconventional sources in the Rocky Mountain basins expands, while Gulf production declines. Over the past 20 years, Indian lands have contributed a significant amount to natural gas production and delivery, and it is estimated that approximately 6 trillion cubic feet of natural gas exist beneath tribal lands.[27]

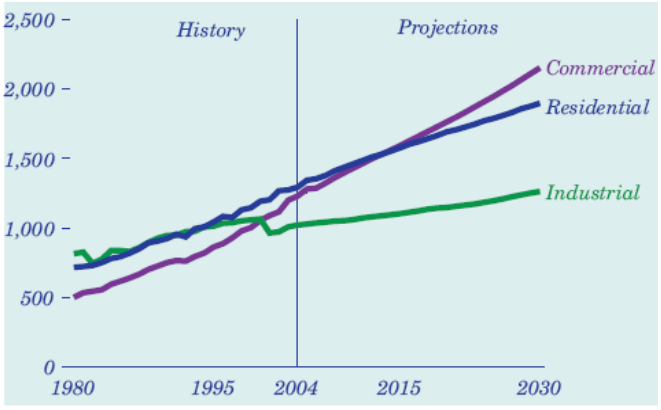
## Electricity

Electricity is different from oil and gas, in that it is an energy resource produced using inputs of other energy fuels, such as coal, oil, natural gas, water, nuclear fuel, wind, and others.

- As with other fuels, U.S. demand for electricity continues to grow at a fast pace. In 2004, total sales of electricity in the U.S. were approximately 3.6 thousand terawatthours (TWh). EIA projects electricity demand to grow by 50%, to roughly 5.3 thousand TWh, by 2030. See Figure 12. The U.S. is heavily dependent on

**Figure 12**

**Annual Electricity Sales by Sector, 1980-2030 (billion kilowatthours)**




Source: EIA AEO 2006, Figure 55.

[26] INGAA spokesperson at the Denver Section 1813 meeting in April, 2006, citing that approximately 2,500 miles of the 300,000 miles of pipelines are on tribal lands.

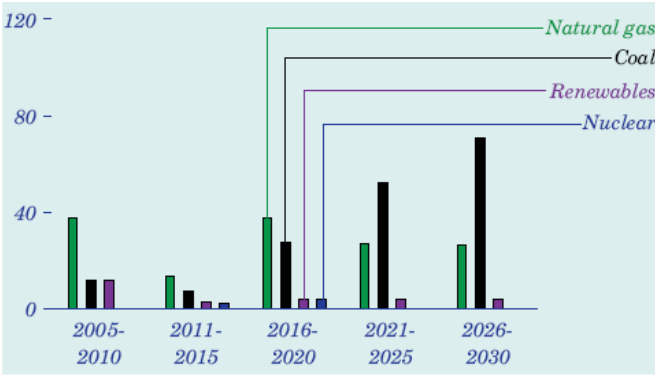
[27] Appleby, page 75.

coal, nuclear and gas-fired generation to meet electricity demands, with coal representing roughly half of all generation. EIA projects the role of coal in electricity generation to grow significantly over the next 25 years, increasing from 50% in 2004 to approximately 57% by 2030.

- According to EIA, total electric generating capacity over this period will need to increase by almost 350,000 megawatts over this period to keep up with demand. Electricity use of gas is expected to increase because much of the recent capcity additions in the U.S. have been gas-fired power plants. EIA projects that, while outdone by coal, nonetheless roughly 40% of new capacity over the next 25 years will be gas-fired. See Figure 13.

**Figure 13**

**Electricity Generation Capacity Additions by Fuel Type, Including Heat and Power, 2005-2030 (gigawatts)**




Source: EIA AEO 2006, Figure 55.

Electricity is unique in the sense that the level of generation must equal demand (plus losses) at each point in time. In effect, there is no practically available way to store electricity for later use. This feature of electric systems across the U.S. means that significant transmission and distribution infrastructure and operational standards are required to ensure the instantaneous matching of generation with demand. Specifically:

- The U.S. contains an extensive web of interconnected transmission infrastructure (see Figure 14, below), constructed and operated to maintain proper voltage levels across major power system regions at all times. The construction and operation of the transmission system within and across major electrical regions is designed to ensure electric system relability with a margin of safety, so that, e.g., redundancy and system reserves ensure that the loss of single line or plant do not cause a cascading failure of the system. As a consequence, such system failures on the transmission and generation systems are rare, as compared to the local wires.

- With the passage of EPAct, transmission system reliability became mandatory. Reliability standards currently applied on a voluntary basis by companies, system operators and relability councils are the likely precedent for the formation of future mandatory requirements.

- Maintaining system reliability requires long-term planning that accounts for the potential shut down of major generation and transmission infrastructure, or changes in the status of such infrastructure. Examples of such as the scheduled termination of permits, operating licenses and long-term contracts, or other factors

> that could affect limitations on future operation. Such potential changes do not take system operators by surprise; assessments of system reliability take into account such projected changes in infrastructure status, as do system planning studies. Annually, the North American Electric Reliability Council ("NERC") issues an assessment of system reliability produced with the input of reliability and planning assessments of all of the electrical regions in the U.S. In its most recent assessment, NERC notes that more than 7,000 miles of new high-voltage transmission are proposed for construction through 2008, with a total of over 12,000 to be added over the 2005 – 2014 timeframe. NERC concludes that the North American transmission systems are expected to meet reliability requirements in the near term. Similarly, NERC expects that generation resources nationwide will also be adequate to meet customer demand through 2009.[28]

Tribal lands are also expected to offer substantial resources for electric power geneartion in the coming decades, particularly with respect to renewable electricity generation. DOE estimates that at least 61 reservations have renewable energy resources in quantities sufficient to support central station generation; as tribes gear up to develop such resources on their land, their positive contribution to meeting the nation's electricity needs will only increase.[29]

### The Energy Policy Act of 2005

In August of 2005, President Bush signed the Energy Policy Act of 2005. The fundamental focus of large parts of EPAct was to address the major energy challenges discussed in each of the preceding sections, including more aggressive development of domestic fossil fuel supplies, bulking up of our underlying energy infrastructure (including pipelines, transmission lines, LNG terminals, etc.), promotion of domestic resource technologies (e.g., clean coal, renewables, etc.), and institutional and legal improvements to support electric system reliability and investment in the electric sector. In short, EPAct was an economic stimulus and regulatory policy package for domestic energy resource and infrastructure development, appropriately focused on the country's most significant challenges from supply reliability and price perspectives.

The Act contains provisions making reliability standards in the electric industry mandatory; providing regulatory, tax and other financial support for new nuclear and "clean coal" development projects; offering new tax provisions for electric transmission and gas delivery infrastructure; assuring clearer jurisdiction to site LNG facilities and gas pipeline projects; providing tax incentives and royalty relief for oil and gas exploration and drilling infrastructure; establishing incentives for natural gas storage; providing tax

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[28] NERC, *2005 Long-Term Reliability Assessment*, page 5.

[29] U.S. Energy Information Administration, *Energy Consumption and Renewable Energy Development Potential on Indian Lands*, March 2000, page ix.

and R&D support for emerging advanced coal, nuclear and renewable resources; enhancing the regulatory and siting authority of the Federal Energy Regulatory Commission (FERC) with respect to energy infrastructure projects; reforming decades-old statutes governing reviews of utility mergers and power procurements from certain power production facilities; enhancing the ability of Indian Tribes to develop their energy resources and their goal of Indian self-determination.

Specifically, major and relevant provisions include the following:

- The Act makes compliance with electric system reliability standards mandatory and enforceable, where they have been voluntary in the past. The standards may be adopted and administered by the new FERC-approved national Electric Reliability Organization, with required adherence by users, owners and operators of bulk power systems. The Act also increases FERC's enforcement/penalty authorities under the Federal Power Act.

- The Act requires that DOE identify "national interest transmission corridors," and provides FERC limited backstop siting authority for new transmission facilities in those corridors. The new authority for FERC under the Act provides significant leverage for requiring that states act on transmission siting requests, particularly where DOE has identified such projects will eliminate constraints and benefit consumers.

- The Act requires that FERC issue rules to provide for incentive-based recovery of transmission investment costs that may include returns on equity strong enough to attract investment, with the goal of increasing reliability and reducing costs associated with transmission congestion. This is in addition to the revised federal tax treatment for transmission investment, allowing for a shorter depreciation period for transmission property (from 20 to 15 years).

- The Act clarifies and expands FERC jurisdiction over the siting, construction, expansion and operation of onshore LNG facilities, gives FERC the authority to establish deadlines for state permitting processes, and codifies FERC policy providing LNG owners more flexibility in establishing commercial arrangements for LNG sales.

- The Act establishes certainty with regard to the legal venue for and expedited review of certain state and federal agency permitting actions.

- The Act allows companies to charge market-based rates for new natural gas storage capacity, and provides economic measures (including royalty relief, and inventories of resources in the Outer Continental Shelf) to support increased activity related to drilling for natural gas and oil, and/or for identifying potential drilling sites.

- The Act includes extensive R&D provisions in virtually all fuels for electric generation. It also authorizes loan guarantees for "innovative technologies" with

the potential to avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases.

- The Act reauthorizes and expands the Price-Anderson Act for commercial nuclear plants, authorizes the construction of a new nuclear reactor at Idaho Falls, creates a federal loan guarantee program for advanced technologies including nuclear, and provides additional R&D funding for certain nuclear-related advanced technologies. Additionally, the Act provides for risk insurance to underwrite costs incurred as a result of permitting delays for the first six advanced design nuclear plants built by the industry.

- The Act repeals the Public Utilities Holding Company Act, while increasing the authority of FERC to review utility mergers and asset dispositions. It enhances FERC's ability to address instances of price manipulation in electric and gas markets. And it repeals the mandatory purchase and sale requirements of the Public Utilities Regulatory Policies Act if it can be shown in particular instances that qualifying facilities have access to competitive energy markets.

- And – last but certainly not least – the Act adds an entire new, 15-page "Indian Energy Title V," which includes Section 2602, the "Indian Tribal Energy Development and Self-Determination Act of 2005." Among other things, Title V provides for the assistance of Indian tribes in the development of energy resources and the goal of Indian self-determination. It establishes authorities for Indian tribes to enter into a Tribal Energy Resource Agreement (TERA) with the DOI Secretary, and in so doing, a tribe may enter into energy-related lease, rights-of-way agreements and other business transactions with third parties without the case-by-case approval of the Secretary of DOI.

### Summary

The U.S. faces many significant energy challenges spanning most fuels, technologies and sectors. As we discuss briefly above, these include (1) our current and growing dependency on oil, tightness of existing refinery capacity, and the high prices at the pump that reflect all of these issues; (2) our transportation sector's near virtual reliance on a single fuel, oil; (3) our increasing demand for natural gas (particularly in the electric generation sector), our diminishing productivity from continental sources of gas, likely growing dependence on LNG imports which will require the siting of difficult-to-site facilities, our concentration of natural gas supply and infrastructure in the Gulf, and the escalating prices associated with these conditions; and (4) the increases in underlying fuel commodity prices for the major sources of electricity generation (natural gas, oil and coal), the difficult history and ongoing challenges associated with transition from regulated to competitive wholesale and retail structures in certain regions of the country, the pressures on interstate transmission infrastructure associated with rising demand and interstate movements of power in certain power regions, the growing opposition to the siting of needed generation and transmission infrastructure, and high prices for electricity which result from a variety of conditions, most notable of which is the escalation of

natural gas prices in recent years. The Energy Policy Act of 2005 was designed to establish short- and long-term economic and regulatory signals to address these major challenges, and support the evolution of our energy systems to a more reliable and low-cost future.

Some, in their comments and presentations to date with respect to Section 1813, explicitly or implicitly suggest that Indian Tribes are a major part of our energy problem, and that the pursuit of legislative change related to the tribes' right of negotiation is a solution to the nation's major energy problems. But these assertions misrepresent the facts and are unsupported by the evidence, as we describe further below. They have no place in discussions of the real energy challenges we face, as discussed above. The very fact that vast majority of EPAct's 1,840 sections and 550 pages cover topics such as the ones we describe above, and devoted a single page to a required study of ROW on Indian lands (the Section 1813) seems clear enough evidence of this misrepresentation.

But there is other powerful evidence of this fact. How significant is the land on tribal lands relative to the overall picture of electricity transmission and natural gas transportation? How do legitimate costs for this portion of ROW, or changes to those costs, affect end-use consumers? Are Tribes really contributing to a decline in reliability or discernable cost impact? In the next section, we present the quantitative reality check, placing the role and cost of Indian ROW within the overall cost recovery context of the electric and gas industries.

## A NEEDLE IN A HAYSTACK: THE SEARCH FOR TRIBAL RIGHTS-OF-WAY IN THE COUNTRY'S ELECTRICITY AND NATURAL GAS SUPPLY NETWORK AND PRICING

The nation's system of major natural gas pipelines is extensive – over 310,000 miles long.[30] According to the Interstate Natural Gas Association of America, approximately 2,500 miles – or less than 1% of this – are associated with easements on the land of 32 Indian tribes in 15 states.[31] For illustration purposes, assume this network of the nation's system of pipelines were represented as a single line end-to-end from Washington D.C. to San Francisco. If you set out across the country alongside the pipe, starting at the Departments' offices in D.C., you would have already finished passing the tribes' portion somewhere near Rockville, Maryland, just outside of the District. The remainder of the trip to San Francisco would be alongside non-tribal ROW pipeline. The U.S. extra high

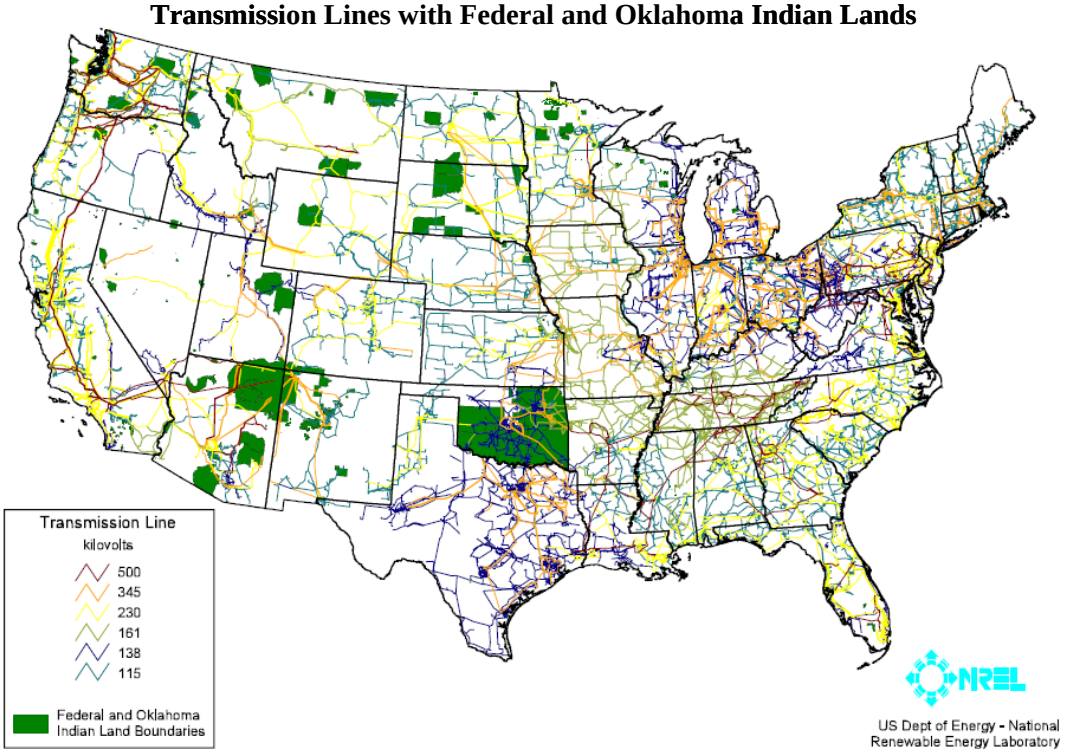
[30] Natural Gas Intelligence, *Natural Gas Infrastructure in North America*, 2005/2006.

[31] Comments of Joan Dreskin, Interstate Natural Gas Association of America (INGAA), Section 1813 Consultation meeting, Denver April 17-18, 2006 (personal notes; no transcript available).

voltage electric transmission system is similarly extensive – roughly 163,000 miles.[32] Again, very little of it crosses Indian tribal land.[33] See Figure 14.

**Figure 14**

**Transmission Lines with Federal and Oklahoma Indian Lands**




Source: DOE, NREL.

Looking at the Section 1813 Study issues within this context leads naturally to key questions. Do the terms and conditions of use of ROW on tribal lands pose significant challenges to the nation's overall critical energy needs? Do negotiated compensation arrangements for ROW on sovereign tribal lands constitute a meaningful component of delivered energy prices? Can changes in tribal land ROW compensation even have an affect on downstream energy market prices? Have there ever been any supply or delivery constraints that can be traced to the result of tribal ROW negotiations? In spite of presentations to the Departments by several commenters during the course of the public

[32] North American Electric Reliability Council, *NERC 2005 Long-Term Reliability Assessment*, September 2005, page 23. This estimate of mileage does not include a significant portion of U.S. bulk power system transmission networks, as the "extra high voltage" transmission circuits included in NERC's estimate do not include any lines rated below 230 kV.

[33] As we describe further below, for the small amount of electric transmission and gas pipelines that does cross Indian Country, no one has suggested that tribes have ever impeded the flow of electricity or gas (or other hydrocarbons) across tribal lands under existing ROW agreements. While it is true that tribes have used their sovereign authority to require fair compensation for access to their land (described in considerable detail in the rest of this report), there is no evidence that tribes have ever used this position to jeopardize the reliability of energy supply.

scoping and hearing processes intended to create a sense of criticality or importance with respect to these issues,[34] the evidence that we have reviewed supports a negative response to all such questions.

Indeed, the Section 1813 Study is like searching for a needle in a haystack. Negotiations over compensation for use of tribal lands for energy ROWs make up a minute piece of the delivered energy prices to consumers. In fact, when these regulated transmission and transportation costs are viewed in the context of market pricing for natural gas, or the pricing of electricity in competitive wholesale or retail markets, it is highly unlikely that changes in underlying ROW costs (tribal or non-tribal) are reflected fully or at all in retail rates. For example, the price of natural gas in downstream markets in California are most likely to vary with commodity supply and demand conditions in those markets, and the pricing behavior of commodity market participants. Changes in embedded transportation costs on a given line may affect the portion of total retail price retained by the commodity supplier, but it is less likely to have an impact on the ultimate price paid by the consumer.

Nevertheless, we have reviewed the contribution of ROW costs to total costs of electricity transmission and gas transportation, and to the total costs or prices of electricity and gas at the point of retail sale. The core of our analysis is a review of financial reports that utility companies file with FERC based on the Uniform System of Accounts (18 CFR 101) (FERC Form 1 for electric companies, FERC Form 2 for gas companies). These filings contain the cost and revenue data that underlie rates charged for transmission, transportation, retail service, etc. We have surveyed these data for several relevant companies (identified below), with the goal of identifying that portion of costs that underlie rates associated with land purchase, easements, and other ROW arrangements. In effect, it is straightforward using these data to capture the significance in general of ROW expenses to filed tariffs for transportation, or for retail rates.

### Electricity

For electricity, we analyzed the data for the following companies:

- Arizona Public Service;
- Idaho Power Company;
- PacifiCorp;
- Nevada Power Company;
- San Diego Gas and Electric Company; and

[34] Comments of representatives from Edison Electric Institute (EEI), INGAA, FAIR Access to Energy Coalition (FAIR), El Paso Natural Gas Company, New Mexico Oil and Gas Association, several state legislators from Colorado, Section 1813 Consultation meeting, Denver, April 17-18, 2006 (personal notes, transcripts not available).

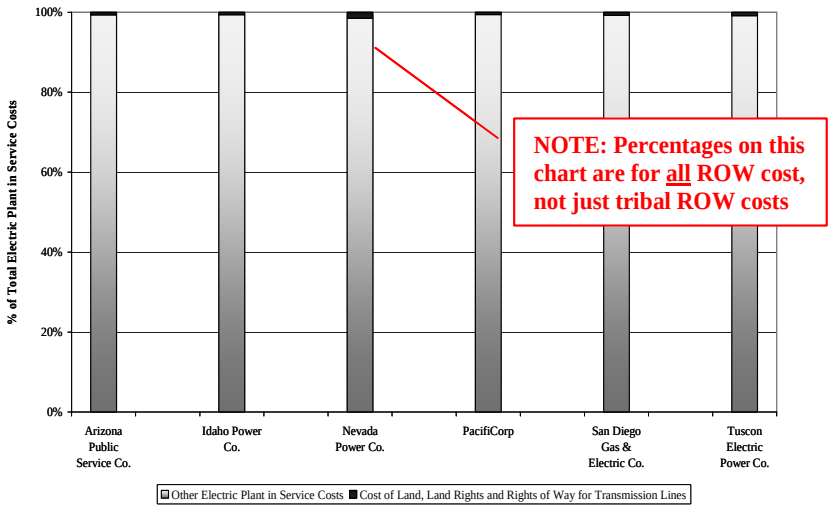
- Tucson Electric Company.

This group of companies in not intended to represent the entire universe of electric companies with significant transmission facilities and ROWs or even all of those with transmission lines crossing Indian lands. Nor does it represent a random selection. Our goals in selecting electric utility companies for the analysis were as follows: to keep it to a manageable number; to use investor-owned utilities with relatively large customer bases, and which were most likely to have relevant data; to focus on the Western U.S. where the majority of tribal lands are located, and on utility companies with significant operations on or near tribal lands (in total, these companies operate approximately 30,000 miles of high-voltage transmission in the region); and to obtain some geographic dispersion within that region among the utility companies examined. There may very well be good candidates for this analysis that we have not analyzed, including companies in other states (with or without tribal land) that could benchmark differences in utility operations across different regions of the U.S., and that would give a picture more representative of national impact. However, we believe that the set of companies we have chosen to date represent a useful basis for obtaining a practical characterization of ROW costs in the context of total costs, and is likely to result in a conservative estimate of tribal ROW impacts given the focus on the regions of the country with most of the tribal land area.

Figure 15 presents the results of this analysis for 2004 for the companies we reviewed. This chart displays the cost of ROW for transmission as a percentage of electric plant in service – in effect, the portion of utility costs associated with the acquisition of *all* ROW and all other costs for transmission lines. The results for total ROW costs range from one-half of 1% for PacifiCorp to 1.44% for Nevada Power. Using these data in combination with other data from Form 1, we calculate the cost of all transmission-related ROW on a per kilowatt-hour (kWh) basis.[35] The results

**Figure 15**

**Cost of Land, Land Rights and Rights of Way for Transmission Lines vs. Other Costs 2004**




Source data from FERC Form 1

[35] In electricity, a kWh is defined as a unit of work or energy, measured as 1 kilowatt (1,000 watts) of power expended for 1 hour. One kWh is equivalent to 3,412 British Thermal Units (Btu). http://www.eia.doe.gov/glossary/glossary_k.htm . While electricity usage varies around the country, a typical household might use 1,000 kWh a month for electricity.

range between 1/100th of a cent to 5/100th of a cent per kWh (or 0.01 cent to 0.05 cent per kWh). For a residential customer with an average monthly electricity consumption of 1,000 kWh, this would amount to 10 cents to 50 cents per month – to pay for the costs of all transmission-related ROW used by the electric company.

*However*, this is not the whole story. Since these results reflect the total impact of *all* ROW costs for transmission lines, another calculation is necessary to estimate the portion *of electric rates* attributable to ROW on tribal lands. Data on the portion of ROW associated with tribal lands are less hard to find, but there are some guidelines that can be used to make a reasonable calculation. First, one needs to translate total annual ROW costs into an equivalent cent-per-kWh figure. We have done that based on FERC data related to utility company investment, return, and expenses. Next, we identify what portion of total ROW costs are associated with *tribal land*. Even a casual look at Figure 14 (above) shows that generally, an extremely small percentage of transmission ROW crosses tribal lands. So, considering only the transmission grid within a region or state, it is obvious that the portion of ROW crossing tribal lands is for the most part a very small fraction of total ROW obligations. Our second observation is a judgment call – namely, that we find it unlikely that the historical compensation for ROW on tribal land included in current rates exceeds or even matches the comparable cost of ROW acquisition for non-tribal lands. We base our judgment on our direct analysis of the data we have reviewed for ROW compensation on the Uintah and Ouray Reservation and on the similar and consistent story put forth by other tribes. The practical effect of these observations is that we expect that assuming that 10% of land costs are associated with tribal ROW represents a conservative assumption (i.e., overestimating likely costs), and that a more appropriate assumption may be that the actual impact is an order of magnitude less – on the order of 1%.

But using this upper end of this range – 10% – we estimate tribal ROW costs as a percentage of total costs, and then as a share of total average retail electricity rates. Figure 16 shows our estimate of the portion of electric utility costs associated with ROW on tribal land, for each of the companies. The results are hard to see, since they are so small. That's why the Figure shows charts that first break-out total ROW costs as a share of total electric rates (showing a range from 1/5–2/5 of a cent per kWh), and then further break out tribal ROW as a share of total ROW (using our conservative rule of thumb of tribal ROW costs at 10% of total ROW costs).

The bottom line of this analysis? Tribal ROW costs make up 2/100th to 4/100th of 1% of the average consumer's electric rate for the companies we studied in the West. For an average homeowner, the average impact ranges between 1 to 6 cents per month, on monthly electricity bills that, depending on the company, range from about $50 to $200. See Table 1. This is why we conclude that the contribution of Indian land ROW costs to an electric distribution utility's total cost of providing service is minuscule – in the range of tenths of a percent, with the impact on an average homeowner being on the order of a few pennies per month.

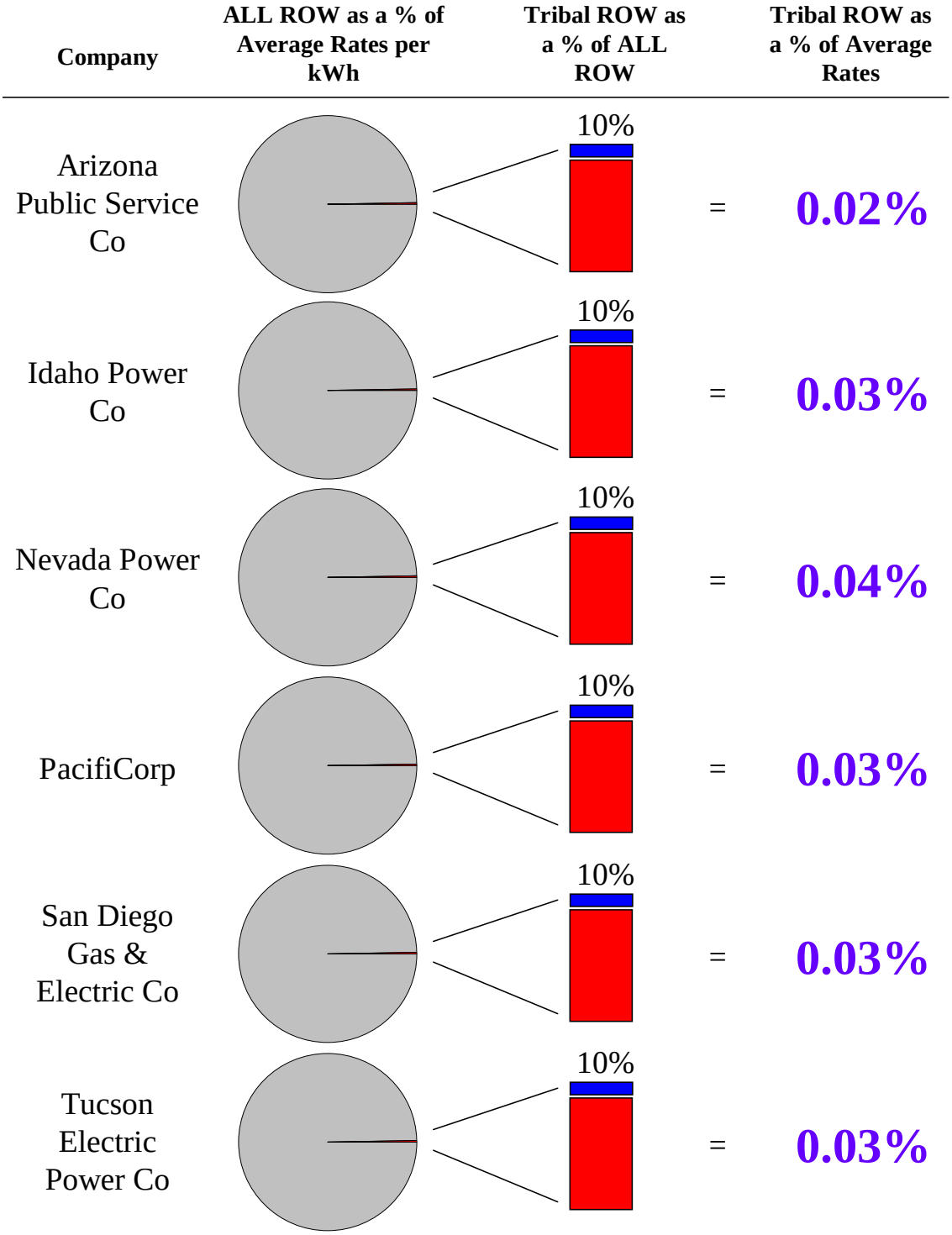
## Table 1

### Average Monthly Electric Costs for Homeowners

| Company | Average Rate per kWh | Cost of Transmission Rights of Way per KWh | ROW as a % of Average Rates | Tribal ROW as a % of Average Rates | Average Monthly Electric Costs for a Single Homeowner (1000 kWh per Month) | Cost from Tribal ROW |
|---|---|---|---|---|---|---|
| Arizona Public Service Co. | $ 0.06 | $ 0.0001 | 0.20% | 0.02% | $ 62.06 | **$ 0.01** |
| Idaho Power Co. | $ 0.05 | $ 0.0001 | 0.30% | 0.03% | $ 49.66 | **$ 0.01** |
| Nevada Power Co. | $ 0.09 | $ 0.0004 | 0.38% | 0.04% | $ 93.01 | **$ 0.04** |
| PacifiCorp | $ 0.05 | $ 0.0002 | 0.32% | 0.03% | $ 48.08 | **$ 0.02** |
| San Diego Gas & Electric Co. | $ 0.20 | $ 0.0006 | 0.30% | 0.03% | $ 202.68 | **$ 0.06** |
| Tucson Electric Power Co. | $ 0.08 | $ 0.0002 | 0.31% | 0.03% | $ 75.40 | **$ 0.02** |

Source data: FERC Form 1.

# Figure 16




Source data: FERC Form 1.

## Natural Gas

We use a similar approach to estimating the contribution of tribal ROW cost contribution to natural gas transportation and retail prices. To estimate the portion of *gas transportation* costs associated with all ROW costs, we follow a similar structure and use similar FERC (Form 2) data related to the operation of a set of interstate pipelines. Using that information and taking into consideration some key differences in the financial and regulatory structures of the electric and natural industries, we then review ROW costs in the context of consumers' retail prices in the service territories of major retail natural gas suppliers in relevant markets. This calculation can not be performed using FERC data for interstate gas pipeline companies, because they typically do not provide local gas distribution services to any but the largest industrial customers in some parts of the U.S.

Our selection of interstate pipeline companies and local gas distribution companies (i.e., the retail suppliers) was based on similar goals as our selection of electric companies – a manageable number, focused on and dispersed throughout the West, with operations on or near Indian land, and significant customer bases. For our natural gas analysis, we analyzed data related to certain major interstate pipelines throughout the region, and the retail rates of states with significant customer bases in markets connected to the major pipelines of interest. Similar to the focus for our electric analysis, our intent here was to choose a group of companies that would provide a reasonable basis for discerning the role of ROW costs in the context of total transportation and retail natural gas costs and prices. The set of companies we have chosen to date represent a useful basis for obtaining a practical characterization of ROW costs in the context of total costs, and is likely to result in a conservative estimate of *tribal* ROW impacts given the focus on the regions of the country with most of the tribal land area.

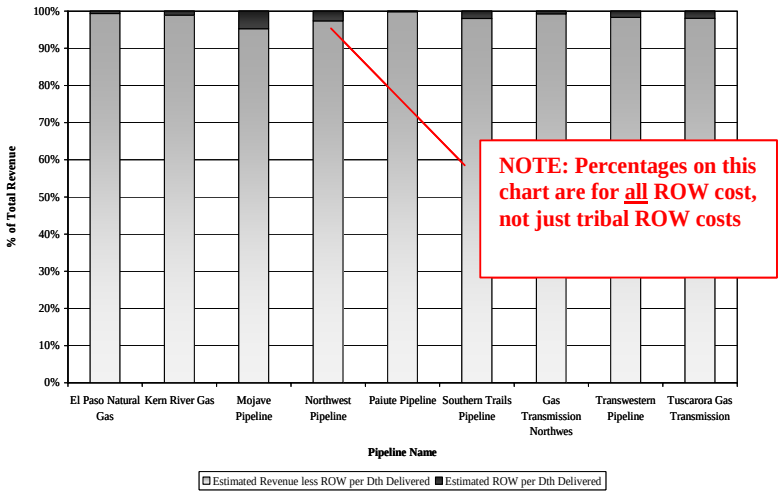
The pipelines/companies we focused on are:

- El Paso Natural Gas Company;
- Kern River Gas Transmission Company;
- Mojave Pipeline Company;
- Northwest Pipeline Corp.;
- Paiute Pipeline;
- Questar Southern Trails Pipeline;
- TransCanada via Gas Transmission NorthWest Company;
- Transwestern Pipeline Company; and
- Tuscarora Gas Transmission Company.

The results are presented in Figure 17, which shows an estimate of the portion of A pipeline company's costs associated with *total* ROW acquisition.[36] The results range from 1/5th of 1% for Paiute, to 4.75% for Mojave. Given the relatively small share of total ROW that is on tribal lands, these greatly overstate the share of costs attributed to ROW on tribal lands. We discuss this further below.

**Figure 17**

**Estimated Rights of Way Costs as a Share of Total Revenue**




Source data: FERC

We then move to estimate how these charges for total ROW investment compare with the retail prices for natural gas delivered to customers in states that are primary downstream markets for the pipelines we analyzed. To do this, we first used data filed by the companies with FERC to estimate what ROW costs mean on a cent-per-decatherm[37] (Dth) basis. We then compare that with average residential prices for natural gas reported by EIA for the states that are major markets for most of the companies in the region we reviewed. Specifically, major local gas distribution companies which are customers of the interstate pipelines we studied include the following:

- Avista;
- Intermountain Gas Company;
- Pacific Gas & Electric Company;
- Public Service Company of New Mexico;
- San Diego Gas & Electric Company;
- Sierra Pacific Power Company; and
- Southwest Gas Corporation.

Consequently, we have analyzed tribal ROW revenues relative to average retail rates in the states where these local gas distribution companies have significant operations: Arizona, California, Idaho, Nevada, Oregon, and Washington. In this report, we present

[36] The calculation reflects the percentage of a company's revenues collected for pipeline investment associated with the ROW portion of that investment.

[37] In the gas industry, a "therm" is equal to **o**ne hundred thousand Btu. A decatherm is ten therms, or a million Btus. http://www.eia.doe.gov/glossary/glossary_d.htm. While gas use varies across the country, a typical household might use 5 Dth per month.

the results for California, as they are representative of the conclusions to be drawn from the analysis for each state, and because California is the one state that is a significant downstream market for most (or all) of the pipelines reviewed.

As with electricity, figuring out the portion of total ROW costs that are attributable to ROW on tribal laws is not simple to do. Again, absent more comprehensive information on the portion of ROW costs for pipelines that is associated with tribal land, we are forced to identify some guidelines to use to establish a likely order of magnitude for breaking out this piece of total costs. As previously noted, tribal land ROW is but a small portion of total land associated with the interstate natural gas pipeline network – 2,500 of the 310,000 miles that cross the country. This is less than 1%. While the proportions may be higher in some states and for some companies, even there the proportion is still likely to represent only a small fraction. There is little or no evidence or reason to believe that the portion of pipeline ROW costs included in current rates that is attributable to Indian land ROW exceeds the actual percentage of total miles of pipeline ROW on Indian land relative to that on non-Indian land. Based on these considerations we believe it is reasonable to assume an upper-bound of 10% as a conservative assumption (i.e., an overestimate) for the portion of pipeline ROW costs to attribute to tribal crossings, and that a more appropriate assumption may be that the actual impact is an order of magnitude less – on the order of 1%.

Using the upper range of these values – 10% – we calculate the portion of natural gas service costs potentially associated with current ROW on tribal land for each of the companies. The results, shown on Figure 18, are so small they are hardly visible. For the Western interstate gas companies we studied, tribal ROW costs make up from 2/1000$^{th}$ of 1% (for El Paso Natural Gas Company) to 34/1000$^{th}$ of 1% (for Mojave Pipeline Company). For a California homeowner using 5 Dth a month on average, the impact of tribal ROW falls in range of 0.1¢ and 1.6¢ per month, on average monthly bills that are about $47. See Table 2. Given net-back pricing for gas in many markets,[38] it is not at all clear that consumers would even see that tiny impact.

[38] Netback pricing is a method by which the sale price for gas or electricity is tied to a price or prices in a reference market, rather than the cost to acquire and transport the energy commodity to that market. This market-based pricing approach means that competitive suppliers compete against each other in terms of delivered prices to specific markets, and they face different costs to participate in the market, including (for natural gas) such things as wellhead commodity price for gas (or the price of gas at a trading hub), transportation between the wellhead (or the hub) and the target market. In that market, suppliers with inframarginal costs will be able to price in a manner that competes with the marginal supplier. If that inframarginal supplier's costs increase but do not increase his/her costs above those of the marginal supplier, that inframarginal supplier's "netback" or margins absorbs the cost increase, rather than passing the cost along to consumers. From a local consumer's point of view, it is the conditions in the particular geographic energy market, along with commodity prices reflecting supply and demand fundamentals, that most shapes prices.

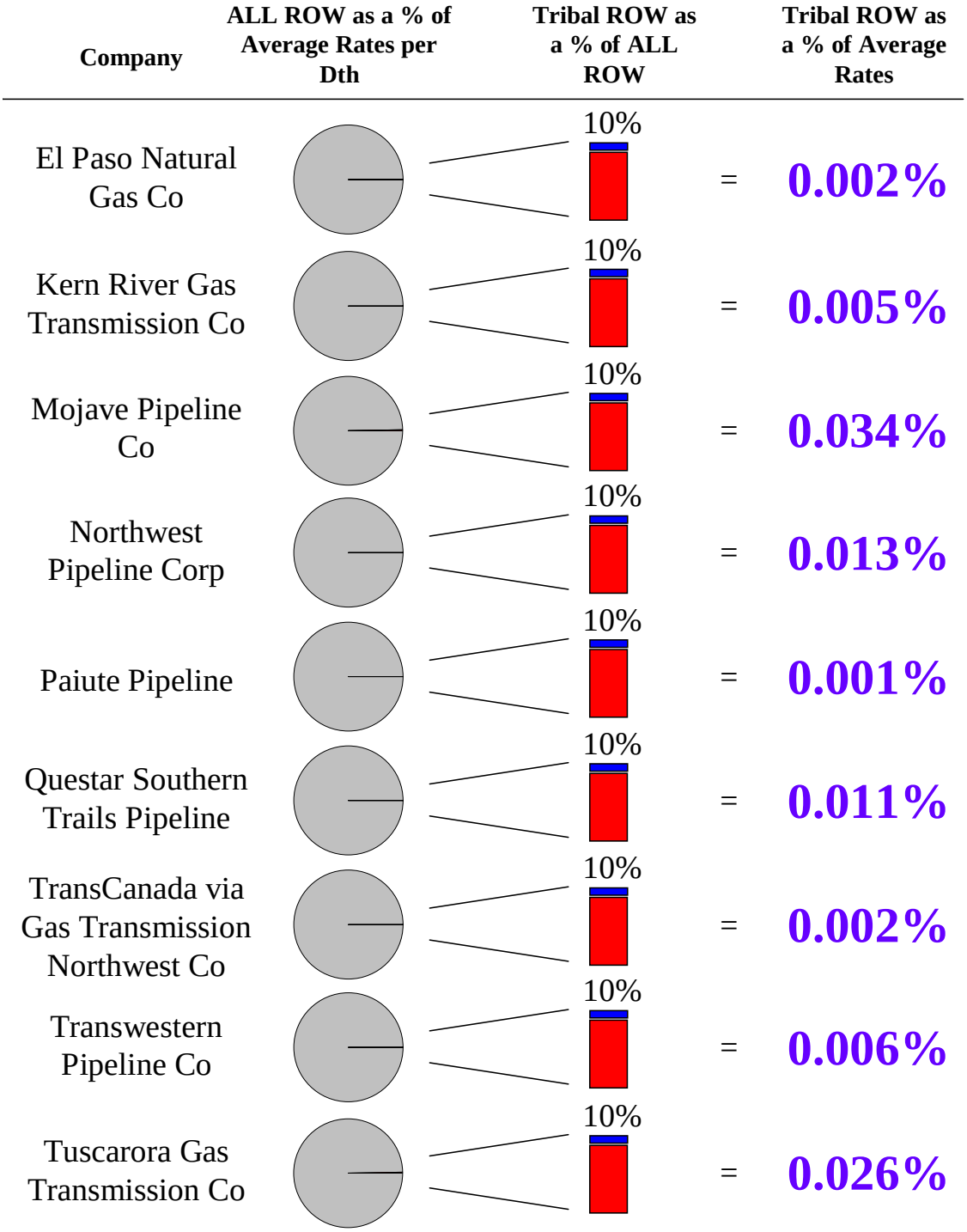
## Table 2

### Average Monthly Natural Gas Costs for Homeowners

| Company | Average Rate per Dth | Cost of Transmission Rights of Way per Dth | ROW as a % of Average Rates | Tribal ROW as a % of Average Rates | Average Monthly Natural Gas Costs for a Single Homeowner (5 Dth per Month) | Cost from Tribal ROW |
|---|---|---|---|---|---|---|
| El Paso Natural Gas Co. | $ 9.57 | $ 0.0018 | 0.02% | 0.00% | $ 47.87 | **$ 0.00** |
| Kern River Gas Transmission Co. | $ 9.57 | $ 0.0048 | 0.05% | 0.01% | $ 47.87 | **$ 0.00** |
| Mojave Pipeline Co. | $ 9.57 | $ 0.0324 | 0.34% | 0.03% | $ 47.87 | **$ 0.02** |
| Northwest Pipeline Corp. | $ 9.57 | $ 0.0129 | 0.13% | 0.01% | $ 47.87 | **$ 0.01** |
| Paiute Pipeline | $ 9.57 | $ 0.0013 | 0.01% | 0.00% | $ 47.87 | **$ 0.00** |
| Questar Southern Trails Pipeline | $ 9.57 | $ 0.0103 | 0.11% | 0.01% | $ 47.87 | **$ 0.01** |
| TransCanada via Gas Transmission NorthWest Co. | $ 9.57 | $ 0.0019 | 0.02% | 0.00% | $ 47.87 | **$ 0.00** |
| Transwestern Pipeline Co. | $ 9.57 | $ 0.0057 | 0.06% | 0.01% | $ 47.87 | **$ 0.00** |
| Tuscarora Gas Transmission Co. | $ 9.57 | $ 0.0248 | 0.26% | 0.03% | $ 47.87 | **$ 0.01** |

Source data: FERC and EIA

# Figure 18




Source: FERC Form 2.

# Energy Policy Context

## Summary

Some of the most vocal proponents of Congressional action on tribal ROW are those that say they seek "only" some "reasonable," "objective" and "uniform" standards for determining compensation for use of tribal land for ROW. They "only" want some sort of "enforceable" or "backstop" valuation process to govern ROW negotiations with sovereign tribes. But this masks what the practical effect of the request for lawmaking on tribal compensation really is: a request to eliminate the tribal right to consent, and of the requirement that energy companies negotiate with the tribes whose land they wish to cross. If initial comments provided in the Departments' public hearings are any indication, the appeal of these groups to the Departments (and later, to Congress) will be wrapped in "energy crisis" language that is by now familiar to not just energy analysts, but also to government officials, and anyone who reads the papers: they have suggested that action on tribal ROW is needed because we have "energy reliability and security" issues; and because "energy prices are skyrocketing."

We find no adverse relationship between the real energy issues the country faces and the development of tribal energy resources or payment for corridor leases. Claims to the contrary are not based on the evidence. The Departments need to look at the fundamental underlying realities when it comes to the role of energy resources and ROW corridors on tribal lands, some of which we have tried to capture quantitatively in this section. Namely:

- Issues relating to access to tribal ROW are not and never have been a significant energy reliability or supply challenge to the nation; to the contrary, tribes are more than a fair-share contributor to our nation's need for resource development to meet future energy requirements – which we describe further below;

- ROW costs in general are a minor component of regulated electricity transmission and gas transportation rates, regardless of how land value changes by location or with time;

- When viewed from the perspective of *end-use* prices to consumers, ROW costs are de-minimus and, in the case of gas markets and competitive electricity markets, changes to such costs generally affect commodity supplier profits, not retail prices;

- A very small fraction of gas pipeline and electric transmission line total mileage in the U.S. is on tribal land. There is no reasonable evidence that utilities are being denied access to that land, and none that can be associated with negatively affect the reliability of delivered energy in the country;

- Within the larger context of ROW costs, *tribal* ROW costs are but a minute fraction, consistent with the relatively small portion of ROW that are on tribal land, and the historic under-compensation of tribes for energy ROW. Tribal ROW costs are a tiny share of electric transmission and transportation tariffs, and are so small as to be hardly visible in consumers' retail electricity and gas prices.

## SHADOW BOXING: THE SEARCH FOR TRIBAL RIGHTS-OF-WAY IN COMPANY DISCLOSURES OF MATERIAL RISKS

But what about the claims that increasing tribal ROW costs are a significant cost to and source of risk for energy companies? In the context of the Departments' hearings on the Section 1813 report, some have implied that the negotiation and renewal of tribal ROW represent, in effect, material risks for the company that could threaten firms' business operations, credit rating, and/or cost of capital.[39]

Our analysis indicates that there is no reasonable evidence pointing to this issue being a common problem in the energy industry, even among the types of companies whose ROW costs and rate impacts we reviewed above. Surely, if tribal ROW cost and access issues were a significant source of risk to electric and gas utility companies, one would expect to see frequent and numerous mentions of such in those publicly traded companies' disclosure statements to investors as filed annually at the SEC. Such filings (e.g., the annual 10K filings), are explicitly required to include a company's own statements of its material risks. Such statements of risk typically describe legal, business, market, and regulatory factors, the nature of the risk, and the potential effect (if not or measurable) on future business and financial outcomes. If a business, legal, market, or regulatory risk would be expected to be significant enough to affect a company's profitability, rating, cost of capital, returns, business strategy, etc., disclosure of such risk would be expected in the company's annual filing with the SEC.

From our extensive experience generally in reviewing utility companies' 10K filings, such statements of material risks are typically comprehensive, thorough, lengthy, and detailed. Utility company annual filings typically identify a host of political and regulatory factors that represent material risks affecting annual company performance and operation. Such factors include not only the more typical risks of large corporations, such as pension costs, labor issues, underlying costs of goods and materials, and the market for their products, but also various risks that are particular to regulated industries requiring a variety of governmental approvals affecting their operations, costs, markets, and the like. Such typical risks include the pervasive risk that revenues, cost recovery and operations depend on decisions of state and federal rate regulators that can not be foreseen at the time of filing; the ongoing need to obtain permits from local, state and federal agencies governing the construction or continued operation of company infrastructure; risks associated with the administration of new laws – such as the Energy Policy Act of 2005 – or the potential passage of new state or federal legislation affecting the industry; and the standing risk that the continued operation of existing infrastructure in the future is typically dependent on the renewal of licenses, permits, easements, leases and other grants that periodically may be canceled at the will of the grantor or that may

[39] See, for example, the presentation and oral comments of Dr. Lisa Cameron on behalf of FAIR Coalition at the Section 1813 Consultation meetings on April 17-18, 2006, in Denver. http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRcameron1813.pdf.

otherwise expire. In some cases, uncertainties in the business environment are discussed as factors that could potentially affect business operations in positive or negative ways, but are not explicitly identified as a "material risk." Yet sections of the SEC form do involve statements of materiality from respondents, and judgments of risk materiality are explicitly included in the 10K form where warranted.

To analyze the extent to which claims of any material risks associated with tribal ROW issues, we reviewed the SEC 10K annual filings for the past five years of many electricity and natural gas companies to determine the nature and extent to which concerns over tribal ROW issues are presented as material risks in company business operations, and to obtain any specific assessments of the degree of materiality these uncertainties represent relative to other stated risks.

The companies we reviewed were selected from the same set of companies used in our rate analysis described above, and which we viewed as likely – by virtue of their location – to have raised concerns about of property and/or transactions and/or services on or near tribal lands. Thus our selection of companies for analysis likely introduces a heavy bias in the results towards companies that introduce or discuss tribal negotiations, ROW, etc. as factors and potential risks in their operations.[40]

We reviewed 10K data from the following companies:

- Arizona Public Service Company
- Avista Corporation
- El Paso Corporation and El Paso Natural Gas
- GTNC
- Idaho Power
- MidAmerican Energy
- Northern Border Pipeline
- Northwest Pipeline
- PacifiCorp
- Pacific Gas & Electric
- PNM
- Questar Corporation

[40] To properly understand the magnitude of risk to electric and natural gas operations of tribal ROW one would need to review disclosures for most or all companies in the U.S. While such an analysis was beyond the scope of this report, given our focus on company operations in states and regions containing significant tribal land, we expect that the results of a nationwide analysis would produce results that further strengthen our conclusions here: tribal ROW can not be characterized as a meaningful risk to U.S. utility operations.

- San Diego Gas & Electric
- Sierra Pacific Resources
- Southern Union
- Southwest Gas Corporation
- Tucson Electric

In our review of the annual 10K forms, we searched on a variety of terms related closely to permitting, siting, and tribal land issues. For example, search terms included the following: "right of way" or "ROW"; "siting," "permitting," "easement," "corridor," "land," "lease," "dispute," "tribal," "Indian," "Native American," "1813," "negotiation," "fair market value," "energy policy act," etc. We used the search terms to capture relevant excerpts in the 10K forms, and organized the results by category – general discussion of regulatory factors; discussion of siting/leases/easements; specific discussion of ROW; or discussion of ROW specially associated with tribal land.

Based upon our review of 86 separate annual SEC 10K filings, representing 18 separate companies with operations in states with significant tribal land, we found that:

- Virtually all companies, in all years reviewed, contain description of *general* regulatory and siting risk related to the need to pursue rate recovery, permits, grants, and so forth, from federal, state and local governmental agencies related to energy company operations. Such mentions are frequent and common. Many also mention the need to obtain grants, leases, etc. from governmental agencies or third parties. Such factors are generally discussed as business risk factors, and are often presented as material concerns. In effect, all companies in most years face challenges associated with the regulation and permitting of energy infrastructure construction and/or operation across their properties and services territories.

- In addition, in approximately 40% of the filings we reviewed, the companies reported circumstances associated with ROW for pipeline or transmission operations in their 10K filings. *Such discussions are almost never associated with tribal ROW.*

- In fact, in our review, we found that over the five-year period 2001 – 2005, only 3 companies have ever characterized the negotiation – or renegotiation – of tribal ROW as a material issue in annual reports to the SEC. Even for these companies, these issues were mentioned in the context of lengthy, detailed statements of other market, legal, business and regulatory risks.

In short, we conclude that while it is clear that utility companies routinely face many regulatory factors which give rise to business risks for these companies, not many of the companies most likely to identify tribal ROW issues as sources of material risk actually do so. Much more prevalent are the more common issues facing the industry associated with cost recovery issues, contract renegotiations, environmental permits, permitting issues, and in some cases negotiations or approvals associated with obtaining or maintaining ROW for company capital investments. Even considering a sample of

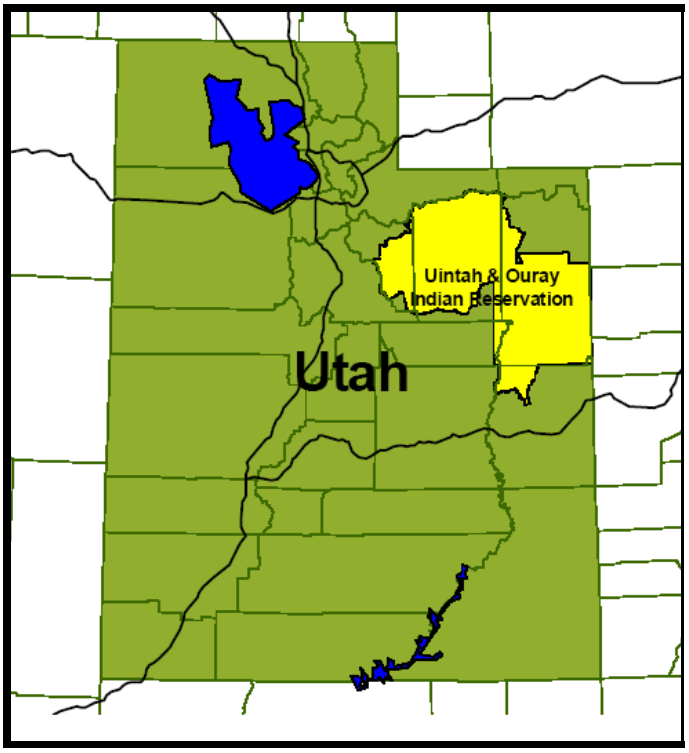
companies most likely to face the issue, companies *rarely* identify tribal land ROW issues as a significant material risk in SEC disclosures. We conclude that claims of tribal ROW negotiations rising to be a significant cost-of-capital concern for the industry are unfounded.

# THE UTE INDIAN TRIBE – ENERGY RIGHTS-OF-WAY TRENDS, APPROACHES AND POLICIES, PAST AND PRESENT (SECTION 1813 ISSUE # 1)

## OVERVIEW: PAINTING THE OVERALL PICTURE OF USE OF THE UTES' TRIBAL LANDS FOR RIGHTS OF WAY

The Ute Indian Tribe's Uintah and Ouray (U&O) Reservation is approximately 120 miles across, 120 miles from top to bottom, and 150 miles diagonally, has exterior boundaries covering 4.4 million acres in Northeastern Utah, and comprises over 8% of the surface of the State of Utah.

**Figure 19**




Source: Department of Energy & Minerals of the Ute Indian Tribe.

The land of the U&O Reservation has been used for a variety of purposes by third parties, through various legal instruments including rights of ways, leases and other agreements. This activity is recorded – to varying degrees of precision – in physical files in the possession of the Tribe and the BIA, and in several databases that the Utes and the BIA have developed and maintained over the years. Before characterizing the rights of way on U&O Reservation land as reflected in these data, it is helpful to describe the data themselves. While the databases are relatively detailed and rich in terms of how they compare to the information organized, collected and maintained at other tribes, even the Utes' data has limitations which need to be understood.

### Information on Ute Indian Tribe's Rights-of-Way:

Over the years, the Ute Indian Tribe and the BIA have maintained physical files with information about grants of access and rights of way, including BIA requests and approvals of such grants, ROW documents, Tribal resolutions, and associated

agreements. There is a wide range of quality in these historical files; some files contain considerable amounts of documentation; others do not. Some rights of way may have no documentation. As part of the Section 1813 study process, and at the request of the Departments of Interior and Energy and their contractor, Argonne National Laboratories, the Tribe has provided a sample of files to researchers from the Historical Research Associates, Inc. (HRA). After communications with the Ute Tribe about ROW documentation in the Tribe's possession, HRA made a series of requests for a sample documentation pertaining to different ROW purposes, such as electric power lines, pipelines, and well sites. The Ute Tribe provided certain files to HRA, responsive to these requests, for further analyses and characterization. We too reviewed this information for our study.

Several databases shed light on these uses of tribal lands. One, prepared by the BIA Agency for the Uintah and Ouray Reservation records information on individual grants of access to tribal lands from as far back as 1966, including data on such items as their identifying name or number; their purpose(s); the entity granted the ROW; the location(s) of the ROW or grant of access; the date on which the grant was issued; the term of the grant of access; acreage included in the ROW; any payments received as consideration for grant of access; and so forth. One purpose of this database is to maintain information on "bills for collection," or the payments received by BIA on behalf of the Tribe from parties holding grants of easements. For a number of reasons, the data are more useful in characterizing a picture of the overall pattern of grants of land for different purposes, than they are for understanding the terms of consideration owed to or paid to the Tribe across all agreements. Notably, the payments are recorded in ways that suggest missing data,[41] multiple recordings of single payments,[42] or ambiguous information.[43] Further, the data reflect only payments, and not obligations, to the Utes, and do not reflect many payments made directly to the Ute Tribe. We have worked with the Tribe to attempt to represent these data accurately to correct for these issues. These data generally cover the period from 1966 to 2005, in a relatively complete way, taking into consideration the caveats listed above.

The Department of Energy and Minerals of the Utes Indian Tribe also possesses various data that is informative to questions regarding grants of access to Tribal lands, including internal data on grants of access to tribal lands, and records of financial arrangements with energy-company partners. ROW data, which are also based on BIA records from the period 1935 to 2002, provides information that

[41] For example, there are some data fields which are left blank.

[42] For example, where a payment was made by one party to cover his responsibility for many grants of access, the same payment was often recorded for each piece of land.

[43] For example, the data do not indicate whether a payment made was less than or equal to an amount owed to the tribe. Additionally, typically there is no indication as to whether a recorded payment was intended to cover an annual fee, or for several years of fees paid at once, or a one-time, up-front payment, and so forth.

complements data from the BIA database on a number of issues, including grantees and the term (or length) of rights or way. Given gaps in the BIA's existing physical files with respect to the ROW that were issued over the past many decades, however, the absolute quality of data from both BIA and the Energy & Minerals Department of the Ute Indian Tribe is not known, although we believe that a better data source for activities on the U&O Reservation is not likely to exist anywhere.

The Ute Indian Tribe has also developed a highly detailed database of geographically-coded information on surface and subsurface interests, ownership types, rights of way, and other activity on Tribal lands. This has been developed in recent years. The database is tied to "GIS" (geographical information system) software allowing for analysis and mapping. While the database does include some historical information for individual areas on Tribal lands, it has mainly been developed by the Tribe as a tool for actively managing its resources in a real-time fashion. Because the Tribe maintains this database regularly, the current data appear to be of high quality, and they provide a rich picture of the complexity of the activities and resources on Tribal lands.

Together, these various data – the Tribal ROW documents collected by HRA, the BIA database, and the Utes' GIS data system and other ROW-related data – provide considerable information about grants of access to Tribal lands over the past few decades. Below, we describe what we have found.

### Rights of Way on Tribal Lands of the Ute Indian Tribe

The pattern of ownership, control of, interests in, and use of lands and subsurface resources on the Uintah and Ouray Reservation is extremely complex. This pattern, as shown in the following figures, complicates the issue of what it means for the Tribe and for users to have a "right of way" on Tribal lands.

First, there are multiple concepts implicated by the phrase "right of way," including electric and gas transmission lines, roads, natural gas gathering systems and lines, sites for drilling oil and gas, and so forth.[44] All of these exist on the U&O

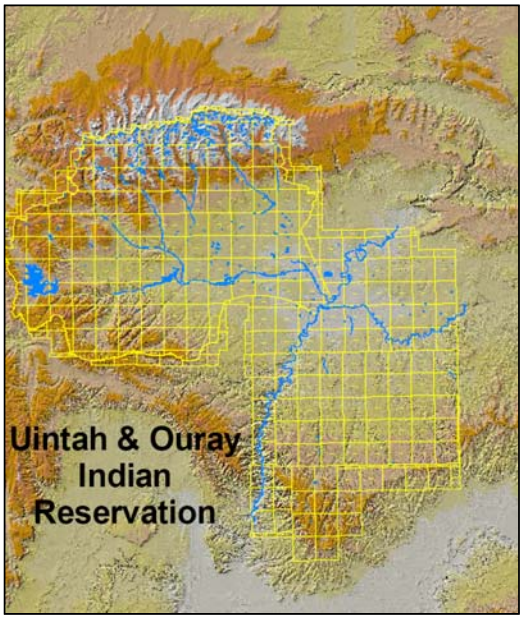
[44] According to the Ute Indian Tribe, all of the following energy activities require issuance of tribal energy rights-of-way: roads (energy service corridors); well & drilling locations; compression sites; natural gas processing and treating sites; regulated gas transportation and distribution; un-regulated gas gathering and transportation; electrical transmission and distribution facilities. These energy activities are granted access through a variety of mechanisms, all considered "rights-of-way" by the Tribe and which include: grant of business lease; facilities lease; surface use and access agreement; and surface damage agreement. Source: Ute Indian Tribe Department of Energy & Minerals.

Reservation. And all can be considered "rights of ways" in light of the basic definition of "a legal right of passage over another person's land."[45]

Second, like the trust lands of many other Indian tribes, the Northern Utes' lands are intersected, criss-crossed, carved out and overlaid with various ownership and interests of other entities. The U&O Reservation spans approximately 120 miles across and 120 miles top to bottom. In the map in Figure 20, each square on the grid indicates a 36-square-mile township. Ownership of lands within the area delineated in Figure 20 is quite complicated.

**Figure 20**

**The Uintah and Ouray Reservation Area**




Source: Department of Energy & Minerals of the Ute Indian Tribe.

Within the overall grid of land on and in the vicinity of the U&O Reservation, the Ute Indian Tribe actually has surface ownership only on the lands show in the highlighted areas of Figure 21. The Tribe has subsurface ownership of other areas (shown in Figure 22), some of which subsurface lands underlie the lands where they own the surface and others of which do not.

Interlaced around and among tribal surface and subsurface rights are lands owned by the U.S. Bureau of Land Management ("BLM") and federal Forest Service ("FS") lands. These are shown in Figure 23, which superimposes these federal lands on top of the figure showing the Utes' surface and subsurface rights. On Figure 23, Forest Service lands are shown in dark green and BLM lands are shown in a solid tan color.

Figure 24 differs from the previous figures by virtue of showing lands owned by the federal government and lands owned by the State of Utah as well as private (fee simple) land owners. In Figure 23, federal BLM lands are shown in Dark Khaki, and FS lands are shown in Bright Green. On Figure 24B, Utah State lands are shown in gray and fee simple ownership is indicated in Dark green.

[45] CERT, *Assessing Rights of Way*, 2005, page 31, citing definitions in the Bureau of Land Management Manual Section 2800. Release 2-224, May 15, 1985.

# Ute Indian Tribe Right-of-Way Experience

**Figure 21**

**Utes' Surface Ownership (shown in yellow highlighting)**

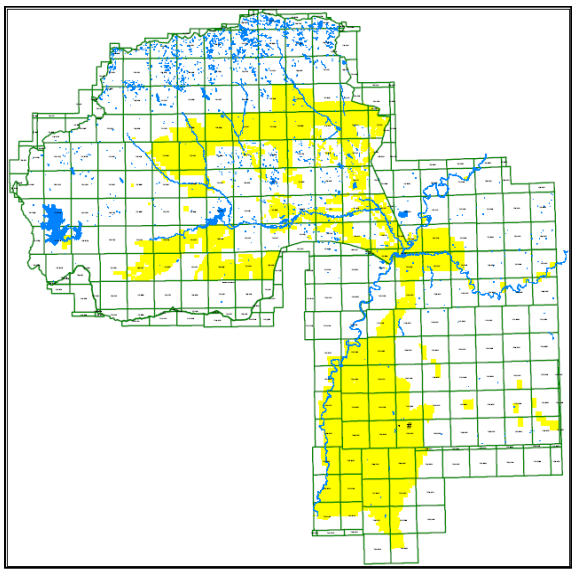
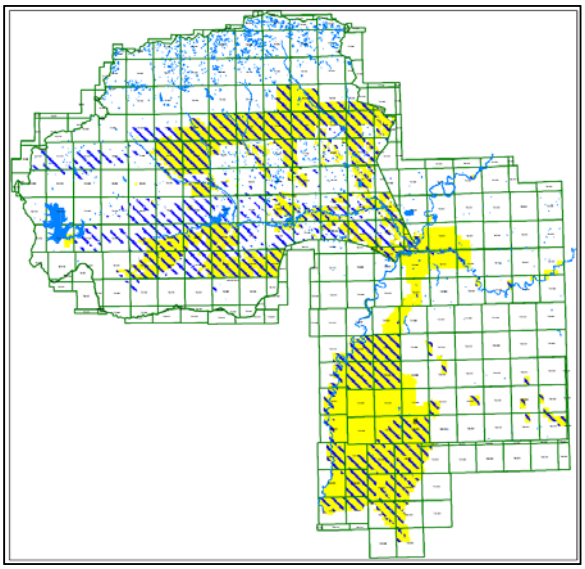


**Figure 22**

**Utes' Surface and Subsurface Ownership (subsurface shown in cross-hatching)**



Source: Department of Energy & Minerals of the Ute Indian Tribe.

**Figure 23**

**U&O Reservation, with Federal BLM and FS Lands**

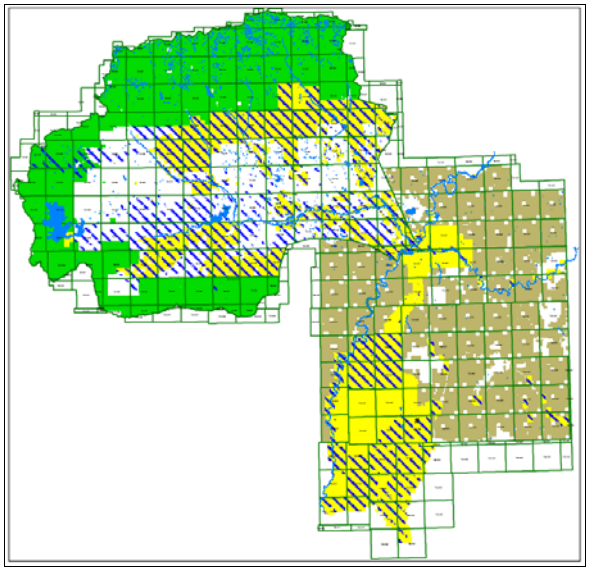
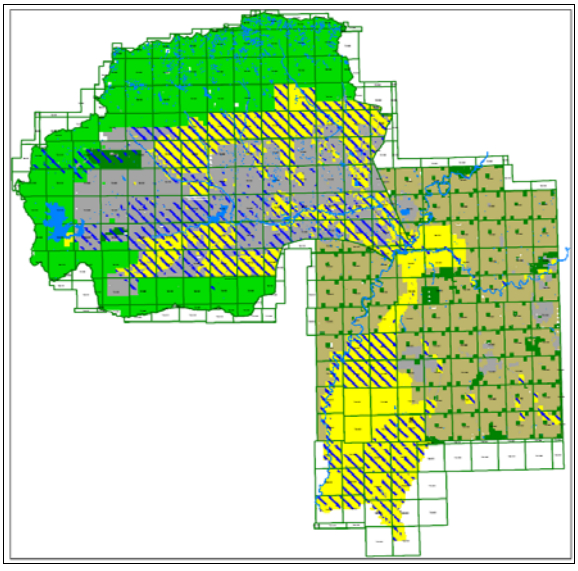


**Figure 24**

**U&O Reservation, with State of Utah and Fee Lands**



Source: Department of Energy & Minerals of the Ute Indian Tribe

# Ute Indian Tribe Right-of-Way Experience

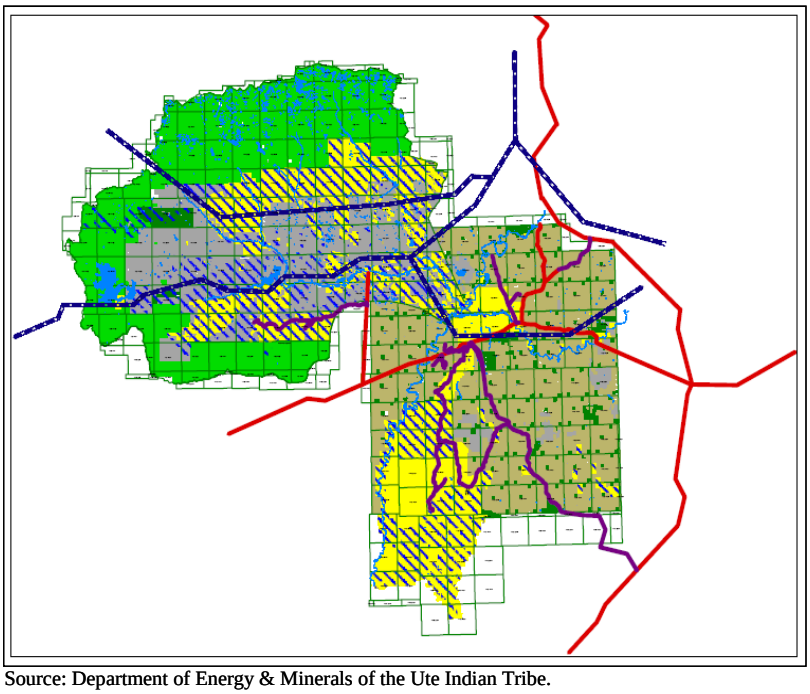
According to the Ute Indian Tribe, about 0.5 million acres of tribal surface overlie federal, state, and fee minerals. At the same time, approximately 0.5 million acres of tribal minerals are overlain by federal, state, and fee surface lands.

On top of this complex set of layers of land-related ownership and rights sits a variety of "grants of access" from the Tribe, giving other entities rights to access lands and carry out certain circumscribed set of activities.

For example, Figure 25 shows the electric and gas transmission lines crossing the reservation, Figure 26 indicates the roads, and Figure 27 shows the location of wells (e.g., for oil or gas) located on the U&O Reservation lands.

**Figure 25**

**Electric and Gas Transmission Lines on the U&O Reservation**



Source: Department of Energy & Minerals of the Ute Indian Tribe.

These maps vividly portray the fact the Tribal lands of the Uintah and Ouray Reservation show an intricate system of ownership, interests and rights, including the common occurrence of split estates throughout the Reservation. Similarly they suggest an equally intricate set of arrangements providing access or a "right of way" to Tribal lands for a variety of purposes and through a variety of legal instruments. All of these factors complicate the task of land management. They also underscore the challenges of addressing in a straight-forward way the Section 1813 language calling for a "study of issues regarding energy rights-of-way on tribal land" and "an analysis of historic rates of compensation paid for energy rights-of-way on tribal land".

**Figure 26**

**Roads on the U&O Reservation**

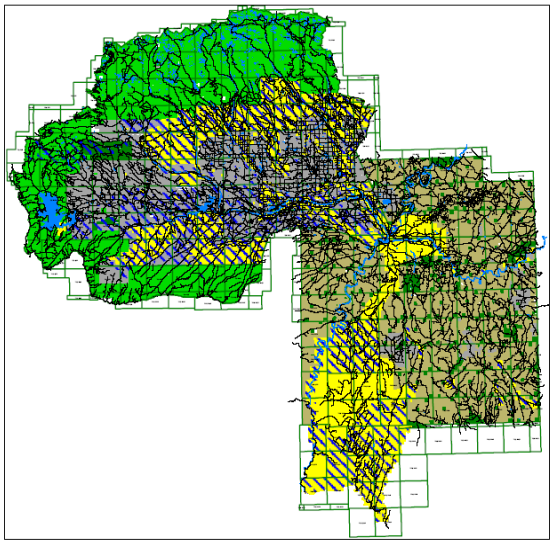
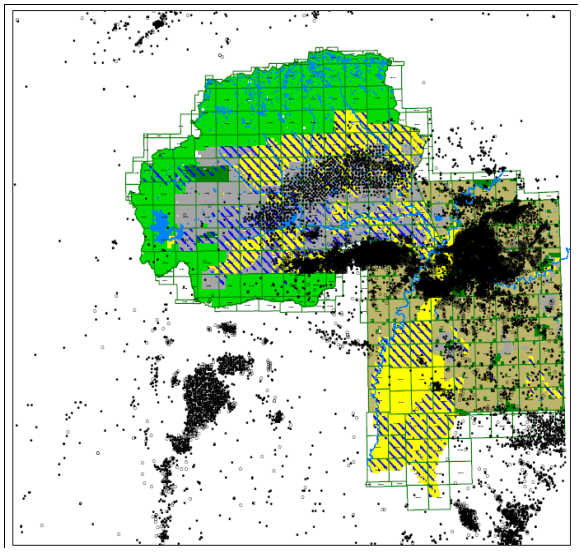


**Figure 27**

**Wells Drilled on the U&O Reservation**



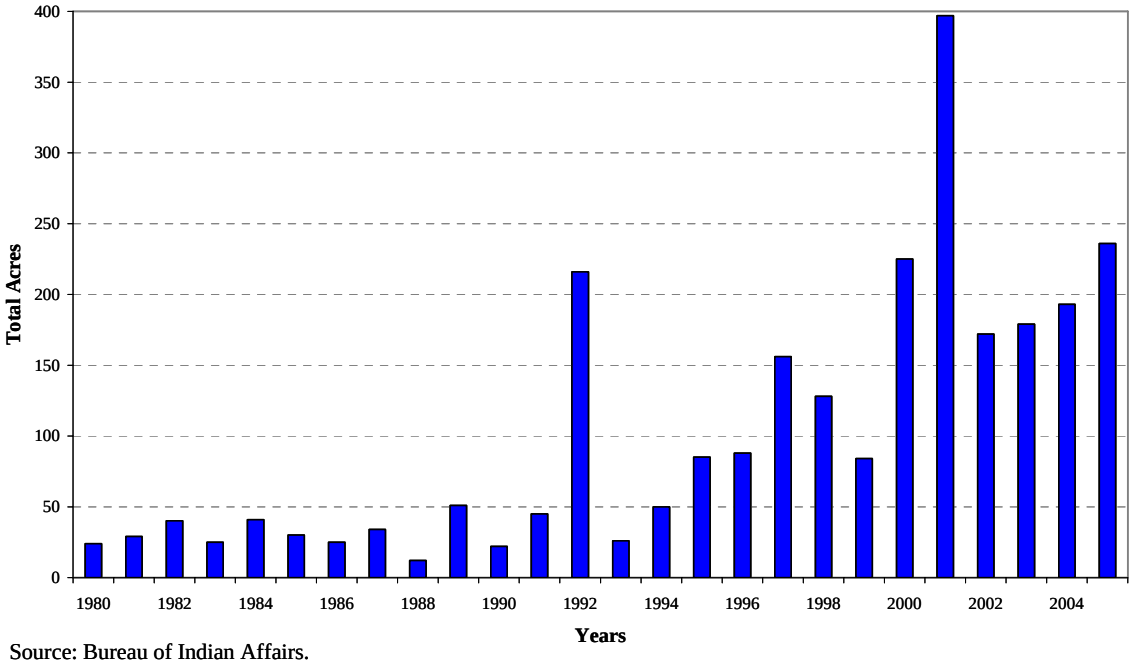
Source: Department of Energy & Minerals of the Ute Indian Tribe.

## Issuance of Rights-of-Way on the U&O Reservation

Data from the BIA provide a perspective on the pattern of energy ROW on the U&O Reservation and their evolution over time. Figure 28 shows the number of rights-of-way granted by the Ute Indian Tribe each year from the mid-1960s to 2005. The figure illustrates a steady increase in the grants of access provided by the Tribe since the late 1980s. Annual fluctuations may result from the timing of particular development projects and the boom/bust cycles that generally drive investment in energy infrastructure. For a variety of reasons, these data may understate the actual number of grants of access by the Northern Ute Tribe in any particular year. For example, the database does not include undocumented ROWs on which energy companies have active commercial operations despite a lack of legal grant of access. This database also does not include over 200 ROW applications, currently pending approval by the BIA, to formalize certain of these undocumented rights of way. In all cases, the process of formalizing these rights of way has not interrupted commercial operations.

**Figure 28**

**Annual Number of Rights of Way**
**1980-2005**




Source: Bureau of Indian Affairs.

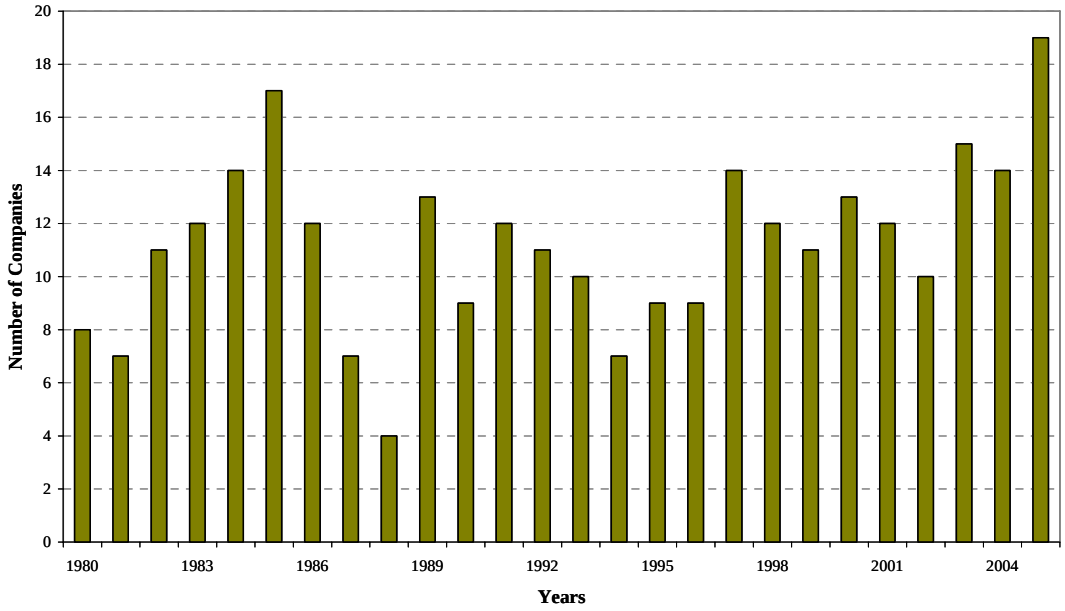
Note: Figure for 2005 reflects data for only a portion of the year.

# Ute Indian Tribe Right-of-Way Experience

The Tribe grants access to many different non-Tribal entities on an on-going basis. Over the period 1970 to 2002, the Tribe has granted access to over 150 different outside entities, including private individuals, firms and corporations, electric co-operatives, local governments, and state and federal agencies.[46] Figure 29 presents the number of different non-Tribal entities awarded rights of way in each year from 1980 to 2005 based on BIA records. Over this period, anywhere from 3 to 25 non-Tribal entities were awarded rights of way in any given year. The last two years have seen a large increase in the number of different entities awarded rights of way; in 2004 17 different entities were awarded rights of way, while in 2005, 37 different entities were awarded rights of way.

**Figure 29**

**Annual Number of Companies Granted Rights of Way**
**1980-2005**




Source: Bureau of Indian Affairs.

Note: Figure for 2005 reflects data for only a portion of the year.

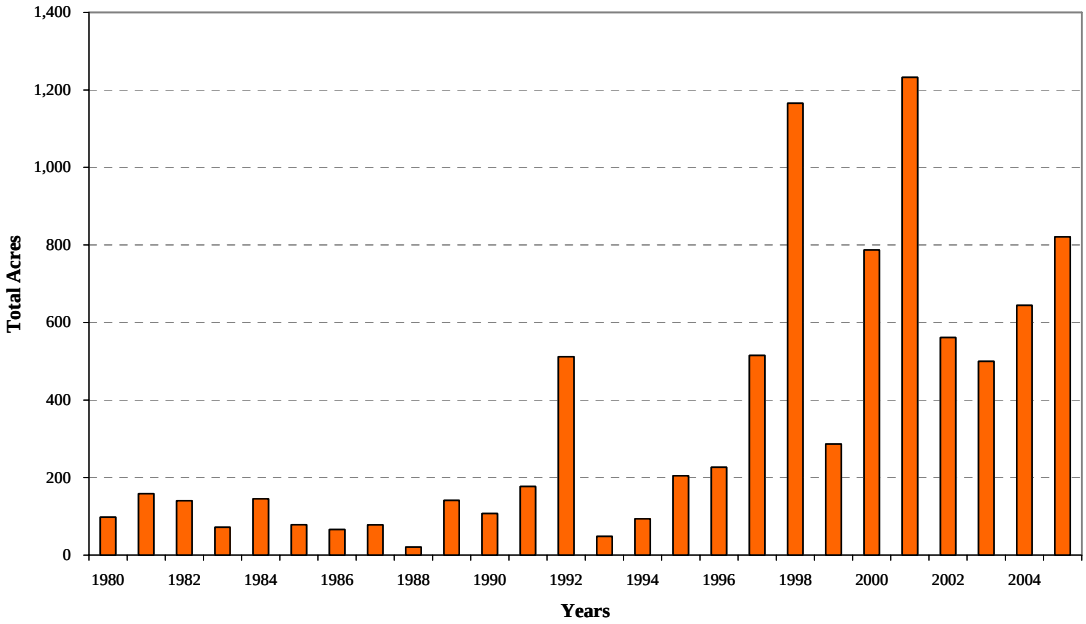
Figure 30 reports the acreage of new rights-of-way granted in each year by the Ute Tribe since 1980 based on the BIA database. The records indicate that access to over 500 acres has been granted in each of the past six years, reflecting a large increase in ROW access granted by the Tribe compared to previous periods. In three of the past eight years, the Tribe has granted access to over 1,000 acres of land. Increased access to Ute Tribe land is primarily driven by the large increase in the

[46] Based on data provided by the Ute Indian Tribe's Department of Energy & Minerals.

number of ROWs granted to outside entities, rather than an increase in the number of acres per ROW, which has not shifted dramatically over the past few decades.

**Figure 30**

**Annual Acres in New Rights of Way**
**1980-2005**



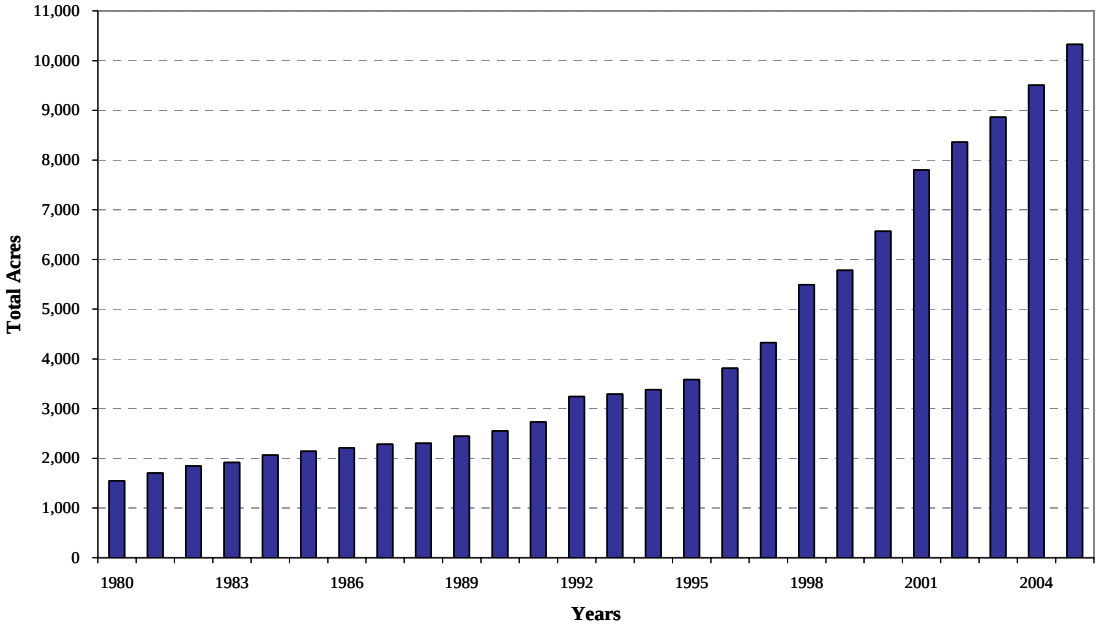

Source: Bureau of Indian Affairs.

Note: Figure for 2005 reflects data for only a portion of the year.

As companies apply for new rights of way and continue operations under existing rights of way, cumulative acreage of Tribal land granted access to outside parties has grown steadily over the past several decades. Figure 31 shows the cumulative acreage of Tribal rights of way based on data provided by the BIA. Through 2005, Tribal rights of way have covered over 10,000 acres of land. This estimate, however, understates the actual access granted to outside parties by the Ute Tribe since undocumented rights of way are excluded.

**Figure 31**

**Cumulative Acres in Right of Ways by Year**
**1980-2005**




Source: Bureau of Indian Affairs.
Notes: [1] Figure for 2005 reflects data for only a portion of the year.
[2] Cumulative acreage in 1980 reflects approximately 1,500 acres of right of way granted in previous years.

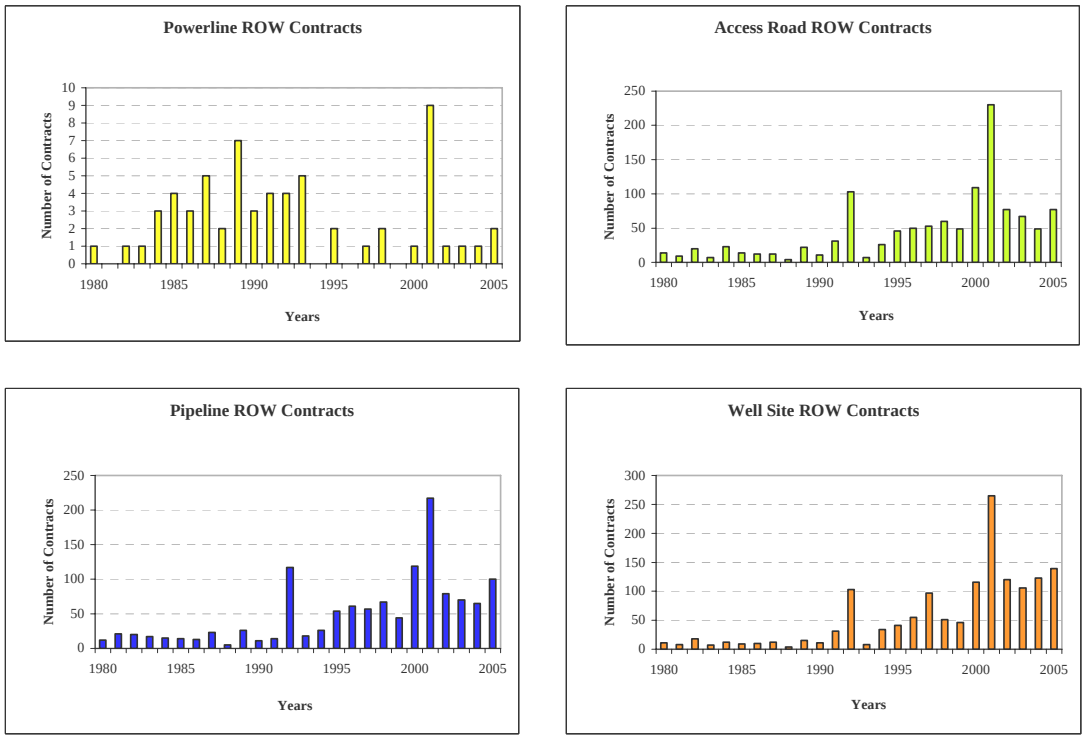
The Ute Tribe has granted access for a wide range of uses, including oil and natural gas well sites, natural gas gathering and interstate pipelines, electricity distribution and transmission lines, access roads, and a large number of miscellaneous uses. Figure 32 shows the annual number of grants of access including well sites, pipelines, access roads, or electric power lines.[47] Grants of access for well sites, pipelines and access roads have grown significantly over the past five years. The figures show a close historical relationship between the number of grants of access for pipelines, access roads and well sites. Many exploration and development projects, particularly for natural gas, require permission for pipelines, access roads, well sites, and, possibly even, power lines. Consequently, periods of growth in exploration and development work leads to simultaneous increases in all of these activities. Development of electric power lines, however, appears to follow a very different pattern. First, there are many fewer rights of way that have been granted for

[47] Many rights of way indicate that access will be used for multiple purposes. The figures reflect all rights of way that include the indicated use. Consequently, the sum of rights of way across all four figures exceeds the total right of ways.

electric power lines compared to these other uses. Second, the historical pattern differs from these other uses.

**Figure 32**

**Number of Right of Ways by Purpose**




Source: Bureau of Indian Affairs.
Note: Figure for 2005 reflects data for only a portion of the year.

In addition to grants of access, the Ute Tribe has also entered into many agreements with firms that set the terms of ROW when the firm chooses to apply for a grant of access within the designated area. Many of the agreements provide the firms with exclusive access to the designated areas under the agreements. These agreements speed up the ROW application process by removing several layers of administrative approval and eliminating the need for negotiations for each new right of way. Reducing ROW approval times provides an important benefits to users of Tribal lands because more timely approval allows firms to more rapidly respond to changes in energy markets and pre-negotiated terms reduces risk by providing greater certainty over the terms of access.

Table 3 shows the number of acres covered by agreements defining the terms of ROW access for lands where the Tribe has surface rights and exploration and development agreements where the Tribe has sub-surface rights. Access to nearly 1.4 million acres of Tribal land is provided through these more efficient access agreements; further, access to over 1.2 million acres has been or is in the process of being gained through these agreements since 2002. The increased use of these

agreements in recent years illustrates one way in which the Ute Tribe's active interest in partnership can lead to increased, and more efficient and timely, access to Tribal lands than the previous mechanisms for granted access when the tribe had a more passive approach to managing Tribal land rights.

**Table 3**

**Agreements Defining Terms of Rights of Way Access for Lands with Tribal Surface and Sub-surface Rights**

| Period | Surface Use and Other Develoment Agreements (Acres) | Exploration and Development Agreements (Acres) | Total |
|---|---|---|---|
| 1993-2001 | | 261,547 | 261,547 |
| 2002-2005 | 367,450 | 346,640 | 714,090 |
| Pending | 145,171 | 275,880 | 421,051 |
| Total | 512,621 | 884,067 | 1,396,688 |

Source: Bureau of Indian Affairs.

The Ute Indian Tribe has typically granted access for either a 20-year period or for the duration of the lease associated with the agreement ("life of lease" agreements).[48] Approximately three-quarters of rights-of-way have a 20-year term and one-quarter have a life-of-lease term.[49] For many oil and gas leases, terms coincide with the productive life of the gas or oil well (i.e., "life of lease") to provide producers flexibility to continue operations for the productive life of the well.

Rights-of-way with 20-year terms generally include a 20-year renewal option for the outside party at either the initial or inflation-adjusted contract terms. With a renewal option, entities granted access have the option to avoid ROW expenses for the last 20 years if energy-producing activity on the right-of-way is unprofitable.

The Tribe uses a wide range of financial arrangements in granting access to Tribal lands. These arrangements vary across firms and for different projects and locations for individual firms. The variation in financial arrangements reflects a number of different factors, including an evolution in Tribal approach to partnership arrangements with outside entities, different financial preferences of the outside

[48] Based on data provided by the Department of Energy and Mineral of the Ute Indian Tribe.

[49] Based on data provided by the Department of Energy and Minerals of the Ute Indian Tribe.

entities, and the unique attributes of the particular project or use for which the tribe is granting access.

Data on 44 financial arrangements from 25 of the largest firms engaged in oil and natural gas production and transportation on the U&O Reservation provide insight into the many different partnerships arrangements in which the Utes are engaged. Some firms have multiple financial arrangements with the Tribe for operations at different locations on the U&O Reservation reflecting different types of uses developed at different periods of time. One firm, in particular, has 7 different financial arrangements for operations in operations. These financial arrangements are often quite complex, with many arrangements using multiple payment mechanisms. Table 4, which organizes these financial arrangements by different types, shows that nearly 40% of the agreements incorporate more than one type of payment mechanism, including access fees (e.g., a through-put fee), damage fees, transportation fees for projects where the Tribe has an equity stake, pipeline or well equity, in-kind services, or payments to Ute agencies or scholarship funds.

**Table 4**

**Ute Tribe Financial Partnership Arrangements**

| Type of Partnership Arrangement | Number of Arrangements | Percentage of Total |
|---|---|---|
| Access Fee | 18 | 41% |
| Access Fee, Damage Fee, Equity | 2 | 5% |
| Access Fee, Equity | 1 | 2% |
| Access Fee, Pipeline Transport Fee, Equity | 5 | 11% |
| Damage Fee | 6 | 14% |
| Damage Fee, Pipeline Transport Fee, Equity | 5 | 11% |
| Equity | 3 | 7% |
| Pipeline Transport Fee, Equity | 4 | 9% |

Source: Bureau of Indian Affairs.

Table 5 reports the number of financial arrangements that incorporate each of the different types of payment mechanisms. Over one-half of these financial arrangements include an access (or through-put) fee on either pipeline flow or production output, while, for over one-third of arrangements, this is the sole form compensation. Of the 44 financial arrangements analyzed, 13 include an annual damages or surface use fees. Only 6 rely solely on this damage or surface use fees; these arrangements reflect older agreements as the Northern Utes' increasingly prefer to rely on either access payments, throughput fees or transport fees (with accompanying pipeline or well equity) to better align incentives and tie financial performance to the productivity of the projects granted access. As a result, many of the arrangements involve projects in which the Tribe has an equity stake in

operations, including the associated cost and other operational risks. The Ute Tribe has some equity stake in nearly 19 of 44 of arrangements with outside partners.

**Table 5**

**Ute Tribe Financial Partnership Arrangements**
**Number of Arrangements including using Payment Mechanisms**

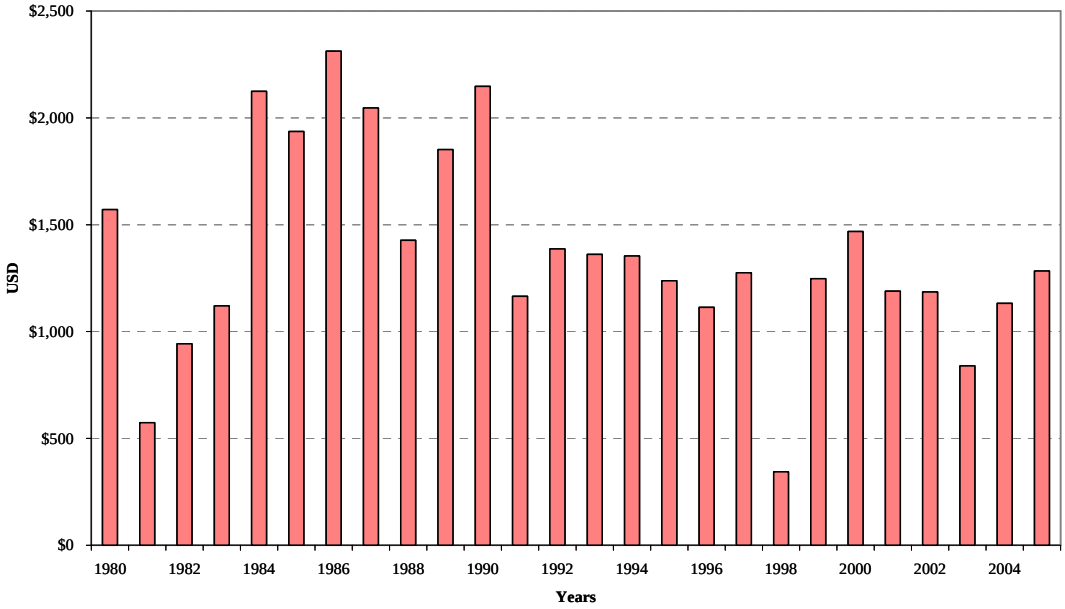
| Type | Number | Proportion of Agreements |
|---|---|---|
| Access Fee | 26 | 59% |
| Damages | 13 | 30% |
| Pipeline Transportation | 14 | 32% |
| Pipeline Equity | 8 | 18% |
| Well Equity | 11 | 25% |
| Other (e.g., payments in kind) | 8 | 18% |
| Fish & Game | 1 | 2% |
| Scholarships | 1 | 2% |

Source: Bureau of Indian Affairs.

BIA data provides some insight into the payments associated with ROW access to tribal lands. Figure 33 shows the average ROW payments per acre for 1980 to present, while Figure 34 shows the average payments per ROW granted over the same period. Both figures show that ROW payments have not changed dramatically over the past 25 years.

## Figure 33

**Average Right of Way Payments per Acre**
**1980-2005**

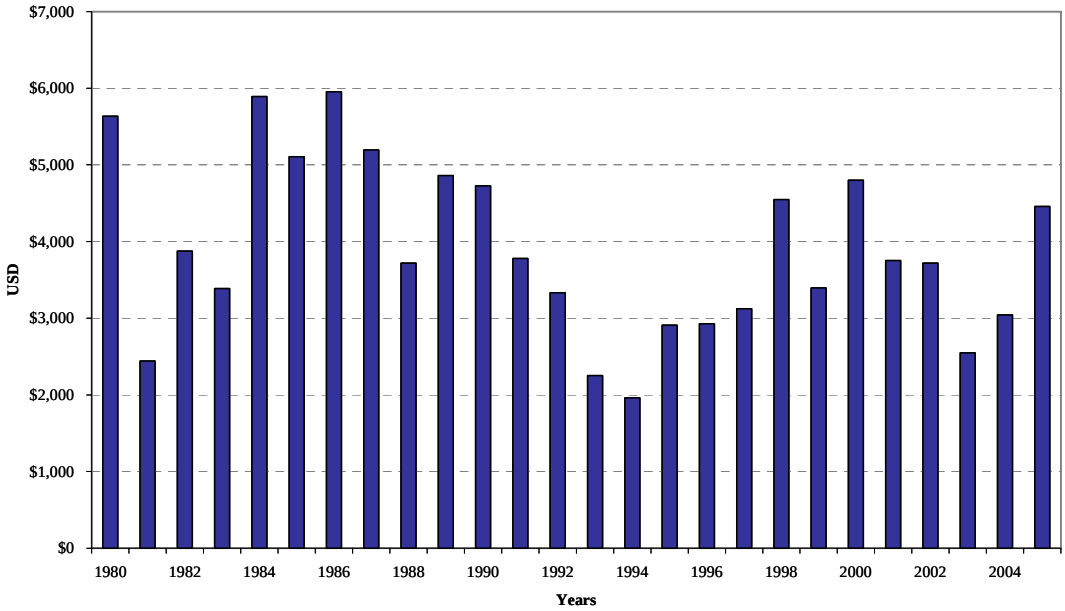



Source: Bureau of Indian Affairs.

Note: Figure for 2005 reflects data for only a portion of the year.

## Figure 34

**Average Right of Way Payments per Right of Way Granted**
**1980-2005**




Source: Bureau of Indian Affairs.

Note: Figure for 2005 reflects data for only a portion of the year.

## Ute Indian Tribe Governmental Services for ROW Management

Finally, the Tribe's energy ROW arrangements entail a wide variety of activities, services and systems to manage their resources and access to them. Table 6 lists the types of activities carried out to manage these land and land-related resources and others' access to them through rights of way, grants of access and other means.

All told, these activities demand a high level of personnel, time, attention and use of the Tribe's governmental funds. The Tribe's effort to inventory, catalogue, verify and record rights-of-way data in its database amounted to several million dollars over the course of a few years. It requires work to maintain those data, and much more. For example, for the budget year ending September 30, 2006, the Tribe's budget relating to resource management totaled approximately $6.3 million. This supports, among other things, 94 personnel positions in the following Tribal departments on matters "dedicated to Rights of Way issuance and maintenance"[50]: Law Enforcement, Security, Occupational Health and Safety, Mineral Resources, Fish & Wildlife, Energy & Mineral Resources, Resource & Wildlife Management, Environmental Health, Cultural Rights & Protection, and Motor Pool.

According to the Tribe, these activities enable the oversight and management of the following third-party entities and activities taking place on the reservation: over 800 Access Permits and business licenses issued annually to companies; 12,000 individuals with access permits; 15,000 pieces of equipment with authorizations to be on the Reservation; and 2,745 documented Rights of way.[51] On the Uintah and Ouray Reservation there are 20 primary producers. Ten producers are paying throughput fees on gas, with 2 in negotiation and 7 producers are paying a throughput fee on oil.[52]

[50] Source: Ute Indian Tribe's Energy & Minerals Department.

[51] Source: Ute Indian Tribe's Energy & Minerals Department.

[52] Source: Ute Indian Tribe's Energy & Minerals Department.

**Table 6**
**Ute Indian Tribe:**
**Activities Involved in Right-of-Way Creation and Monitoring:**

| RIGHT-OF-WAY APPLICATION PROCESS | PRODUCTION AND GATHERING |
|---|---|
| Route / site reconnaissance | Compliance and monitoring |
| 5-day posting | Business licenses and access permits |
| Permission to survey | Production seals |
| Archaeological survey | Standard operating procedures compliance |
| Paleontological survey (in needed) | Spills and leaks |
| Fish & Game consultation | Theft and vandalism |
| Fish & Game monitoring | Accidents and acts of God |
| Area-wide environmental assessment | Tribal court on enforcement action |
| Environmental impact studies | **ADMINISTRATION** |
| Consultation with Utah Div. of Wildlife Resources | Energy & Minerals Department Personnel |
| Consultation with Utah Div. of Oil, Gas & Mining | Fish & Game |
| Consultation: Utah State Inst' Trust Lands Admin. | OSHA |
| Consultation with U.S. Fish & Wildlife | Air and water quality |
| Consultation with BLM | Conservation officers |
| Consultation with BIA | Historic and cultural preservation |
| Consultation with Bureau of Reclamation | Severance tax audit |
| Consultation with Army Corps of Engineers | Royalty audit |
| Consultation with other state agencies | Motor pool |
| Consultation with county agencies | Roads |
| Site specific environmental assessment/ inspection | Consultants |
| BIA Grant of Easement | Vehicle maintenance and replacement costs |
| Permission to construct | Employee training |
| **CONSTRUCTION, DRILLING & COMPLETION** | |
| Survey | |
| 48-hour notices | |
| Set surface casing | |
| Blow-out preventer test | |
| Drilling supervisor | |
| Completion / rig up | |
| Gas meter calibration | |
| Production on line | |
| Pit and pad reclamation | |

## CASE STUDIES – RECENT UTE INDIAN TRIBE RIGHT-OF-WAY ARRANGEMENTS – POST 2001

### The Context: The Ute Indian Tribe's new approach to its energy resources

Thinking about change:

Several years ago, the Tribe had become aware of alternative methods for managing its resources. Although there were apparently several efforts in parallel, one important way the Tribe learned about such new approaches was through the transfer of "lessons learned" at the annual Tri-Ute meeting in 1999. The three related Ute tribes (the Northern Utes, the Southern Utes and the Ute Mountain Utes) gather together periodically.

On at least one occasion at the Tri-Ute meetings, there was discussion of the new financial and resource management activities that were underway at the Southern Ute Tribe. Following this meeting, in late 1999, the Northern Ute Business Committee (the governing entity of the Ute Indian Tribe) heard a presentation from the Southern Utes' financial advisor.

Gradually over the next year or so, the leadership of the Northern Utes began to be advised by a financial advisor with expertise in energy matters. While formally joining the Northern Utes as their advisor in January 2001, gradually he helped the Tribe position itself to play a more active role in managing and growing the value of its natural resource base.

The Northern Utes began to research and organize the data related to their resources, including information about their rights of way agreements, the entities with whom they had such agreements, their land and natural resources, the ownership of and interests in surface and subsurface minerals and other resources within the Uintah and Ouray Reservation boundaries, and various other information that they needed to better manage their people, raw materials, terms of surface and mineral access, and finances.

Articles VI, Section 1(c), (i) and (l) of the Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation (1937)[53] set forth the following power of the Tribal Business Committee:

[53] The Ute Indian Tribe's Constitution is included as Appendix A to this report.

- "(c) to approve or veto any sale, disposition, lease or encumbrances of tribal lands, interest in tribal lands, or other tribal assets,…"
- "(i) to exclude from the territory of the Uintah and Ouray Reservation persons not legally entitled to reside therein…"
- "(l) to safeguard and promote the peace, safety, morals and general welfare of the Ute Indian Tribe of the Uintah and Ouray Reservation by regulating the conduct of trade and the use and disposition of property on the Reservation…"

The Tribal Business Committee, acting under its constitutional authority, scrutinized its existing practices for issuing grants of access to tribal lands. At the time, this was embodied in Tribal Ordinance 96-002. This ordinance, adopted in 1996 (but similar to approaches in place prior to that time) set forth the requirements and obligations associated with Tribal grants of access to Reservation Lands, and the procedures by which the Tribe's Energy and Minerals Department and the Bureau of Indian Affairs could negotiate and issue surface use and access to oil and gas lessees of Tribal trust minerals.

For example, Ordinance 96-002 required that those seeking to "move upon and utilize Reservation Lands for a specific purpose" approval for the acquisition of a new right of way or the use of an approved right of way.[54] The approval would set out the conditions associated with that right of way grant, and typically provided a 20-year grant of access. The permit would also include the consideration to be paid to the Tribe for such grant. According to the Ordinance, the "Surface Use and Damage Payment" "compensates for reasonably anticipated actual surface damages to Tribal lands resulting from activities undertaken pursuant to a right-of-way grant. The amount of the Surface Use and Damage Payment due shall be based on an appraisal by the Energy and Minerals Department or an authorized contractor. An additional Surface Use and Damage payment may be required…."[55]

### A New Approach – 2001:

By September 2001, the Tribal Business Council repealed Ordinance 96-002, and replaced it with a different approach to reviewing applications to provide access to and use of Tribal land, and for determining the appropriate consideration to be paid for use of Tribal lands for rights of way by others. In Resolution 01-006, the Tribal Business Council decided:

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[54] Ordinance No. 96-002: To Govern Surface Use For Oil And Gas Activities On The Uintah And Ouray Reservation. (This is included as Appendix B to this report.)

[55] Ibid.

> Notwithstanding the fact that the Business Committee acknowledges that the Bureau of Indian Affairs has an appraisal procedure towards determining fair market value on a per-acre basis, the Business Committee has now determined that it is in the best interest of the Tribe to repeal Ordinance 96-002 in its entirety, effective immediately, and, to ensure that the Tribe receives fair market value with respect to its mineral and surface estates, effective immediately all new business related to the energy affairs of the Tribe follow the [attached] process and narrative, which provides for a flexible, modern regulation process designed to achieve fair market value, in lieu of the inflexible, outdated per-acre determinant of value contained in Ordinance 96-002, and pursuant to which attached process flow and narrative authority will be delegated to the Business Committee's financial advisor [redacted], to negotiate fair market value consideration to be paid to the Tribe with respect to all energy affairs on the Reservation, always subject to presentation and final approval by the Business Committee.

Ordinance 01-006 directs the Tribe to negotiate consideration, in no event to be less than the fair market value as determined by the Bureau of Indian Affairs in its appraisal procedure, to be paid to the Tribe with respect to all energy affairs on the Reservation, subject to presentation to and final approval by the Business Committee.

Ordinance 01-006 sets out the expectation that the Ute Indian Tribe's financial advisor (with the assistance of the Tribe's Energy & Minerals Department) reviews the proposal; compares it to industry benchmarks for similar proposal in light of the strength of the Tribe's negotiating position given the particular circumstances involved; negotiates with the company involved; designs potential options and structure to accommodate the company's request and maximize value to the Tribe; uses the historical BIA annual appraisal process as a base or floor of fair market value with respect to these negotiations; evaluates (among other things) the company's current performance elsewhere on the reservation with regard to Tribal preference issues (e.g., hiring members of the Tribe for jobs on the reservation), royalty currency, and environmental compliance, to negotiate in a way so that "the company is acting as a good corporate guest on the reservation;" and presents the proposal, with its recommendation, to the Tribal Business Committee.

At that point, the Business Committee may instruct the financial advisor and the Energy & Minerals Department to proceed forward with the transactions as proposed, or decline the transaction altogether, or suggest modifications to the transaction as structured (which might result in several iterations of the transaction between the financial advisor/Energy & Minerals Department, the company and the Business Committee). If and when the Business Committee elects to proceed with the transaction, as finally structured and negotiated, the company may seek permission to survey and apply for a grant of access, followed by reviews by the BIA and the Tribal Energy & Minerals Department. Upon completion of required studies to the satisfaction of the Energy & Minerals Department, it may then sign off and the BIA issues the grant of easement.

Such an approach reflected the Tribe's interpretation of its rights under the Code of Federal Regulations, 25CFR§169, which prescribes "the procedures, terms and conditions under which rights of way over and across tribal land, individually owned land and Government owned land may be granted."[56]

> § 169.1 Definitions….(d) *Tribal land* means land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance, and includes such land reserved for Indian Bureau administrative purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under Section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).
>
> § 169.3 Consent of landowners to grants of right-of-way. No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.
>
> § 169.12 Consideration for right-of-way grants. Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate.

In parallel with adopting these changes, the Tribe asked its financial advisor to prepare a business plan for managing and growing the Tribe's assets. The new business plan, which was subsequently reviewed, approved and formally adopted by the Tribal Council in Ordinance 01-007, on December 4, 2001.[57] Further, it was ratified by Tribal Membership in a referendum that took place on December 20, 2001.

### The Financial Plan for Active Resource Management.

The Financial Plan, as described in Ordinance 01-007, provides a framework for "active management of the Tribe's resources, including its surface lands." Recognizing that in "the past, like traditional governments, the Tribe has managed it assets passively, and accordingly parties other than the Tribe have captured significant value from the Tribe's land and natural resource base…and [the Tribe] has done so on an ad-hoc basis, without the benefit of a long-term financial plan." (Ordinance 01-007, Paragraph 3). In light of "this state of affairs, the Business

[56] 25CFR169.2 Purpose and scope of regulations. A copy of the 25CFR § 169, in its entirety, is attached as Appendix C to this report.

[57] The Tribal ordinance adopting the Business Plan is included in Appendix D to this report.

Committee determined that the best interests of the Tribe and the Membership would be served by changing the Business Committee's management of the Tribe's assets, revenues and expenses from a passive to an active management methodology, targeting aggressive cost and expense control and optimal use and deployment of all of its resource to increase and diversify revenues for the benefit of the Tribe and the Membership." (Ordinance 01-007, Paragraph 4.)

The Financial Plan's goal is: "To provide the Tribe with an economic strategy that will fund a core government and baseline Tribal Member benefits, while at the same time optimizing available Tribal resources to achieve greater socio-economic well-being for both current and future Tribal Members. (Ordinance 01-007, Paragraph 5.) It is designed to take a portfolio approach to financial capital management, and to provide a means to benchmark and hold the Business Committee responsible for the performance of the Tribe's assets. The new, active management methodology is key to the goal of maximizing "the Tribe's resources and achieve optimal implementation and execution of the Financial Plan." (Ordinance 01-007, Paragraphs 6-9.)

### Doing Energy Business on the U&O Reservation:

The BIA Agency for the U&O Reservation has published a new handbook[58] to assist companies interested in doing energy-related business on the Reservation. This guide describes the process by which a prospective developer can apply to receive the Tribe's consent to a grant of access and "rights-of-way standard procedures." The handbook provides "best practices" for the steps the developer should take to prepare an application and conduct business with the Tribe. The process described by the BIA is consistent with Ordinance 01-006, as described above. As stated in the document, "In accordance with 25 CFR Part 169 – RIGHTS-OF-WAY OVER INDIAN LAND, the following procedures have been established to assure applications are processed in the most efficient manner possible while adhering to tribal, and federal regulations when dealing with mineral and mining development on the Uintah & Ouray Reservation."[59]

When issuing and renewing rights of way and grants of access in recent years, the Tribe has used its sovereign authority to actively manage its surface estate, and has routinely reached agreement with counterparties seeking to do business with the Tribe.

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[58] Bureau of Indian Affairs, Uintah & Ouray Agency, Branch of Real Estate Service, "*Ute Indian Tribe – Bureau of Indian Affairs – Mineral & Mining Development Guide: How to do Business on the Uintah & Ouray Reservation.*". This is attached at Appendix F to this Report.

[59] *Ibid*., page 10.

# Ute Indian Tribe Right-of-Way Experience

From time to time, the Tribe has been concerned that pipeline and other energy rights-of-way on Tribal lands have been in trespass, and other disputes have arisen over existing grants of access. Determining surface ownership can be complicated by the checkerboard ownership of surface lands and by split surface and mineral estates. The maps of the Uintah and Ouray Reservations lands and rights of way, above, show the extent of these complex land-holding overlays.

In areas where the underlying mineral rights were owned by the federal government, the Tribe has acknowledged that rights of way and grants of access would need to be provided to those entitled to develop their subsurface interests.

The Tribe has analyzed the prevalence and circumstances posed by these split estate situations on the Reservation, including the terms of compensation and the quality of the legal documents related to grants of access. As noted above and in the cases described below, the Tribe's Energy & Minerals Department has discovered many instances of potential trespass.

Where such trespass has been encountered – whether because of defects in the grants of access, or discrepancies between the terms of the right of way agreements and actual practice in the field, or expiration of a right-of-way agreement, or other reasons – the Tribe has sought to exercise and protect its surface and subsurface assets. This process has created opportunities for improved long-term business relationships with entities granted access to lands on the Reservation.

The Tribe has reported that as part of this effort, it has informed applicants for rights of way (whether for renewal grants or new rights of way) of the Tribe's new resource-management goals and approaches, and expectations for different compensation and business arrangements than were required in the past. The Tribe is overseeing and actively managing a significant number of grants of access on the reservation (as described further above): over 800 Access Permits and business licenses issued annually to companies; 12,000 individuals with access permits; 15,000 pieces of equipment with authorizations to be on the Reservation; and 2,745 documented rights of way.

According to the Tribe, no legal or formal complaints have been filed with respect to the Tribe's right-of-way process. As a matter of policy, the Tribe honors all existing contractual commitments, even if the Tribe is dissatisfied with the terms of the agreement. In a few instances, the Tribe has rejected an application for a renewal of an energy right of way, where the entity seeking the renewal had a past record of poor conduct on the land (e.g., environmental mistreatment). In one instance reported to us, the Tribe has declined to approve a renewal application because the two parties have not been able to reach agreement on appropriate terms. In good faith, the Tribe in some instances has shown a willingness to continue to negotiate with a party after a company's right of way terminates; in such cases and where negotiations are making progress and being conducted in an amicable fashion, the Tribe has said that, as a good faith measure, it does not take action with regard to the trespass issues.

# Ute Indian Tribe Right-of-Way Experience

## Satisfied partners doing business on the U&O Reservation

Many of the energy companies with whom the Ute Indian Tribe has worked for many years have made statements of support for the new way of doing business on the U&O Reservation. For example, in a June 27, 2005, letter from John E. Dyer and Kyle R. Miller of Miller Dyer & Company, the energy company executives stated: "We are writing to express our appreciation and gratitude for having been included in the start-up talks for Ute Energy….The Tribe is now a respected industry partner, a fact easily proven by the many offers now being received that include, not only the customary bonus and royalty arrangements, but working interest participation. This represents ownership on a new level. While the Tribe retains its traditional compensation, it is now accessing the intellectual and financial capital of multi-billion dollar industry partners and it's participating side by side with them."[60]

At the Section 1813 Consultation meeting in Denver in March, three other energy company executives commented about their cooperative working relationships with the Ute Indian Tribe. Mr. Logan Magruder of Berry Petroleum Corporation spoke of his view that "I don't think the system is broken right now." Further, he said:

> I can't say that I have experience with doing business with many tribes, but I have had a very, very favorable experience with the Northern Ute Tribe. Our company has invested probably $175 million over the past two and a half years. So that requires a lot of drilling. That's over 200 wells. Every well requires a flow line which requires a right-of-way. … I mean it's business as usual on the Northern Ute reservation….[F]or any transaction to go through you have to have a willing seller and a willing buyer and you have to have fair market considerations on both sides of the table. I think that that's what we've tried to achieve and we've tried to achieve a lot of trust in the relationship and if you don't have those components you won't perpetuate the business….We've been very, very effective in our development efforts on the Northern Ute Tribe. They've been very, very supportive. … I think they're benefiting from the efforts. We felt it was very important for them to have a vested interest in the stake. I think someone mentioned earlier that behavior is driven by some type of motivation. In this case it's having a vested interest. So anyway, I'd just like to say that the relationship has been good and we haven't been held up on any right-of-ways that have been going through in an expeditious fashion. You know, I can't say that we've had any problems whatsoever. So I'm - - I guess an example the oil and gas producer from a public company has been doing very well on tribal lands and we appreciate the relationship and look forward to further business.[61]

[60] This letter is attached as Appendix G.

[61] Mr. Magruder's statement from the March 7th 2006 meeting is attached as Appendix H.

# Ute Indian Tribe Right-of-Way Experience

From Bill Barrett Corporation, Mr. Duane Zavadil described his "long working history with the Ute Indian Tribe and our experience, with its emphasis on E&P [gas and oil exploration and production] operations rather than downstream issues, may provide a unique perspective on the matter."[62] He concluded his statement by saying that he sees no rationale for changing the process affecting ROW compensation and think that there is greater risk from the "law of unintended consequences" if a rulemaking affecting ROW compensation were commenced and created such disruption as to produce "negative impacts on our ability to turn our investment into cash flow or to bring gas to market." Mr. Zavadil explained further that:

> BBC [Bill Barrett Corporation] does not find it advisable to prescribe a formulaic approach for ROW compensation. We have been party to many creative and mutually beneficial arrangements for ROW compensation. These agreements were worked out in the spirit of and to the effect of promoting production. We believe it would be impossible to anticipate these widely varied circumstances in rulemaking. BBC has been able to readily obtain Rights of Way for E&P operations on Tribal lands. That is, the time that passes from when we enter into an exploration agreement with the Tribe to the time that we are able to bring a meaningful amount of gas to market, is far shorter on Tribal lands than it is on Bureau of Land Management or United States Forest Service Lands. In our business, predictability is of foremost important. BBC is concerned that the Law of Unintended Consequence will apply and we will suffer greater delays working through Rights of Way under a new process than is currently experience. We believe that in the case of Rights of Way granted in association with development of Tribal minerals, the interests of the Tribe and those of operator are well aligned. Delays over Right of Way negotiation affect both parties negatively. This is useful dynamic for encouraging effective, timely negotiation."[63]

Finally, Mr. Perry Richards, of Questar Gas Management Company, made similarly supportive comments at the Section 1813 Consultation meeting in March. He started by explaining that "Questar is a little bit of a unique company in that we have – we're an energy company. We deal in all the different aspects. We have an exploration and production company. We also have a midstream gathering processing company. We have a FERC regulated natural gas pipeline company, as well as a local distribution public utility regulated pipeline as well." Stating that "we think the current model and the current way things are running are very satisfactory and we've had a very satisfactory experience with the tribe."

> We have a whole lot of right-of-ways that go across Northern Ute Tribal lands dealing not only with the wells that we drill, but also the various levels of pipelines and facilities that we put in along those lines. And we've had a long relationship with the Northern Ute Tribe going back many, many years. Recently we had the

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[62] Mr. Zavadil's statement was submitted to the March 2006 Section 1813 Consultation meetings, and is attached as Appendix I. See also http://1813.anl.gov/documents/docs/Presentations/Bill_Barret_Corp.pdf

[63] *Id.*

> opportunity within the last year or so, because we have such all different types of businesses, we went in and negotiated a global access concession type agreement with the Northern Ute Tribe. Did it basically as the gentleman from Barry Petroleum talked about, we had a willing seller and a willing buyer. And we were able to do that on all of our business so that we didn't have to deal with each one separately, and I found that the tribe was very amenable and very willing to do business and to allow us to conduct our business on their lands under this concession agreement.[64]

## Case Studies – Providing Access to Tribal Lands for Rights of Way

To further characterize how the Tribe's new active methodology has guided its approach to granting access to its land, this section describes recent three case studies. Each involves situations where an energy company had an existing energy facility on a right of way on tribal land within the U&O Reservation. For one reason or another, in each case the energy company and the Tribe decided to discuss a new agreement to grant access to tribal lands. In some cases, the parties desired to clean up disputed instances of trespass; in other cases, the discussions were necessary to remedy disputes over past performance under existing agreements. In all cases, the negotiations resulted in agreement on a renewal or replacement agreement covering the right of way for an existing pipeline, along with other voluntary agreements that expanded the scope and scale of energy-related activities to be undertaken together by the Ute Indian Tribe and the counterparty. In all three cases, surface access was a single component in a complex and sophisticated transaction.

Because these agreements are confidential, the descriptions of them below are been written so as to mask the identity of the counterparties. The descriptions are based on our careful review of the actual unredacted agreements, Ute Indian Tribe internal documents related to them, and interviews with parties involved in the negotiations and/or their approvals.

### *Case 1: Omnibus negotiations and package of agreements for new ROW for an existing pipeline, transportation capacity, and resource development on Tribal surface land and a split estate*

A few years ago, another energy company (which we'll call Energy Company A) came to the Tribe in an effort to improve its working relationship with the Tribe with respect to the company's existing pipeline located on a right of way previously issued by the Tribe. Apparently, at the same time that the Tribe was endeavoring to more actively manage its surface and subsurface assets, Energy Company A was also attempting to better manage its rights and interests relating to operations on

[64] Mr. Richards' statement in attached in Appendix H, along with Mr. Magruder's.

Tribal property. This latter effort apparently stemmed from somewhat contentious private business activities of the owners and operators of the pipeline and subsurface interests, and not specifically from activities involving the Tribe, including disputes over mineral ownership and use of the pipeline. Energy Company A decided it needed to come to the Tribe to request improvements, clarifications, and additions to the ROW, which would add certainty to its operating interests.

The Tribe approached these negotiations in a way that would provide long-term benefit to the Tribe and to do so in a way that would put the commercial interests of the Tribe and Energy Company A in tandem. Specifically, the Tribe approached the negotiations in order to provide for compensation for the use of its surface and its annual cost of governmental oversight, as opposed to the traditional approach of receiving a one-time payment for 20 years of use of its lands. According to the Tribe, the negotiations were tough but cordial. They resulted in a package of five agreements, among and between the Tribe, Energy Company A and various other parties involved in Energy Company A's energy development and management activities.

These agreements, negotiated at or around the same time frame, include:

1. a long-term pipeline concession agreement covering new rights of way and access for the existing pipeline (for gas gathering and transportation), with options for another renewal and with provisions for how future right-of-way applications (for new long-term rights-of-way) will be considered by the Tribe;

2. a long-term gas transportation agreement, which grants the Tribe a priority for transportation of certain of its gas (including royalty gas) being transported on the pipeline and which obligates the Tribe to use this pipeline to transport its gas covered by the agreement.

3. a right for the Tribe to participate in the ownership the pipeline if it ever were expanded.

4. a long-term surface use agreement granting access to Tribal surface lands for the right to conduct exploration, drilling, development, production, operations.

5. a multi-year participation agreement, involving an area of mutual interest that includes non-Tribal minerals below Tribal Surface lands.

These agreements included a number of provisions designed to align the interests of the parties to the agreements, including the following in one or another of the agreements as negotiated by the Tribe and the counterparties:

- In certain agreements, a provision establishing that the Tribe agreed to a limited waiver of sovereign immunity in legal proceedings (defined in the

contract) with respect to certain named activities and issues specifically under the agreement.

- In some agreements, a provision setting forth the process and standards to be used by the energy company in submitting and by the Tribe in reviewing right-of-way applications in the future.
- In most agreements, a statement of applicable laws.
- In some agreements, provisions setting out dispute resolution procedures.
- Some agreements allow for no assignment of the agreement without prior approval from the other party.

Seen as a package, these agreements provide opportunities for the gathering and transportation of natural gas across Tribal surface and the exploration and development of energy reserves underlying Tribal surface lands for the mutual benefit of the Tribe and the producer. In keeping with the complex nature of these agreements, the terms of the compensation arrangements are also complex. Taken together, they included such provisions as:

- An indexed per-barrel (10 cents) and per-mcf (5 cents) regulatory throughput fee paid to the Tribe for oil and gas (respectively) transported through the pipeline;
- No throughput payment for "royalty gas transported on behalf of the Tribe;"
- Automatic termination of the incentives if the tribe terminates the ROW;
- Delivery on the pipeline of specified volumes of Tribal gas.
- Gas transportation for the Tribe at a negotiated tariff.
- An "overriding royalty interest" for the Tribe equal to 2.5% of all oil, gas, hydrocarbons produced, saved, sold from specified properties.
- Upon signing the agreement, payment to Tribe of past unpaid royalty and this minimum monthly payment.

Various provisions in this package of agreements provide for negotiated assurances, rights, obligations, and consideration that make this a mutually beneficial package for the parties to the voluntary agreements.

In summary the Tribe and Energy Company A used six different incentives to accomplish their mutual business objectives: (a) regulatory through-put fees for a ROW renewal for the existing pipeline; (b) capacity priority position for the Tribe's royalty in-kind gas; (c) an overriding royalty to provide a ROW for each well

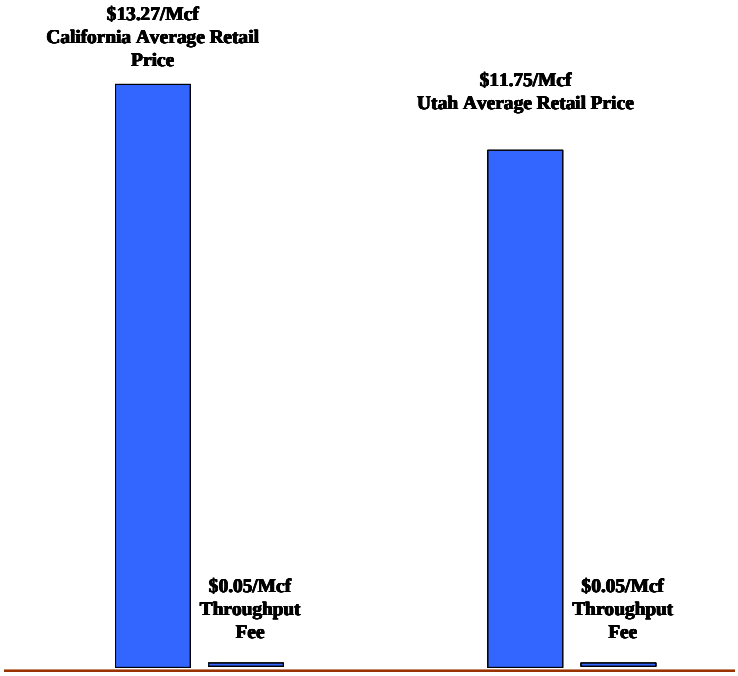
location; (d) a commercial right for the Tribe to participate in any expansion of the pipeline; (e) a right to participate in any new drilling in the area; and (f) preferential transportation cost for any 3rd-party commercial gas.

The Ute Indian Tribe believes strongly that had the Tribe and Energy Company A been required to use a single formula or standard, this transaction would probably not have happened or been resolved or renewed because the company and the Tribe needed to spread the incentives to burden several different revenue sources to make the transaction work for both parties. Had the Tribe entered into an agreement based on BIA appraisal standards or "across-the-fence" compensation analysis, the Tribe would have received a one time payment for twenty years versus the substantial payment the Tribe is currently receiving each month. This latter better reflects the *actual*, transaction-based market value of the land. The latter reflects the full range of value necessary to the Tribe to consummate the agreement, including an incentive to offset the Tribe's annual governmental cost of oversight of the ROWs, as well as providing an incentive that aligns the Tribal and Producer interest.

Setting this throughput fee in context, the 5 cents-per-Mcf regulatory throughput fee paid to the Tribe for gas transported through the pipeline has a small impact on consumers' prices, which providing a significant incentive to align the Tribe's interest in moving gas through the U&O Reservation for consumption in external natural gas markets. By way of illustration, Figure 35 presents a 5-cent-per-Mcf throughput fee with the retail price of natural gas in California, and in Salt Lake City, and Figure 36 provides a representative breakdown of exactly what the significant contributors are to retail natural gas prices, using Utah as an example. These figures make it clear that these rate impacts are hardly visible, with the Tribe's nickle-per-Mcf throughput fee, the impact is 1/5th of 1% of natural gas prices for an average natural consumer in Utah, and an amount approximately equivalent to 1/250th of 1% of retail prices in Utah and California.

## Figure 35

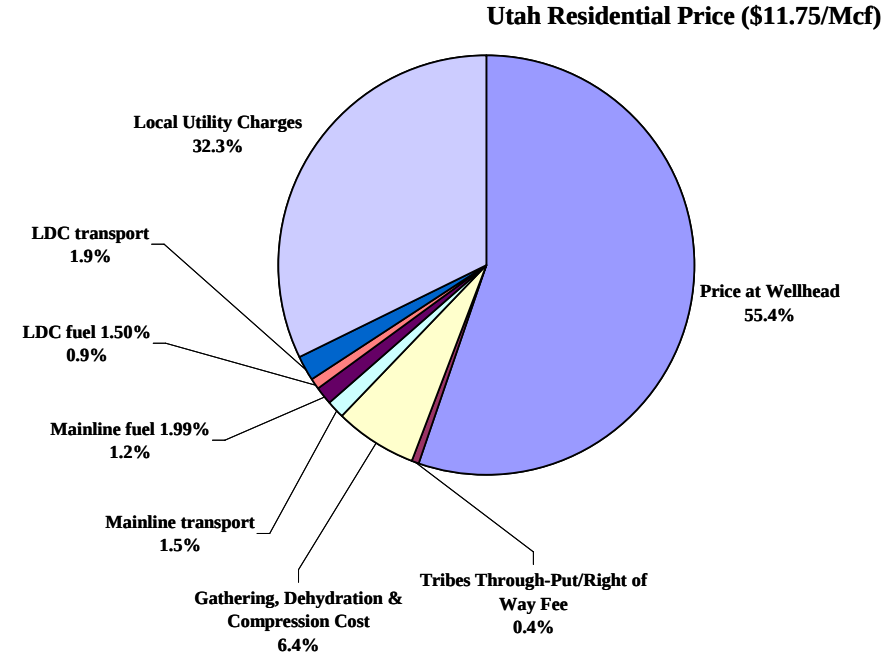
### Comparison of Throughput Fee with Average Price of Gas for Residential Customers




Source: EIA, February 2006 prices.

## Figure 36

### Representative Breakdown of Utah Residential Natural Gas Prices




Source: Ute Indian Tribe, Utah Residential Price from EIA data.

### *Case 2: Renegotiating ROW for an existing regulated pipeline, in conjunction with various other facilities on split estate surface lands of the Tribe*

The Tribe has often worked through potential resistance from companies working on Tribal lands to achieve its management goals. One such example involved a company (which we will call Energy Company B) that was seeking new grants of access as well as renewals of pipeline right-of-way and surface access from the Tribe in order to develop its mineral rights and interests and to transport third-party gas. The Tribe was not eager to approve such grants until Energy Company B also negotiated improved terms on its existing surface use agreements that provided ROW for well locations, gathering systems and facilities and regulated and un-regulated transportation systems, including agreements up for renewal, agreements still in their primary term, and uses in trespass. The Tribe sought a global resolution of all these issues. The Tribe wanted to assure that its cost of providing rights-of-way oversight and management services were being covered by adequate compensation, as part of actively pursuing a strategy in which the Tribe believed it was obtaining fair market value for the use of its lands.

While it took time to get there, Energy Company B eventually sat down with the Ute Tribe to discuss their issues. The first step was to formulate an agreement to allow the company to develop its subsurface interests, conduct third-party gathering operations in its most active field, and more efficiently manage various activities including the renewal of existing and acquisition of new ROW from the Tribe on a global basis (as compared to securing one ROW for each different surface use at a time). The Tribe proposed a concession agreement which would provide, among other things, a "concession area" for the Company so that it could manage all of its different surface use agreements (ROWs) under one master agreement. Further the Tribe provided the company with pre-authorization (subject to permitting procedures) to construct right-of-ways for well locations, gathering systems and facilities and transportations systems within the defined area. This allows for the efficient implementation of the ROW process, which benefits the producer. The parties negotiated this as the framework for perfecting the pipeline rights of way arrangements that were previously in dispute.

For this long-term concession agreement, the Tribe negotiated a fee to be paid to the Tribe. The fee had a floor and a ceiling, with increases in payment levels above the base tied to the volume of production in the concession area and the volume moving through the gathering system. Periodically, the floor and ceiling levels would be reset based on a specified index.

As part of the overall transaction, both parties agreed that in the event of certain types of disputes between the parties, they would attempt to resolve their disputes amicably, but would turn to binding arbitration if discussions failed. Tribal law and regulations would be followed for the permitting and regulatory process. Further, the Tribe granted a limited waiver of sovereign immunity and submission to jurisdiction to outside legal courts for enforcement of an arbitration award.

Eventually, the parties agreed upon the new concession agreement, which set forth the rights of the Company relating to conducting its operations in the concession area. The company would have to make applications to the Tribe for specific grants of access, which the Tribe would need to approve except where there the Tribe and the BIA found that there was good cause to reject it based on cultural, archeological, environmental, historical, topographical, religious, or residential considerations. The Tribe maintains the right to suspend and operation or activity if in its opinion such activity has an adverse effect on the health and safety of its membership or its lands.

With the concession agreement in place, the Tribe and the company had a basis for working together to develop further assets. Both parties had a financial stake in the success of the company's activities on tribal lands. The parties eventually turned to exploring opportunities to do joint ventures, where the two parties contributed access, capital, and technical expertise. The agreements ultimately included giving the Tribe the option to participate in various exploration and drilling activities through an equity or working interest in the enterprise.

The Tribe believes that had the parties been required – by virtue of some new federal law or regulation or other externally imposed "uniform" standard and approach – to structure compensation for access to ROW on a particular type of basis (such as a dollar per rod), the renewal of the ROW would not have resulted in this particular case. This particular transaction was resolved in a manner quite from the transactions described in other cases, even though there are common circumstances among them. The Tribe believes that the differences in outcomes were driven in part by the companies preferences as well as the Tribe's. In the end, these negotiations led to the new rights of way and concession agreements and enabled the Tribe and Energy Company B to develop a highly positive and well-aligned and voluntary set of business interests, to the benefit of both parties.

### *Case 3: Negotiations and agreements to clean up practices and rights for an existing pipeline right of way on Tribal land*

Within the past few years, an energy company (which we'll call Energy Company C) owning a pipeline on the U&O Reservation approached the Ute Indian Tribe to discuss matters relating to its right of way and other matters involving the Tribe's then-existing interest in the pipeline. For various historical contractual reasons relating to this counterparty, the Ute Indian Tribe had the right to approve assignment of the ownership of the pipeline in the event of an attempt to sell such by Energy Company C. At the time Energy Company C approached the Tribe for its approval of the assignment, the Tribe had been concerned about a number of issues relating to contractual performance and trespass involving the pipeline and other related activities affecting tribal lands and subsurface interests. (Since adopting its active management methodology for overseeing and managing its surface and subsurface rights and assets, the Tribe had begun not only to organize and improve its data collection but also to examine more actively the quality of energy

companies' compliance with existing rights of way agreements.) The Tribe and Energy Company C needed to resolve disputes prior to moving forward.

Eventually, in light of the common ground associated with reaching agreement on the concerns involving the trespass claims and on the assignment of ownership, the parties eventually negotiated a set of voluntary agreements relating to renewing (and cleaning up the terms of) the existing pipeline right of way agreement, historical joint venture agreements and other agreements relating to gathering systems and drilling operations on tribal lands, and various other energy development activities.

At the end of what the Tribe has characterized as tough negotiations, the Tribe entered into a package of transactions with Energy Company C, and other companies in partnership or ventures with the new owner of the existing pipeline.

One aspect of the new transactions involved addressing certain historical disputes relating to prior agreements among the parties.[65] The Tribe was able to address the concerns, and in so doing extend the term of the right of way for Energy Company C's pipeline, maintain the original compensation structure for that right-of-way (i.e., the original throughput fee), add an additional length of pipeline to be constructed, and arrange for exclusive rights to explore, drill and gather in a particular geographic "mutual area of interest". Also, a new five-year agreement between the Tribe and parties involved in buying the existing pipeline provided for joint exploration and development, with the company agreeing to a schedule of drilling over the course of several years, with penalties for failure to drill and incentives for contract extensions if the company meets a minimum threshold of wells drilled. The tribe negotiated the

[65] Twenty years ago or so, the Ute Indian Tribe was offered an opportunity by a predecessor company of Energy Company C to become a part owner in a natural gas pipeline to be located on tribal lands. That company made this offer as part of a package of agreements and arrangements that included obtaining access to the Tribe's lands for the right of way for that pipeline (then not yet constructed or in operation); an exploration and development agreement to encourage drilling in a particular gas field within the U&O Reservation; a gas-gathering agreement (to construct and operate the pipeline to transport gas produced from that field to the interstate gas pipeline facility). The Utes would provide the rights of way and access permits; the energy company would provide the capital, construction, operations, management, and maintenance for a pipeline that needed to be in service within five years of the original agreement date. Each party (the Tribe and Energy Company C) had the right to withdraw from the joint venture. There were also other agreements made in parallel and with the intention to provide incentives for developing and gathering resources on or under tribal lands, moving them through pipelines granted access across tribal lands, and providing compensation to the Tribe and returns to the joint venture parties for their participation in the drilling, gathering and transportation arrangements. The compensation for the pipeline right of way was based on a throughput basis, at relatively low levels of compensation because the parties (including the Tribe) agreed for other compensation (e.g., royalties) creating incentives for investment and production. Eventually, over the years the Tribe learned that the final agreement providing for production-related royalties had been delivered to and approved by the BIA in a form that did not include a provision that the Tribe had considered essential to the deal – that being that the gathering agreement was exclusive, thus preventing the energy company from drilling and producing from other wells in the area and transporting such other parties' energy resources using another party's gathering services. In the more recent set of negotiations, returning the agreement to this original structure was important to the Tribe as a way to restore the value in the right of way it had previously granted to the energy company and whose terms, in the Tribe's view, the energy company was failing to meet.

right to participate for a minor percentage interest in the joint venture, with the Tribe obligated to pay the company dollar-per-net acre for any non-Tribal minerals acquired by the company and on a percentage of all costs associated with exercising the Tribe's option to participate in the pipeline and gathering system.

There were several features of this recent package of agreements designed to align the financial interests of the Tribe and the energy company in developing energy resources on the U&O Reservation and via energy facilities on rights of way on Tribal lands. These are the combination of the participation options for the Tribe in the exploration, drilling and gathering activities in the area of mutual interest; throughput fees on gas transported on the pipeline; a royalty payment to the tribe for drilling in the specified areas; grants of right of way and access for the pipeline, along with water use for drilling and roads and surface use related to the covered energy activities; extension options at terms set forth in the agreements; exclusivity provisions tying the two entities' interests together in a specific geographical area of interest; reciprocal requirements prohibiting either party from transferring its interest in the gathering system without prior consent of the other party.

Importantly, to provide assurances to the parties about legal venue and enforceability of the contract, the Tribe agreed to a specific limited waiver of sovereign immunity allowing the Company to enforce the terms of the Agreement. In the event of breach, either party may seek any legal remedy, including specific performance. The contract sets forth the applicable laws (e.g., federal or state or tribal) and venues for taking disputes. And certain other legal concessions were provided among the parties to the agreements.

In total, the compensation for the right of way is bundled into and part of the overall value created by these agreements, with the energy company getting rights and commitments in exchange for the Tribe getting rights and commitments. These agreement resulted in a renewal (or extension) of a right of way for an existing pipeline crossing the Reservation, cleaned up disputes among the parties, created partnerships and aligned economic interests, arranged for complicated development opportunities in split estate situations within areas on and off the Reservation, helped to enhance the access to and opportunities to develop energy resources on tribal lands for external gas markets, and allowed for transportation arrangements for that gas off the reservation. The requirement that the Tribe provide its consent to use its land for energy rights of way created the platform for development of this mutually beneficial business arrangement for the benefit of the Tribe, its members, the energy company, its shareholders and the consumers of its products.

# SELF DETERMINATION AND SOVEREIGNTY: IMPLICATIONS OF THE NORTHERN UTES' APPROACH TO RIGHT-OF-WAY AGREEMENTS (SECTION 1813 ISSUE # 3)

## LESSONS LEARNED FROM THE UTE INDIAN TRIBE: SOVEREIGNTY, CONSENTS FOR RIGHTS-OF-WAY AND SELF-DETERMINATION

### Overview

This report's overview of the historical data on and recent cases involving energy rights-of-way on the Ute Indian Tribe's lands points to a number of important trends and lessons learned. Rather than revealing a serious problem warranting a change in national policy or law (as might have been suggested by the arguments that led to the adoption of Section 1813 in EPAct in the summer of 2005), the evidence from the Ute Indian Tribe suggests that the process is working well for both the Tribe's economic development as well as the nation's energy supplies. The Tribe's use of its sovereign right to consent to uses of its lands for others' rights of way is being used as a tool for tribal self-determination in positive ways. This latter point is particularly important in light of the evidence, above, indicating the minute role that tribal ROW costs play in consumers' energy prices.

With enactment of the Indian Reorganization Act in 1934, Congress launched a new policy for Indian matters that assured that Indian lands would no longer be taken from tribes and rights in tribal lands could only be obtained with the consent of the tribe that owned the lands. 25 U.S.C. 476(e). The Ute Indian Tribe of the U&O Reservation was formed under this law, and as a result its constitution provides that the Tribe, through its Business Committee, must "approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in tribal lands, or other tribal assets."[66]

For many years, the Tribe, like other tribes, passively exercised this authority. For instance, consideration provided for grants of ROWs was frequently calculated on a cents-per-rod basis. For many years, the Tribe, like other tribes, passively exercised this authority. For instance, consideration provided for grants of ROWs was frequently calculated on a cents-per-rod or dollars-per-acre basis. Documents provided to HRA provide many examples of such agreements; in one case, the Utes received $25 per acre a ROW granted in 1966, while in another case, access was granted for a ROW in 1976 for

[66] Ute Indian Tribe Constitution, Article VI, Section 1(c).

$250 per acre. Similarly, leases were granted for minimal consideration and without regard to timely and business-like development of tribal resources from the tribe's perspective; this allowed lessees to hold tribal lands without developing tribal minerals, thus depriving the tribe of royalty payments.

The Ute Indian Tribe, like so many others, has substantial economic and social needs, from maintaining a government, to providing stipends for their members, to financing programs from Headstart to burial of tribal members, that have been funded primarily through the compensation provided to the Tribe from companies having been granted use of tribal lands. (Tribes have very narrow tax bases and federal funding pays only a small and shrinking portion of the pie. We have been told by the Tribe, for example, that the BIA has recently closed the Tribe's detention facility and is considering centralizing tribal health service to locations remote from the Reservation. The Tribe will need to find its own way to pay for these fundamental governmental services.) By the late 1990s, the Tribe's passive management approach to its lands and other resources did not provide sufficient funding for these governmental services. According to the Tribe, for example, in 1999, it had enough funds to pay for only the subsequent month's anticipated expenses.

The Tribe determined that the only way it could do take control of its own affairs in a responsible fashion was to actively manage its resources, particularly its interests in tribal land. As described in the previous chapter, the Tribe prepared its Financial Plan, and approved not only by the Business Committee but also by referendum of the Ute Indian Tribe people. Second, the Tribe took a whole variety of steps consistent with this plan and its desire to actively manage tribal resources for the good of tribal members and future generations. For instance, the Tribe adopted laws and policies to ensure that it did not grant ROWs for less than fair market value consistent with the Indian Reorganization Act and DOI regulations. And the Tribe commenced to approach its access and business negotiations in a more strategic way, fostering greater energy development and more sustainable economic development for the Tribe.

The Tribe has been successful in implementing this program. Through active dispatch of its resources and authorities the Tribe is meeting the needs of its people and it no longer is in a position that it has the money to pay for only the following month's expenditures. To the contrary, the Tribe has broadened its programs and has reserves in place to ensure they are funded into the foreseeable future.

Others have followed the Tribe's lead. Many Tribal partners have got on board. Energy companies have come forward to testify[67] that the system is not only not broken, but it's working well. Additionally, the BIA supports the Tribe's efforts, as witnessed not only in the approvals of the new more creative arrangements that have been negotiated in recent years, but also in the BIA's handbook describing "doing business on the U&O

[67] See the communications of executives of Questar, Berry Petroleum, and Miller Dyer, above.

Reservation." This story demonstrates that the Self-Determination policies that underpin Indian law and the relationship between Indian tribes and the federal government is working and should not be changed. This seems entirely consistent with congressional intent when it adopted Indian Energy Title V of EPAct, described in more detail below. These facts also demonstrate that present law and policy contribute to the Nation's energy development and use, contrary to the impression proponents of change try to create.

### Observations and Lessons Learned from the Ute Indian Tribe example

There are many lessons learned from the Tribe's progressive practices and approaches to energy ROW issues.

- Energy companies have long gained – and are still gaining – access to tribal lands for energy ROW.
- The Ute Indian Tribe has approved access for many companies, many purposes, and many acres.
- The Tribe's active approach to managing its lands and access to them has enabled the Tribe to gain a far better understanding of its own resources, obligations, commitments, opportunities than it had in the past.
- The Tribe's management systems also give the Tribe with information on which to build viable economic development activities for the Tribe, for its members, and with the parties seeking to have access to the resources located within the Reservation for their own commercial interests.
- This transition has meant not only greater involvement of the Tribe in determining the conditions under which it is willing to grant access, but also been accompanied by greater transparency in the process for "doing business on the U&O Reservation."
- This transition has not led to a pattern of denials of grants of access to Tribal lands, nor has it impeded the issuances of consent for rights of way on these lands.
- Recent grants of rights of way and access have been accompanied by creative business solutions, offering the promise of providing enhanced access to energy resources on the Reservation and investment aimed at developing and transporting those resources to commercial energy markets.
- In the process of negotiating rights of way agreements in the context of these commercial solutions, the Tribe has shown a willingness to include various provisions in its agreements that align the counterparty's business interests with the Tribe's, provide various clear legal bases for enforcing the contract provisions, give the counterparty various assurances (such as limited waivers of

sovereign immunity) to reduce contract risk, and enhance the status of the tribe as a commercially viable business partner.

## OTHER CASE EXAMPLES

Other Indian tribes have also begun to adopt new approaches to managing access to their lands to accomplish strategic purposes. While different tribes have approached this issue in different ways, a common thread in many is the tribe's use of its consent powers to provide grants of access to its lands to accomplish the strategic objectives of the tribe.

### Morongo Band of Mission Indians

One example of a new era of constructive working relationship between a tribe and a utility company is the Morongo Band of Mission Indians, near Banning, in Southern California. After describing a history of having the Morongo reservation crossed by many large ROW for utility and other services for which the band received pennies a day in compensation, the Morongo Band's representative stated that his people "have significant experience in producing the mutual benefits that can be achieved when consent is required and utility companies and tribal governments cooperate."[68]

As an example, the Morongo commenter described efforts to negotiate a mutually satisfactory right of way agreement with Southern California Edison (SCE). SCE's high voltage power lines have crossed the Morongo for decades; one right of way (the Devers to San Bernardino No. 1 ROW) expired in the mid-1990s, and other (the Banning to Garnet to Maraschino ROW) expired in 2005. According to Morongo representative, the tribe and the company have been working together "to ensure that there will be no disruption in their delivery of services even though their rights of way are expiring…. [W]e have agreed to extend the use of both lines to 2010, when another easement will also be up for renewal. Negotiations are set to get under way on these rights in 2008. We are working to ensure that there is no disruption in delivery of services." As part of its relationship with SCE, the tribe and the company have negotiated an agreement for the company to install a fiber optic in the late 1990s, and the parties are currently negotiating on SCE's proposal "to modify its existing single-circuit 230-kilovolt lines and make room for the construction of two 500-kilovolt lines."[69]

[68] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Mor_ROW_4_17_Complete.pdf

[69] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Mor_ROW_4_17_Complete.pdf

### Southern Ute Indian Tribe

Another example of successful negotiations was described by is the Southern Ute Indian Tribe's "Red Cedar" case, which has been described in presentations made as part of the Section 1813 consultation process. The Southern Ute Indian Tribe's Reservation sits in Colorado, within the San Juan Basin area where significant oil and gas reserves are located. As explained by the Chairman of the Tribe, Mr. Clement Frost, "Our reservation is blessed with substantial natural resources and natural gas reserves, and since the early 1950's our tribe has been actively involved in its development. We also have several major interstate natural gas pipeline and electrical transmission lines that cross portions of our reservation. Over the course of the last 60 years we have consented to the issuance of thousand of energy related rights-of-way."[70]

Interested to know the resource development possibilities in their area, the Southern Utes studied the potential for gas, including unconventional gas from coal bed methane wells. According to the representative from the Southern Utes, the Tribe's studies indicated "substantial reserves and a forecast of massive increases in gas production rate," which were subsequently confirmed by other producers in the area.[71]

To take the resources out of the region, new gathering and transportation capacity would be required. But most of the existing pipeline companies in the area were not inclined to make the investment to expand the take-away capacity in the time frames the Tribe to take advantage of various tax credits that were then set to expire.

By contrast, one company, WestGas (a subsidiary of Public Service Company of Colorado (PSCO)) showed interest in rapid expansion. To create the incentive for that expansion, the Tribe granted West Gas ROW access on a reservation-wide basis in exchange for a throughput arrangement.

Meanwhile, PSCO decided to sell WestGas. To participate in the purchase process, the Tribe developed a partnership with the Stephens Group. This partnership eventually purchased the WestGas system for $87 million in 1994, the Tribe/Stephens partnership created Red Cedar Gathering Company. Under the partnership, the Tribe extended the duration of all Red Cedar rights-of-way for a term of 42 years. Red Cedar, in turn, aggressively expanded the gathering system "ahead of the producer's gas development plans."[72]

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[70] Statement of the Honorable Clement Frost, Southern Ute Indian Tribe, at the Section 1813 Consultation meeting in Denver, March 8, 2006. http://1813.anl.gov/documents/docs/Meetings/7_March_1813_Scoping_Mtg_transcript.pdf

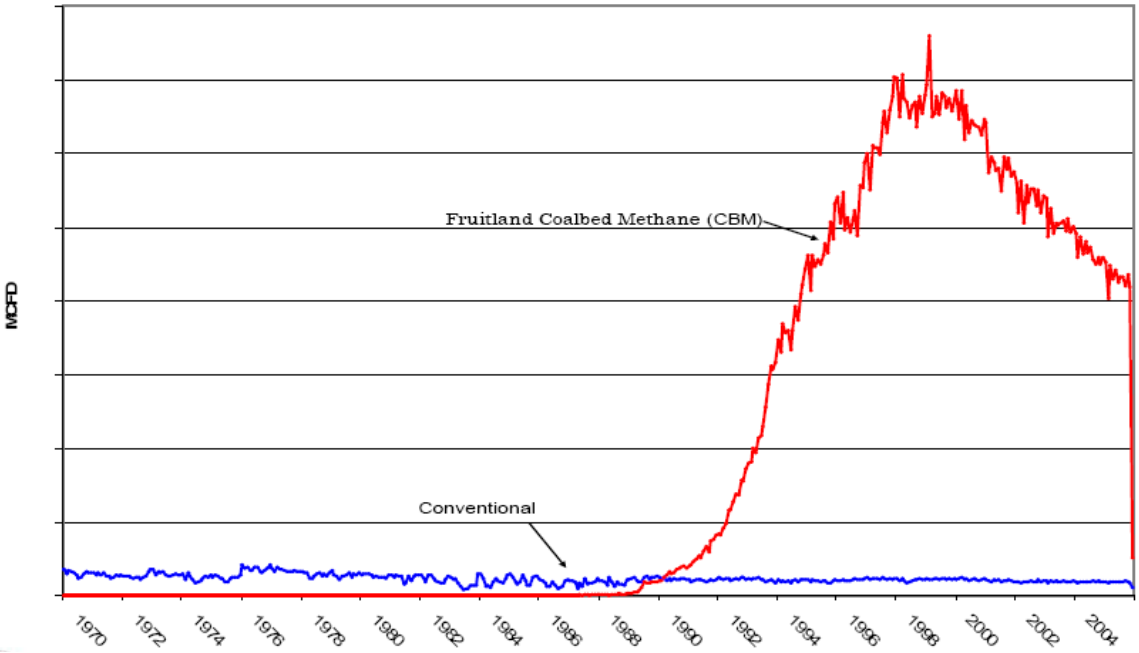
[71] Presentation of Robert Zahradnik on behalf of the Southern Utes, at the Section 1813 Consultation meeting in Denver, April 18, 2006. http://1813.anl.gov/documents/docs/Presentations/apr06mtg/SouthernUteRedCedar.pdf

[72] *Id.*

According to the Southern Utes' representative, the Red Cedar system's pipeline mileage increased nearly six fold from 1994 to 2006. Increased gas production skyrocketed (as shown in Figure 37), as a result of opening up the coalbed methane resource. Over the same period, the number of compressor stations went from six to 88; the number of well connected increased three fold from around 300 to over 1000; treatment capacity rose grew from around 100,000 mcf per day to 550,000 mcf per day; the yearly reinvestment rose from approximately $13 million a year to approximately $35 million a year, with a cumulative reinvestment of over $180 million during that period.[73]

**Figure 37**

**Natural Gas Production – Ignacio Blanco Field**
**1970 - present**




Source: Presentation of Robert Zahradnik on behalf of the Southern Utes, at the Section 1813 Consultation meeting in Denver, April 18, 2006. Available at http://1813.anl.gov/documents/docs/Presentations/apr06mtg/SouthernUteRedCedar.pdf

The Southern Ute Tribe has described the Red Cedar case in the following terms:

> Red Cedar's success helped not only the Southern Ute Tribe; it was a key part of the producers moving their gas, allowing them to achieve phenomenal returns on their investment. It also greatly benefited the average gas consumer in the western U.S. by ensuring substantial gas volumes reached market more economically, more quickly, and with greater certainty. Red Cedar is a compelling example of the importance of Tribes having ROW consent rights. The Red Cedar example points to how Tribal self-

[73] *Id.*

determination in this area can work for the good of all involved. But for the consent requirement, the Tribe and its partner would not have been able to acquire the WestGasSystem. The acquisition of the WestGasSystem allowed the Tribe to align management of energy resource development with gathering and transmission of energy products. Strategic alignment of energy resource development and gathering and transmission provided consumers significantly accelerated availability of natural gas products. The partnership between industry and the Tribe was a financial success for the Tribe and its partner.[74]

## BEST PRACTICES FOR RIGHTS-OF-WAY ON TRIBAL LANDS

Drawing upon the Ute Indian Tribe's and others' examples, there are a number of "best practices" for tribes' management of energy companies' access to reservation lands. For example,

- Adoption by the tribe of a strategic framework for its natural resource management, including tribal lands and any subsurface mineral rights.
- Data collection and management by the tribe about it resources, the ROWs it has granted, the terms and conditions of such rights of way (including counterparties, purpose, size, type of ROW, etc.).
- Preparation and publication of "Best Practices" handbook for doing business with the tribe.
- Development of and adherence to a transparent process for granting and managing grants of access to tribal lands;
- Negotiation and adoption of legal agreements that set forth the obligations and commitments of the tribe and the counterparty(ies), including the procedures that will be followed to resolve disputes between the parties.
- Inclusion in those commercial contracts a variety of terms that serve to develop a platform to align the interests of the two parties, to clarify and bound areas of risk, to mutually bind them to the agreement.
- Negotiation between the parties to establish appropriate compensation for ROW and grants of access, using such negotiations as an opportunity to find creative solutions that bring monetary as well as other value(s) (including intangible ones) to both parties.
- Encouragement of both parties to come to the negotiations process with an attitude that each entity need not agree with the other's values but that if they

[74] *Id.*

want to do business with each other, they have to respect each other and find areas of common ground and common interest.

- Approaching the negotiations process in a "give to get" point of view, so that (for example) if the tribe wants to get more compensation and consummate a transaction, it may need to give contractual provisions which clarify dispute-resolution processes, and if the energy company wants to get approvals to conduct its business on tribal lands, it needs to be creative in thinking about what the tribe needs in order to accomplish that goal.

- Having energy companies approach the process of obtaining approvals to operate on tribal lands with the same types of cultural sensitivity, strategic creativity, customized business practices, expectations of "local content" or other requirements to inspire interest from the host government, that is typically understood as necessary, appropriate and good business practices when attempting to do business in most other countries, rather than thinking of tribal lands as just another part of the U.S.[75]

- Understanding and accepting that business under the terms of the commercial ROW contract require that each party needs to respect, manage, support and comply with its responsibilities and obligations.

- Understanding that adoption of "best practices" like those described above actually send the message *inviting* companies to do business with a particular tribe – through developing partnerships of mutual benefit – rather than what has been alleged in the Section 1813 debates (i.e., the having to negotiate with tribes sends the message "we don't want your business).

- Appreciating that the "best practice" approaches outlined above help to create a politically stable environment for tribal leaders within their memberships, by supporting a process in which tribes may negotiate mutually beneficial agreements with energy companies rather than forcing tribes to accept an energy-related transaction (such as a right of way) based on externally imposed expression of "value."

## IMPLICATIONS FOR TRIBAL SOVEREIGNTY AND SELF-DETERMINATION

Additionally, there are many other positive outcomes from adoption of such "best practices." Perhaps most importantly for the Ute Indian Tribe, these approaches have

[75] A recent article in *Oil and Gas Investor* concludes with a similar point: "Investors in energy development projects located on Indian lands are well advised to be familiar with tribal custom and law as well as federal law related to Indian tribes. Familiarity with each is the key to unlocking natural resources on Indian land." Appleby, at 76.

helped the tribe determine and chart its own economic development path and support its long-term goals for its people and the use of their natural and other resources.

The Tribe views its movement to actively manage its resources as the key to the long-term economic success. These resources include its land and the rights associated with it, the Tribe's mineral resources and rights, its sovereign ability to issue or withhold its consent to use any of its assets, its people, their talents and skills, their culture, and many other resources. As a Tribal Resolution put it when the Tribal Business Committee adopted its Financial Plan several years ago, the plan's goal is: "To provide the Tribe with an economic strategy that will fund a core government and baseline Tribal Member benefits, while at the same time optimizing available Tribal resources to achieve greater socio-economic well-being for both current and future Tribal Members." The new, active "management methodology" is key to the goal of maximizing "the Tribe's resources and achieve optimal implementation and execution of the Financial Plan."[76]

The Tribe has charted and is now navigating its course. This involves leveraging and making best use of its resources and the revenues they support and generate to fund its core government services, as well as health, retirement, housing, and other education benefits for its members. The Tribe's approach exemplifies the best democratic norms and standards, where a citizenry empowers its government to decide how to organize the country's affairs for the public and private benefits of its people. In fact, what the Tribe is doing is not that different from what shareholders of a corporation expect their company's board of directors and management to do on their behalf. In all of these cases, an organization's tangible and intangible resources – its raw materials, its people, its know-how, its leverage in community affairs, its will – are used to meet the short-term and long-term aspirations and needs of its members.

The recent Indian Country literature suggests that what we've observed in the Utes' recent history of "active management" of its natural resources is similar to other recent 'success' stories among the tribes. For example, the authors of a recent book describing the path of many tribes to move themselves forward on their own terms, observe that "…tribes are engaged in a process of safeguarding recent progress while coping with daunting poverty and ongoing challenges to tribal authority by: Strengthening their institutions of governance to more effectively assert their sovereignty; Diversifying their economic strengths to better improve their citizens' well-being; Innovating their social policies by drawing upon the experience of both the Indian and non-Indian worlds; and tapping and developing their cultural resources – traditional and emergent."[77]

Even more relevant is the study of different approaches to economic development on American Indian reservations, which concludes that "One Works, the Other Doesn't."

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[76] Ute Indian Tribe Ordinance 01-007, Paragraphs 5, 6-9.

[77] Eric Henson and Jonathan Taylor: *Native America at the New Millennium*, publication of the CIP-NANM, July 11, 2001, page 7.

The one that works bears a close resemblance to the Ute Indian Tribe's "active management" methodology for its natural and financial resources. The study by Cornell and Kalt describes the process "that works" as one in which a successful tribe has

> backed up its ambitions with changes in government and policy that made the reservation a place where both outsiders and tribal members wanted to invest. This was the beginning of an economic renaissance….a much bigger story—the revolution that is underway in Indian Country. As much of the world knows, American Indian nations are poor. What much of the world doesn't know is that in the last quarter century, a number of those nations have broken away from the prevailing pattern of poverty. They have moved aggressively to take control of their futures and rebuild their nations, rewriting constitutions, reshaping economies, and reinvigorating indigenous community and culture. Today, they are creating sustainable, self-determined economies and building societies that work.….These [are] two very different approaches—the old and the new—to reservation economic development. Not only do these approaches differ, but they have produced dramatically different results. In short, one works, and the other doesn't. The one that doesn't work we call the "standard" approach. Our version of it is broadly based on federal and tribal practices developed during the twentieth century and still prevailing today. The one that works we call the "nation-building" approach. Our version of it is based on extended research on the breakaway tribes whose economic performances have been so striking in the last three decades of the twentieth century....[78]

This literature is highly relevant to the situation that has led to this Section 1813 study – that is, tribes' recent efforts to assert the sovereignty in the context of considering whether and under what terms to approve energy rights of way on their land. This new effort is certainly a change in the old ways in which energy companies have obtained rights of way and other grants of access on tribal lands. But the effort is providing meaningful and positive results for tribes, even as it is shown to have minuscule impacts on consumers' energy prices and offers the opportunity for greater access to and development of energy resources located on tribal lands.

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[78] Stephen Cornell and Joseph P. Kalt, "Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't," JOPNA No. 2005-02, 2006, page 1-3. By contrast with the "process that works," which is described above, the authors describe the one that "doesn't work" as having the following attributes: "Characteristics of the Standard Approach. This approach has five primary characteristics: it is short-term and non-strategic; it lets persons or organizations other than the Indian nation set the development agenda; it views development as primarily an economic problem; it views indigenous culture as an obstacle to development; and it encourages narrowly defined and often self-serving leadership.…We have called this the "nation-building" approach, thanks to its dual focus—conscious or unconscious—on asserting tribal sovereignty and building the foundational, institutional capacity to exercise sovereignty effectively, thereby providing a positive environment for sustained economic development.[fn] Once again, we can generalize from a variety of cases and details to identify five primary characteristics of the nation-building approach: it involves comprehensive assertions of sovereignty or self-rule; it involves backing up sovereignty with effective governing institutions; it matches those institutions to indigenous political culture; it has a strategic orientation; and it involves a leadership dedicated to nation building. " *Ibid.*, pages 4, 11.

## Sovereignty and Self-Determination

What are the critical success factors for "self determination" and "nation building" as they have been expressed in the Utes' experience with rights-of-way management? We make these observations.

- The Ute Indian Tribe's ability to move to actively manage its land and other natural resources could not have occurred without the element of tribal consent to granting access to its lands. Without it, the concern would be that another entity's issuance of grants of access would be treated only as something narrowly necessary for the energy companies and their consumers, and not something that should also be used by a tribe to help them determine their own economic destiny in ways that provide them with their own values.

- The issue of tribal consent is an inducement to good agreement, since it keeps energy companies motivated to stay at the table to find agreement, rather than treating such negotiations as merely a stepping stone with the possibility to move to another venue for decision, if such other entity actually played the role of final arbiter of the failure of the tribe and the energy company to agree.

- Tribal consent and its exercise in mutually acceptable rights-of-way agreements between tribes and energy companies have the potential to play an important role in the very political and institutional stability that both parties seek from the other side. Having tribal leaders make rights-of-way decisions based on their determination of what is in the best interests of the tribe – as opposed to forcing tribal leaders to accept a right-of-way agreement adopted and/or imposed on the tribe by others and then to defend it in the event of tribal disapproval. Additionally, having energy companies make agreed-upon, voluntary rights-of-way contract that enhance the prospects for good business relationships with a tribe whose land is being accessed for the benefit of others.

- In the pursuit of workable and mutually beneficial agreements between tribes and energy companies, both parties may be motivated to be creative and to think outside the box in order to find common ground. This may involve bring other types of company personnel (e.g., commercial business personnel, as opposed to simply rights-of-way and real estate personnel) and other types of partners (e.g., other parts of the energy company's organization, or other third parties who may be able to be part of the solution).

- Linking tribal consent, best practices on rights-of-way negotiations, creative problem-solving on grants of access to tribal lands, and tribe's economic development strategies offers the opportunity for success stories not only in enabling rights-of-way through Indian lands but also in supporting tribes' contribution to solving the nation's energy supply challenges and their own goals for sustainable economic development.

The implications of these cases are that: where tribes are given the opportunity to exercise their sovereignty – their own decision making, governance, joining business interests with self-government, in combination with retention of their sovereignty/consent

requirement for use of their land – in a way that aligns their interests with those of companies trying to use their land for energy development, supply or transport, then it can create a win-win situation. It supports tribal economic development *and* self-determination. It provides energy companies with access to tribal lands and the opportunity to have long-term, mutually productive partnerships to develop energy resources (as compared to contentious access struggles). It provides consumers with the benefit of access to greater North American energy resources through and located on/under tribal lands. Economically viable tribal enterprises provide economic benefits to region and communities beyond Indian Country.

The bottom line? To us, it is clear that "self-determination" as the means for arriving at appropriate compensation arrangements can enhance rather than inhibit the nation's access to energy resources. Further, it will simultaneously enhance the long-standing national goal of Indian self determination. Encouraging tribal sovereignty and self-determination as the means to shape ROW access terms and compensation arrangements allows for an alignment of interests between the parties that is mutually beneficial.

These interests are wholly consistent with past presidential and recent congressional declarations of the importance of tribal self-determination for meeting Indian and well as energy goals.

> "We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self determination." President Lyndon Baines Johnson, 1968.[79]
>
> "This administration intends to restore tribal governments to their rightful place among governments of this nation and to enable tribal governments, along with State and local governments, to resume control over their own affairs" President Ronald Reagan, 1983.[80]
>
> Energy Policy Act of 2005, Section 2602. Indian Tribal Energy Resource Development. (A) Department Of The Interior Program. — (1) To assist Indian tribes in the development of energy resources and further the goal of Indian self-determination, the Secretary shall establish and implement an Indian energy resource development program to assist consenting Indian tribes and tribal energy resource development organizations in achieving the purposes of this title. . …"

[79] ,Weekly Compilation of Presidential Documents, 1968, Volume 4, No. 10, (Washington DC, Government Printing Office, 1968).

[80] Statement on Indian Policy, 19 Weekly Comp. Press Doc., 98 (January 24, 1983)

# STANDARDS AND PROCEDURES FOR FAIR AND APPROPRIATE COMPENSATION (SECTION 1813 ISSUE # 2)

In light of the prior observations about tribal consent and energy rights-of-way on tribal lands, we now comment on the third subject identified in Section 1813: What standards and procedures are appropriate "for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land"? We start by laying down a framework for fair compensation, identifying the alternative approaches to "valuing" rights of way, and then examining what approaches satisfy the criteria in that framework.

## CONCEPTUAL FRAMEWORK FOR FAIR COMPENSATION: KEY ELEMENTS OF VALUATION

### The concept of "Fair Market Value"

Our starting premise for describing what standard is "appropriate" is the body of current regulations and law. U.S. Code Title 25 states that "the Secretary of the Interior is empowered to grant rights-of-way for all purposes over any lands held by the United States and set aside for the benefit and use of American Indians." Further, Section 325 of U.S. Code 25 states that "No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior." Finally, "CFR § 169.3 Consent of landowners to grants of right-of-way. (a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe."

In light of the legal platform of tribal consent, then, what constitutes "fair and appropriate compensation?" The answer is found in the actual transactions that result when both a Tribe and the entity requesting the ROW agree to the terms of access to Tribal lands. There is comfort in this perspective on defining "fairness.' This is how we typically value commercial transactions where willing buyers and sellers agree to the terms of by which goods and services are provided by one party for another. From this perspective, "fair and appropriate compensation" is the compensation resulting from an agreement between a willing buyer and willing seller, where there is no special affiliation or relationship between the buyer and seller that would distort each's motivation to act in its own best interests and where there is no compulsion or pressure to consummate the transaction.

Thinking about "fair and appropriate" compensation in this way is entirely consistent with the basic definition of "fair market value" in the economics literature. While there

are various methods for valuing different types of transactions or assets,[81] there are some commonly understood features of the concept of "fair market value," "market value," or the value that an asset would obtain in a marketplace.[82,83]

The concepts in this general definition of "fair market value" or "market value" are applicable to valuation of energy ROW on tribal land for several reasons. In the process of agreeing to grant a ROW on tribal lands, neither party can require the other party to enter into a transaction unless they both agree to the terms of access and compensation. The tribe must give its consent before there is the opportunity for a lawful grant of access. Presumably, a tribe will only agree to a compensation arrangement if its decision makers determine that the offer provides "fair and appropriate" compensation. The same can be assumed to be true for an energy company with whom the tribe signed an agreement. Assuming that the grant of access creates some economic value and the negotiating process is without coercion and fraud, and with reasonable disclosure of the information, then the compensation and terms of access emerging from a negotiation will be beneficial – that is, "fair and appropriate" – to both parties.

Given this legal platform by which ROW are granted, the proper standards and procedures for determining "fair and appropriate compensation" require only a set of standards for assessing the reasonableness and fairness of the negotiating process itself. Assuming the parties are not coerced, that there is no fraud, and that both parties have sufficient resources to conduct fair negotiations, this negotiating process is likely to be the most reliable approach to determining "fair and appropriate" compensation, particularly given the unique circumstances surrounding many grants of access and the opportunity for parties to create the most economic value through the negotiation process. Assuming these standards are met, there is no need for the outcome to be compared to any "objective standards" since such a standard, at best, would simply attempt to replicate the outcome of the transaction itself. Any difference between values produced in

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[81] For example, corporations invest in a variety of types of assets, including real estate, equipment, licenses, other businesses, securities, intellectual property, and so forth. Some assets are tangible, meaning that they are physical assets. Others are intangible, including intellectual property, a brand name, and "goodwill." To determine the worth or value of an asset, there are many approaches, techniques, and methods, including appraisal, comparables, cost, opportunity cost, income generating potential, discounted cash flows, options valuation, and so forth. Some are more appropriate than others to a particular valuation problem. See, for example, Richard Brealey and Stewart Myers, *Principles of Corporate Finance*, McGraw-Hill, 1996.

[82] "Fair value is the price at which an asset or liability could be exchanged in a current transaction between knowledgeable, unrelated willing parties." According to the Financial Accounting Standards Board (FASB), this definition comes in the context of providing "guidance for how to measure fair value." FASB, Exposure Draft – Proposed Statement of Financial Accounting Standards, Financial Accounting Series, NO. 1201-100 JUNE 23, 2004, pages i and 2.

[83] "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to but or sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the time wherever appropriate." U.S. Internal Revenue Service, 26 CFR Ch.1, § 20.2031-1.

such an assessments and the actual outcome of negotiations would need to be viewed with some suspicion. While such standards and valuation methods may be necessary in the event that standards for fair and appropriate negotiations are not adhered to by both parties to determine potential remediation, they have no apparent role in assessing the outcome of a negotiation between two willing parties that maintain these negotiation standards.

It is unclear under what circumstances an alternative approach to determining compensation would be preferred to this negotiation process. Because the tribe is a sovereign government and a third party seeking to transact with the tribe has no rights of eminent domain on tribal land,[84] there must be a meeting of the minds on compensation and the other terms of access and use in order for the parties to reach agreement. This is akin to a situation where, say, an energy company sought to use land under the ownership of or held in trust by another foreign government. When doing business in another country, a private company from another country is often be required – and typically expects it will be – to make arrangements with a local partner in order to satisfy the "local content" requirements of that foreign country. Another example: when a *merchant* electric transmission company (i.e., not a utility which enjoys the right to request eminent domain and the ability to take private land for a public purpose) doing business in one state seeks to obtain approvals and permits to put in a transmission line crossing a second in order to serve customers in a third state, it is commonplace for that company to have to create sufficient benefits for consumers or others in the second state in order to make it worthwhile for that state to issue the permits as "being in the public interest." In neither of these examples may the private party presume that it will receive permission to carry out the hoped-for activity without the express and voluntary approval of the government. Without such agreement or approvals, the transaction does not take place. The same should be considered in circumstances, such as they now exist in the U.S., where sovereign tribal governments hold the right to consent to others' uses of their lands. Where agreement does occur on the voluntary basis on which it must inherently proceed, it can only be interpreted as having been fair to both parties.

In recent discussions relating to use of tribal ROW, many have argued that "fair market value" is implicitly or explicitly equivalent to the "appraised value of the property."[85] Ignoring for the moment the difficult question of what constitutes an appropriate appraisal for land for which no eminent domain powers exist, the guidance under federal regulations governing rights of way on tribal lands is that such an appraisal-based fair market value is the floor, and not the ceiling, for determining compensation for the use of tribal lands for rights of way. Chapter 25 of the US Code makes this clear: "§169.12

[84] "Needless to say, there are some kinds of properties that appraisers find really difficult to value – for example, nobody knows the potential selling price of the Taj Mahal or the Parthenon or Windsor Castle." Richard Brealey and Stewart Myers, *Principles of Corporate Finance*, McGraw Hill, 1996, page 11 (footnote 1).

[85] See, for example, http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRJShepard.pdf.
http://1813.anl.gov/documents/docs/Presentations/apr06mtg/EdisonElectricMegHunt.pdf
http://1813.anl.gov/documents/docs/Presentations/apr06mtg/BPA18134-19-06.pdf

Consideration for right-of-way grants. Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal." In light of the various strategic and other values that consenting parties may bring to bear in reaching an agreement to use tribal lands as part of larger energy agreements, it is difficult if not impossible to imagine how traditional appraisal practices can reflect what motivated parties may achieve in transactions they create for themselves. Even if 25CFR169 can be interpreted to mean that "fair market value" is the appraised value of the property, that appraisal is the floor but not the ceiling for determining consideration.

### Considerations of parties in entering into transactions at "fair market value"

Given that "market value" reflect the price, terms and conditions of the deal to which the parties agree, the value reflects the many elements of the entire transaction that create economic surplus for both parties to share, and impose costs and foreclose options for each party individually. Each party may place different values on particular elements. Some of these elements are directly monetary; others may be less concrete. This makes it difficult to find true comparables for a grant of access to tribal land for use in an appropriate appraisal process.

The market value of the agreement is tied to the economic surplus generated by the grant of access. The economic surplus must reflect the increased financial profits and other benefits resulting from the economic activity made feasible by the grant of access. However, it must also account for the individual costs to each of the parties and the options foreclosed by each of the parties choosing to participate in the agreement. All of these factors help determine the size of the gains from the agreement, as well as the how those gains are split between the two parties. Thus, both parties, when negotiating the terms and conditions of such an agreement, take account of the full costs and benefits to both parties as they affect the value to each party of entering into the partnership agreement. Further, given these costs to each party, the negotiating process insures that both parties are actually benefited by the grant of access given the many costs to both parties.

For the tribal "seller" (in reality, the tribe is the *provider* of land for the right of way, since the tribe cannot "sell" its property), there may be multiple tangible and intangible values attributable to the land in question. Across tribes, these values might include one or more of the following:

- the "*use value" of the land*, which may reflect the land's intrinsic ability to provide a stream of net revenues or income or other non-monetary values important to the tribe and associated with use of the land asset for a particular

purpose. When the land owner/provider is considering granting access that excludes other uses, this use value reflects the *highest and best use* associated with the land, or the *"opportunity cost"* associated with not using that land asset for another, more valuable purpose. For a tribe considering whether to make its limited land resources available, the tribe compares the surplus gained through the "use value" under the proposed access agreement against the value of the alternative "best use" of the land. To motivate the land owner to make its land available to another party, the price and other terms of the transaction at minimum must compensate the owner for the "lost opportunity" of not pursing this alternative use.

- *replacement cost,* or – for the land owner – the out-of-pocket cost to obtain another land asset of equal usefulness or value to the tribe;

- the "*option value" of the land,* reflecting the value to the land owner of maintaining the option to use the land for another purpose in the future. Granting access may foreclose future development options that may, after the fact, be more profitable than the activities actually undertaken. Given this uncertainty, a buyer must pay a premium to induce the owner to give up this option;

- *recovery of damage costs,* or *"externality costs"* or any out-of-pocket costs and/or inherent devaluation of lands or other assets introduced by the use of the land for the proposed purpose (e.g., an right of way), including costs imposed on adjoining lands, or costs imposed on the tribal government to manage and oversee the right of way;

- *governance and administrative costs,* or any incremental expenses to the landowner where it is also the government, with responsibilities to manage and oversee grants of access and to provide services necessary for firms and other entities granted access. A tribe is both landowner and the sovereign government responsibility for providing various governmental services which would, on private property, be carried out by at least two entities (the landowner, on the one hand, and the various levels local government, on the other), each of which is compensated for what it provides.

- *strategic value of the transaction,* or the value of using the land transaction to accomplish some other, non-land-related purpose. In the case of a decision to grant access to land for an energy right-of-way, the Tribe could have a strategic objective for entering into other business relationships with the firm requesting the right of way. Achievement of such a strategic objective might lead an asset owner to accept a lower monetary compensation for the right of way. There are many elements to such strategic values, particularly since the Tribe and outside entities are involved in multiple interactions across right of way, development, and other issues. Consequently, the Tribe values the maintenance of these relationships for the development of future rights of way and the development of Tribal resources in cooperation with outside partners. Since the Tribe has relationships with most outside entities on multiple operations across Tribal lands,

the tribe has *sunk relationship costs* that span these different operations; arbitrary or short-sighted actions in one negotiation will lead to negative spillovers affecting all these relationships. Further, the Tribe values its *reputation* as it tries to develop new partnerships with other firms.

- *the value of other intangibles*, or things that are important to the buyer but are not concrete or monetary items.

On the other side of the transaction, the "buyer" (or, for tribal land, the "grantee" of the right of way) similarly may have multiple bases for determining the value of the land to that buyer. These might include some combination of the following types of considerations, any of which may be important to a particular buyer:

- the *use value of the right of way* to the buyer, such as the income-producing or net-revenue-generating potential of the activity to take place on the land. Both the buyer and seller will be aware of the value likely to be created by the grant of access and, correspondingly, include such values in their assessments of the surplus created by the proposed agreement;

- the buyer's *avoided costs*, or the net costs not incurred by obtaining rights of access to a particular area of land. These costs would reflect those the buyer would face if it had to use another area of land. This is a common calculus involved in traditional, voluntary real estate transactions, and which is equally applicable to a situation facing a holder of a right of way on tribal land, who is facing the end of the term of its grant of access. In these common real estate situations, the decision facing a tenant at the end of the term of its existing lease is whether to pay then-current rental prices and attempt to retain the same office space and the use value of any investment in furnishings, fixtures, and so forth made at that location, versus whether to pay a new rental price at another property, taking away any salvageable investment made at the prior property, and incurring moving costs, inconvenience, any new costs to outfit that new rental space, and any other costs to occupy the new property over the life of the future term of the lease. In this very common example – one that occurs routinely in real estate and other environments – the tenant has no right to stay beyond the term of its agreement with the land owner, and all of the costs the tenant incurred in the past to use that space are sunk costs, from an economic point of view. The economic choice the tenant (or buyer) then faces is whether the going-forward costs of attempting to stay at the present location (at the price demanded by the landlord) is more attractive than relocating to another property and incurring all of the costs attendant such a decision. The economics of the two options affects the buyer's (or tenant's) willingness to pay a particular amount for the lower-cost option. In an eminent domain environment, these might include the legal costs avoided in condemning a piece of land, which might cause the buyer to be willing to pay more to obtain a parcel in a consensual transaction. The choices facing the land owner reflect similar considerations, although the owner, wanting to fully utilize the property and minimize turnover (which gives rise to costs for the owner as well as tenant) must consider costs such the relationships with existing tenants

that can observe the treatment of other tenants on the property and the reputation within the broader community that it must rely on to maintain tenants for the property.

- the buyer's *substitution or replacement costs*, or those costs that would have to be incurred to replicate the service(s) or activities or revenues that would have been obtained through use of the right of way. In practice, this is similar to the avoided-cost consideration described above.

- the buyer's *opportunity costs*, or the combined value of the out-of-pocket costs spent in obtaining the asset, in combination with foregoing the value of the other uses to which that money could have been put. For example, if using funds to pay for a particular investment or asset or service means that the returns associated with use are lower than the returns achievable through another investment, then the income or revenues or earnings foregone are the opportunity costs of pursing the first option.

- the *strategic value* of the asset to the buyer, or the value of the asset to accomplish strategic objectives of the buyer, including entrance into a new market. One buyer may be willing to pay more for a particular asset than would another buyer, if the first were seeking to accomplish strategic goals or make use of efficiency gains not available to the second prospective buyer.

- the value of other intangibles of importance to the buyer.

The considerations of sellers and buyers (or, in the case of use of tribal lands for rights of way: the grantors and grantees) are complex, and figure into each one's motivations to enter into particular transactions for particular prices. In the absence of eminent domain (which gives the buyer or acquirer of land the presumption of being able to obtain access to the land over the objection of the land owner and to obtain it for appraised value), the parties to an actual agreement will be the ones to decide what is price is fair compensation for the right-of-way transaction. This is, as often stated in economics textbooks, the essence of the concept of "fair market value": the price obtained in an actual transaction by a willing buyer and a willing seller, in the absence of compulsion. In each voluntary transaction, a willing buyer and a willing seller will have determined for themselves what is fair – or the transaction would not have be consummated. This then has to be the basis for determining "fair market value" in the context of applications for use of or renewals of rights of way for tribal land.

In the end, then, the value of a particular right-of-way transaction to a particular tribe is whatever price and other terms and conditions it takes to be willing to enter in the transaction at that time and at that place with a particular counterparty. These may not be tied directly to the *land* value itself, if what the land provides for the tribe is the opportunity to pursue some other goals in a transaction. Illustrative examples of such strategic goals might include obtaining electric supply for tribal members, becoming a partner in other unconnected business activities, or providing jobs for tribal members. These are but illustrations of strategic goals, since the range of possible tribal goals rests

within the aspirations and value of a particular tribe at a particular time. Where a tribe seeks to use its ability to extend or withhold access to its lands until it accomplishes its strategic goals, this in some sense is where the concept of "strategic value" and "highest and best use" of the land converge.

## OTHER VIEWS ABOUT DEFINING FAIR MARKET VALUE: APPLES AND ORANGES

There are, of course, many observers in this debate on energy rights of way on tribal land who argue for and against a particular basis or standard to establish what constitutes "fair and appropriate" compensation for use of tribal lands for energy rights of way.

Many participants in the Section 1813 Consultation process agree with the proposition that negotiation between a tribe and a specific energy company is the appropriate way to arrive at what is "fair value." Those articulating this point of view include: the various tribes adopting the "Statement of Principles;"[86] Confederated Tribe of the Colville Reservation,[87] the Morongo Tribe of Mission Indians;[88] Mr. Robert Zahradnik[89] and Mr. Thomas Shipps[90] on behalf of the Southern Utes; Mr. Louis Denotsotsie, Attorney General, Navajo Nation;[91] Mr. David Lester[92] and Dr. Ahmed Kooros[93] on behalf of the Council of Energy Resource Tribes (CERT); Mr. Reid Chambers, Esq., of Sonosky, Chambers, Sachse, Endreson & Perry;[94] Mr. Duanbe Zavadil, Bill Barrett Corporation;[95] Mr. Perry Richards, Questar Corporation; and Mr. Logan Magruder, Berry Petroleum

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[86] *These principles, called the "INDIAN TRIBES – PARTNERS IN AMERICA'S ENERGY FUTURE – SECTION 1813 RIGHT-OF-WAY STUDY – TRIBAL PRINCIPLES, dated April 11, 2006, were distributed at the April 18th meeting of the Section 1813 Consultation process in Denver.*

[87] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/The_Confederated_Tribes_of_the_Colville_Reservation.pdf

[88] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Mor_ROW_4_17_Complete.pdf

[89] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/SouthernUteRedCedar.pdf

[90] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/SouthernUteROW.pdf

[91] http://1813.anl.gov/documents/docs/Presentations/Navajo_Nation_Scoping_Comments.pdf

[92] http://1813.anl.gov/documents/docs/Presentations/CERT_ROW_Pres_7_MAR.pdf

[93] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/AhmedKooros-Section1813.pdf

[94] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Remarks_of_RPC_re_%20Interior_Energy_Scoping_Meeting.pdf. See also, http://1813.anl.gov/documents/docs/Comments/Hopi_Tribe_the_Pueblo_of_Isleta_the_Mandan_Hidatsa_ and _Ar.pdf

[95] http://1813.anl.gov/documents/docs/Presentations/Bill_Barret_Corp.pdf. In commenting on Section 1813, Mr. Zavadil stated that, as an oil and gas exploration and production company with extensive operations on tribal lands, including the Ute Indian Tribe, "We have a long working history with the Ute Indian Tribe and our experience, with its emphasis on E&P operations rather than downstream issues, may provide a unique perspective on the matter. ..BBC does not find it advisable to prescribe a formulaic approach for ROW compensation. We have been party to many creative and mutually beneficial arrangements for ROW compensation. These agreements were worked out in the spirit of and to the effect of promoting production."

Corporation.[96] Other commenters argue that there are other bases for valuing rights of way in the context of negotiations, including the value of the land to the user in terms of profits or build-around (replacement value) costs; those stating this point of view include Bill Havens;[97] and the CERT.[98]

In contrast, many other participants in the Section 1813 Consultation Process have called for use of an "objective standard," which is most often equated with an appraisal of the value of the land. Among the parties articulating this point of view are: Governor Bill Owen of Colorado;[99] Commissioner Marc Spitzer of the Arizona Corporations Commission;[100] Dr. Lisa Cameron, [101] Mr. Tom Sansonetti,[102] and Mr. James Shepard[103] on behalf of the FAIR Access to Energy Coalition; Ms. Meg Hunt on behalf of the Edison Electric Institute;[104] Bonneville Power Administration;[105] Mr. Jim Greenwood, Office of Consumers Counsel, State of Colorado.[106]

In their comments supporting adoption of an "objective standard," these parties mentioned various arguments for why such a standard was necessary as an alternative method to today's norm of negotiations with the tribes to reach agreement on compensation for rights of way. In the table below, we identify these arguments and then comment on each one.

[96] http://1813.anl.gov/documents/docs/Meetings/7_March_1813_Scoping_Mtg_transcript.pdf

[97] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/APS_Trespass_problem_for_Section_1813_Study.pdf

[98] Tweedie Doe, Stuart Schare, and Kevin Cooney, *Assessing Rights-of-Way on Tribal Lands*, Council of Energy Resource Tribes, August 2005. http://www.certredearth.com/resources/pdfs/ROW-Report.pdf

[99] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Gov_of_Colorado.pdf

[100] http://1813.anl.gov/documents/docs/Presentations/Arizona_Corp_Commision.pdf

[101] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRcameron1813.pdf

[102] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Sansonetti_FAIR.pdf

[103] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRJShepard.pdf

[104] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/EdisonElectricMegHunt.pdf

[105] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/BPA18134-19-06.pdf. "BPA favors a market value approach for valuing land rights. BPA would want criteria developed that allowed for the flexibility to negotiate for other than monetary consideration, equivalent to the value of the right-of-way identified as a result of this study. Although BPA's preference is to have perpetual easements, we understand that many tribal governments are unwilling or unable to commit beyond 20 years, so consideration relative to the term of the easement will need to be addressed."

[106] htt://1813.anl.gov/documents/docs/Presentations/Colorado_Office_Consumer_Counsel.pdf

**Table 7 (contains 5 pages total)**

**Arguments of Parties Seeking an "Objective Standard" to Use in Determining Compensation for Tribal Rights of Way**

| Position, Assertion | Party/person making the assertion or argument | Analysis Group Comments on the assertion/argument |
|---|---|---|
| ***"Having no "objective standard" raises risk to utilities"*** | In her comments, Ms. Hunt explains that "Without some sort of standard process or limit to the negotiated settlements, utilities face what they consider to be an unreasonable risk."[107]<br><br>Similarly, FAIR's economist, Dr. Lisa Cameron, asserted that if more transparent, based standards for ROW fees on tribal trust lands, a 'significant source of risk" for utilities will be removed" with "Enormous uncertainty on horizon."[108] | Based on our analysis, described above, we see no evidence to support the assertion that most energy companies in the West views issues associated with accessing and/or paying for rights-of-way as an "enormous uncertainty" or "significant source of risk" for utilities in the very regions where tribal lands loom largest.<br><br>Regardless, these risks are no different than the many business risks faced by firms in their multiple interactions with suppliers, customers and other firms operating networked markets. Tribal leaders, recognizing these risks, enter into agreements with a limited waiver of sovereignty to provide assurance that the enforceability of agreements is no different than agreements with any business partners. |
| ***"The costs of ROW on tribal lands are increasing the overall energy costs to the nation"*** | Dr. Lisa Cameron stated, on behalf of FAIR, that the key policy question is "How do we reduce overall cost of meeting national energy needs?... introduce more transparent, based standards for ROW fees on tribal trust lands upward pressure on rates reduced."[109] She goes on to say that where transporters can pass along the costs of ROW fees to consumers, prices rise and harm consumers; where transporters cannot pass such costs along, then they face reduced returns and lose the ability to attract capital. | As we have described earlier, ROW costs on tribal lands are insignificant when compared to the delivered costs of retail gas and electric supply even in the Western states, where tribal lands are large. See discussion above.<br><br>We find no reasonable justification in the record for her assertion about the level of increased tribal ROW fees causing transporters to face reduced returns such that the companies are unable to attract capital.<br><br>Additionally, in light of the pricing practices for retail gas and electricity, it has not been shown that there is a cent-for-cent pass-through of ROW payments to a tribe and retail rate effects in retail energy markets. While it is true that most transporters operate pursuant to cost-of-service-based tariffs, the realities of the timing between rate cases, the relatively small size of most tribal ROW charges relative to the overall cost of service, and the practice of net-back pricing for many wholesale gas and electric commodity supplies weaken the opportunity for such cent-for-cent pass through to retail consumers. Moreover, between rate cases and in net-back pricing, such costs would more likely affect company returns, but in a small way. |

[107] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/EdisonElectricMegHunt.pdf

[108] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRcameron1813.pdf

[109] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRcameron1813.pdf

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**Arguments of Parties Seeking an "Objective Standard" to Use in Determining Compensation for Tribal Rights of Way**

| Position, Assertion | Party/person making the assertion or argument | Analysis Group Comments on the assertion/argument |
|---|---|---|
| ***"High costs and uncertainties associated with current ROW negotiations on tribal lands signals to investors: Don't build here, Don't invest here."*** | Dr. Cameron, on behalf of FAIR, asserts that the message being sent by today's increased ROW costs is that tribes don't want energy companies as business partners, providing opportunities for investment and cooperation. | Our analysis of best practices for tribal ROW indicates that the negotiation process, combined with tribal consent, is providing exactly the opposite signal to energy companies. For the Ute Tribe, for example, the number of ROW granted and ROW acreage have increased steadily when Tribal representatives negotiate directly with ROW applicants. See discussion above. |
| ***"Eminent domain is used for other non-private land, so it should be used here, with fair market value based on appraisals where values are disputed. "*** | FAIR's expert, Dr. Cameron suggests that when public lands are used for energy rights of way, "Areas within US in which energy transporters do not have eminent domain include State lands, Federal lands administered by Bureau of Land Mgmt, US Forest Service, or National Park Service, Municipal lands. In these areas, standard is that ROW fees approximate lost value of property, even without eminent domain."[110] | The examples used by FAIR's economist to describe circumstances under which publicly owned land is valued at appraised values when such lands are used for ROW do not inform relevant issue here: what happens when a sovereign owner of lands (or a sovereign with the ability to issue or withhold an approval to carry out a business activity on its lands) decides it doesn't want to make a particular piece of land available for the proposed use? In such circumstances, the appraised value of land is irrelevant if the government decides not to approve the proposed use. Relevant examples are situations where a state government decides not to issue an approval for a transmission line unless there are greater benefits provided to the state or its citizens; a foreign government withholds approvals to traverse its land for a pipeline unless that proposed project provides value to that country and its citizens; a state government that decides a proposed use of its parkland is not in the public interest, at any price; a municipal government decides not to sell a parcel of land to a merchant transmission company (which has no eminent domain rights).<br><br>While some non-private entities may enter into access agreements at levels of compensation similar to values resulting in eminent domain proceedings (although we have not confirmed such), these non-private entities are under no requirement to do so. Payments at such levels may reflect a variety of policy and administrative considerations, although it is not clear the relevance of such considerations to negotiations between the Ute Tribe and its private partners. |

[110] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRcameron1813.pdf

**Table 7 (contains 5 pages total)**

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| Position, Assertion | Party/person making the assertion or argument | Analysis Group Comments on the assertion/argument |
|---|---|---|
| ***"In negotiating ROW compensation, tribes should be prevented from charging monopoly prices."*** | Dr. Cameron suggests in her comments that when tribes use their consent power to negotiate price and other terms for grants of rights of way, then the tribe is exercising monopoly power with the potential for "overpayment" of compensation for use of the land.[111] While she does not go on to explicitly say that consumers are paying monopoly prices for energy as a result, | There are several conceptual flaws with this argument: First, there is no "market" for a tribe's land; there is only one party (the US government acting as the trust for the tribe) who may own a party land asset; the land cannot be sold to a third party. The supply cannot be increased if consumer demand increases. Further, as a sovereign government making decisions about how to use its resources, a tribe (like any other government carrying out its authorities) is not a "market participant," in the same way that a producer of a good or service is in competition with others for use or deployment of their goods or services. While a sovereign government may "compete" in various ways to attract and retain citizens, attract and retain economic activity, it is not strictly speaking a "market participant" when it is deciding whether to grant access to its lands for a ROW.<br><br>Second, Dr. Cameron would suggest that energy companies pay higher ROW costs on tribal lands which are somehow illegitimate by labeling them "monopoly" prices that may lead to "overpayment." In fact, these prices reflect the reasonable rights of Tribal sovereignty, as described above, and are further constrained by the market forces that provide many substitute supplies for natural gas and oil supply and transport, electricity transmission, and other rights of way uses. To insinuate that these are "monopoly" prices is to suggest that a transaction for any asset, such as a piece of art, a business or a house, results in monopoly prices. |
| ***"Sunk costs matter when considering whether to approve a renewal of a ROW across tribal land."*** | FAIR's Mr. Sansonetti[112] argues that the main concern about tribal ROW revolves around renewals of ROW, because "Currently there is not a level playing field during negotiations because the life of any project is greater than the ROWs term of years: Sunk costs create an opportunity for unreasonable compensation requests. | In economic analyses comparing the costs and benefits of alternative approaches to addressing an objective (e.g., providing transportation of a commodity from point x to point y), what matters is going-forward costs, not sunk costs. As economists often say, "sunk costs are forever sunk," no matter what actions are taken in the future.<br><br>Additionally, reasonable commercial terms, accounting standards and regulatory cost recovery standards tend to tie the depreciation of investment costs to the life of the underlying lease or contract setting forth the useful economic life of the investment to the buyer. If the buyer has no rights to occupy an office beyond the terms of its lease, and there is unrecovered or undepreciated investment still remaining at the end of that contract, then it is a loss or has salvage value, but it doesn't play a role for the counterparty in determining the then-current terms and conditions of the renewal of the lease.<br><br>Presumably, a regulated electric transmission company or natural gas pipeline company offering service based on cost and facing higher costs to provide service would include the higher costs in its next application for tariffed rates. |

[111] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/FAIRcameron1813.pdf

[112] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/Sansonetti_FAIR.pdf

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**Arguments of Parties Seeking an "Objective Standard" to Use in Determining Compensation for Tribal Rights of Way**

| Position, Assertion | Party/person making the assertion or argument | Analysis Group Comments on the assertion/argument |
|---|---|---|
| ***"It is possible to find good comparables for valuing tribal lands for ROW, if the appraisal is done right."*** | For example, Marian Wolcott from Bonneville Power Administration describes the appraisal standards (i.e., the Yellow Book, or Uniform Appraisal Standards for Federal Land Acquisitions) which 'are used by BPA to provide the definition and criteria for: market value; highest and best use; economic use – not a special use."[113] | There are several key differences between (a) ROW made available to private parties on tribal land, and (b) land obtained *by* the federal government and entities that follow its standards. First, like the federal government itself, tribes are sovereign nations not subject to the eminent domain powers and authority applicable to most private property in the US when energy utilities seek to use such land for public purposes. So it is not particularly informative to compare "standard" appraisal processes when it is the government doing the purchasing and attempt to apply them when someone else wants to use the government's own land. We are not aware of situations where federal land can be, in essence, taken by another entity with compensation set using the USPAP standards. That is what is being asked of tribes for use of their lands.<br><br>Second, on tribal land, the land owner has a full set of obligations and governmental services required for the tribe that does not exist for the landowner in a non-tribal ROW negotiation. The tribe is both the land owner as well as the government entity responsible for the provision of basic services that occur in a jurisdiction. These include items such as land management, oversight, and jurisdictional responsibilities; permitting, monitoring and enforcement; public and environmental health and safety; preservation of cultural rights and history; land recovery; and regulation, data collection and administration. On non-tribal land, such government-service and land-management and planning functions are typically carried out by a government entity that it is separate and distinct from the land owner himself. The entity that uses such land typically pays for rights to the owner and then pays taxes and other types of fees and licenses for supporting government services to the government.<br><br>There simply is no comparability between tribal access negotiations and the same negotiation happening "across the fence" on this point. The only appropriate comparables for grants of access are those done under a comparable legal framework; that is, comparable to the terms and conditions reached between Tribal governments and outside partners done under fair and appropriate negotiations. Such values may inform Tribes as they enter into their negotiations, although their beyond this role is unclear. |

[113] http://1813.anl.gov/documents/docs/Presentations/apr06mtg/BPA18134-19-06.pdf

**Table 7 (contains 5 pages total)**

**Arguments of Parties Seeking an "Objective Standard" to Use in Determining Compensation for Tribal Rights of Way**

| Position, Assertion | Party/person making the assertion or argument | Analysis Group Comments on the assertion/argument |
|---|---|---|
| ***"It's not fair to expect energy companies that are only in the business of providing transportation of energy commodities to have to bring other parties to the table to meet the demands of tribes in ROW negotiations."*** | An implicit assumption in discussions relating to concerns about renewals of ROW for existing transmission facilities and pipelines that those companies engaged in those businesses have either no business or interest in solving problems through other than transmission or pipeline solutions. In this view, tribal demands, for example, to provide distribution facilities to make energy commodities available or to provide other forms of compensation or benefits to the tribe simply cannot be met by the energy company who facility passes through the tribe's lands. | In the past, many energy companies may not have had to solve ROW issues except through their real estate divisions. But even energy companies that have unusual ROW challenges and other challenges have been able to think outside the box when they either expect to have to do so, or are required to do so as a condition of doing business in, say, another country. Making sure that the appropriate company personnel with business or commercial responsibilities are at the table for problem solving is a minimum step toward problem-solving. Thinking about partnership with unexpected players is another. Many examples come to mind as creative solutions that have occurred when the conditions for negotiations and creativity are in place. For example, years ago when the electric utilities in a region (i.e., New England) jointly decided to build a direct-current transmission line to bring hydroelectric power from Canada into the New England electric market, it was necessary to get "access" approvals from states that stood to bear most of the burden of the facility with only a small proportion of the benefits. The parties negotiated arrangements that allowed creativity on the allocation of energy benefits that would flow over the lines, in exchange for grants of access – even though such benefits had "nothing to do" with land values and other attributes of the ROW itself. This illustrates the opportunities for creative problem-solving when more than the real-estate personnel or transmission staff is working to solve the problem. In countless cases where a company is trying to do business in another country, it looks to create partnerships with local players (with whom no other prior relationship may have existed) in order to create the conditions for a successful resolution of the business challenge. |

For the various reasons presented in Table 7, above, the arguments in favor of adopting a "standardized approach" to establishing fair and appropriate compensation for tribal rights of way do not bear up under scrutiny. In fact, this discussion of the elements of "appropriate" compensation supports the reasonable conclusion that there is no single formula that determines appropriate compensation other than that which results from arms-length negotiations among the parties to the ROW agreements. Tribes that are incurring social, development and administrative costs to provide access and/or services must be free to consider proper compensation in ROW negotiations. Additionally, and moreover, tribes that are using the totality of their resources, including their land and their ability to make it available to others under conditions they are willing to accept, may have strategic reasons that shape their approach to granting access to their lands. In the cases we have examined here, these strategic objectives and the negotiations that are flowing from them are providing these tribes with partnerships that support their goals for sustainable development and "self-determination." To take this away from the tribes would have no meaningful impact on consumer prices, and it would have powerfully negative impacts on tribes' sovereignty, their ability to emerge from past conditions of poverty and dependency, and in many cases their ability to work with business partners to provide creative solutions to the nation's energy problems.

## CONCLUSIONS AND RECOMMENDATIONS FOR STANDARDS FOR "FAIR AND APPROPRIATE COMPENSATION

The DOI/DOE study focuses on approaches to "appropriately" compensating tribes for use of their lands for energy ROW. There is a critical platform for thinking about this issue: Is there any plausible rationale for establishing "standards and procedures" for negotiation of tribal ROW compensation that differs from the current approach, or that otherwise deviates from the principle of establishing fair market value through negotiation? Specifically in the context of tribal rights of way, the only appropriate definition of "*fair market value"* is "[t]he fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to but or sell and both having reasonable knowledge of relevant facts."[114]

"Appropriate compensation" must reflect a tribe's fundamental right to negotiate with counterparties to establish the fair value *to the tribe* of granting access to its tribal land. There can be no other "right" compensation than that which each individual tribe is willing to accept for use of its land.

For each tribe considering any specific grant of right of way at a particular time and place and for a particular counterparty, what it considers fair will vary, in light of the specific circumstances, conditions, knowledge and inclination of the tribe at the time of

[114] U.S. Internal Revenue Service, 26 CFR Ch.1, § 20.2031-1.

negotiations. Recognizing this basis for the concept of "fair and appropriate compensation" is critically important, in part because the current and historical circumstances and conditions of tribes are markedly different from that of non-tribal counterparties and in part each tribe assigns different values to its resources. Thus, other bases for determining ROW compensation – e.g., historical trend lines for compensation, or appraised valuations based on non-tribal lands, or the like – can not be considered precedential, deterministic, or even appropriate or relevant, in a particular tribe's future negotiations of ROW compensation on its tribal land. Use of such other bases would be like comparing apples and oranges.

# CONCLUSION: RELATIONSHIP TO ENERGY TRANSPORTATION ISSUES (SECTION 1813 ISSUE # 4)

The final provision of Section 1813 calls for "an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land." We comment on this final issue in the conclusion to our report, because the prior chapters set the stage for addressing it, along with the other important matters raised in Section 1813.

We note, though, that commenting on energy transportation issues is principally meaningful by discussing larger energy policy questions, since transportation of energy has little value apart from enabling the larger goal of connecting production of energy products with consumers. Thus, we interpret Congress as having invited a discussion of such larger energy policy when in Section 1813, EPAct called for "an analysis of relevant national energy policies relating to grants, expansions and renewals of energy rights-of-way on tribal land."

Two points are relevant here. First, as described above in some detail, "energy policy" is actually the composite of a complex set of responses to government directives, incentives, programs and funding activities set forth in an array of federal, international and subnational statutes and regulations administered by the U.S. Departments of Energy, Interior, Agriculture, Commerce, and Revenue; the U.S. Environmental Protection Agency; the Federal Energy Regulatory Commission; the Nuclear Regulatory Commission; and an almost countless set of other national agencies.[115] It is beyond the scope of this report to summarize and analyze this array of policies affecting national energy production, transportation, and use. The first section of this report, however, describes the main features of the nation's energy challenges, and situates the issue of energy rights of way on tribal lands within that overall national energy context.

Second, the EPAct includes explicit expressions of Congressional intent and consensus on an extraordinarily comprehensive set of energy policy issues. One of these, previously described in this report, is in Section 2602, part of the Indian Energy Title V of EPAct, the Indian Tribal Energy Development and Self-Determination Act of 2005."

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[115] See, for example, the Federal Power Act; the Natural Gas Act; the Public Utilities Regulatory Policies Act; the Public Utility Holding Company Act; the Clean Air Act; Energy Policy and Conservation Act; EPAct, 2005; EPAct, 1992; the Outer Continental Shelf Deep Water Royalty Relief Act; Maritime Security Act of 2002 Amendments to the Deepwater Port Act of 1974; the annual budgets of the U.S. Congress as they relate to the Departments of Energy, and a myriad other agencies and departments; and many other statutes, regulations, orders. See also: the *National Energy Policy: Report of the National Energy Policy Development Group*, May 2001; and the National Commission on Energy Policy, Breaking the Stalemate: A Bipartisan Strategy to Meet America's Energy Choices, December 2004. See http://www.eia.doe.gov/oiaf/aeo/assumption/pdf/appendix_a.pdf

# Conclusion

Among other things, Title V provides for the assistance of Indian tribes in the development of energy resources and the goal of Indian self-determination. Specifically, it establishes authorities for Indian tribes to enter into a Tribal Energy Resource Agreement ("TERA") with the Secretary of the U.S. DOI. Under a TERA, a tribe may enter into energy-related lease, rights-of-way agreements and other business transactions with third parties without the case-by-case approval of the Secretary of DOI. A TERA may enable the tribe to act on its own behalf in agreements for electric power generation, transmission and distribution, along with exploration and drilling of mineral resources, other energy processing and refinement facilities, and energy rights-of-way for power lines and gas pipelines. EPAct restricts the lengths of such agreements to a maximum term, depending upon the type and purpose of the agreement.[116]

The TERA provisions have been called the "most significant provision in Title V of the Energy Policy Act" by Chairman Maxine Natchees of the Ute Indian Tribe's Business Committee. In her comments to the Section 1813 Consultation process in April, 2006, she described the importance of the TERA provisions, as "the creation of the opportunity for tribes to enter into a Tribal Energy Resource Agreement (TERA) with the Department of Interior. Once a tribe enters into a TERA, it has the authority to enter into leases, business agreements and rights-of-way affecting energy development without the review and approval of the secretary of the Department of Interior. If a TERA is properly structured, there should be a greater certainty and efficiency in the development of energy resources on tribal lands. Finally if it were the intent of Congress to take away tribal consent as written in 25 Part 169.12 then why would the TERA provision be written as such in the energy bill if tribes did not have the authority to regulate commerce on their reservations homelands?"[117]

Second, the TERA provisions underscore congressional intent that Indian Tribes be enabled with tools to help them develop their energy resources and grants of access in strategic ways – for the dual purposes of development of energy resources on tribal lands and for tribal self-determination. This supports the recent history of "innovation" in the area of ROW agreements on tribal land, which provides rich examples where *partnerships* are producing positive results for tribes' sustainable economic development *and* enhanced access to energy resources for the nation. Such results are a positive advancement over the era when antagonisms and opposing interests guided compensation agreements. The recent exercise of sovereignty and self-determination in the sustainable development of tribal land (both access to and resources within) is producing a growing certainty of tribal self sufficiency on the one hand, and of mutual benefits between tribes and energy developers – and federal energy policy – on the other.

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[116] For a clear description of the TERA provisions of the Energy Policy Act, see: Scot W. Anderson, Davis Graham & Stubbs LLP, Energy Development on Indian Lands: Title V of the Energy Policy Act of 2005, Rocky Mountain Mineral Law Institute – Special Institute on the Energy Policy Act of 2005, October 11, 2005.

[117] Remarks of Maxine Natchees, Chairman, Ute Indian Tribe of the Uintah & Ouray Reservation, at the Section 1813 Consultation Meeting, April 17-18, 2006

# Conclusion

This brings us full circle: Section 1813's call for the "story" about ROW compensation in Indian Country is a story of progress, rather than just about remedying historical injustices. Today's "best practices" are those that result from the exercise of self-determination. These have proven to lead to development of and enhanced access to energy resources and infrastructure on tribal land. Rather than uncovering a "problem" causes by recent ROW arrangements on tribal lands, we have discovered many ways in which current "best practices" are more creative, more efficient, and certainly more responsive than in the past. Current practices and energy ROW compensation structures are beginning to truly align tribal incentives with those of developers in a way that supports the long-term health and welfare of tribal membership and rational development of energy resources.

Much of this success stems from the self-governance, decision-making, long-term planning, and financial organization revealed in cases where tribes are actively exercising their fundamental rights to sovereignty and self-determination. This situation has provided opportunities for long-term, mutually beneficial tribal-developer partnerships, as opposed to contentious and unproductive access struggles. And there is no denying the positive second-order economic benefits that flow to communities, regions and states that contain or neighbor tribal lands that succeed in their efforts of sustainable economic development and self-determination.

# APPENDICES

A. Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation (adopted January 19, 1937).

B. Northern Utes Ordinance No. 96-002: To Govern Surface Use For Oil And Gas Activities On The Uintah And Ouray Reservation (subsequently repealed).

C. 25CFR Part 169—Rights-Of-Way Over Indian Lands.

D. Northern Utes Ordinance No. 01-006, Energy Proposal Process Narrative To Accompany Process Flow.

E. Ute Indian Tribe ROW Process Flow Document.

F. Bureau of Indian Affairs, Uintah & Ouray Agency, Branch of Real Estate Service, "Ute Indian Tribe – Bureau of Indian Affairs – Mineral & Mining Development Guide: How to do Business on the Uintah & Ouray Reservation".

G. Letter from John E. Dyer and Kyle R. Miller of Dyer & Company, Jun 27, 2005.

H. Section 1813 Scoping Meeting – transcript excerpts (Berry Petroleum, Questar statements) – March 7, 2006.

I. Comments of Mr. Duane Zavadil, Bill Barrett Corporation, March 8, 2006.

J. Remarks of Maxine Natchees, Chairman, Tribal Business Council, Ute Indian Tribe of the Uintah & Ouray Reservation, presented to the Section 1813 Consultation Meeting, Denver, April 17-18, 2006.