

## **APS IN TRESPASS ON HOPI LAND Tribe Never Approved Renewal of Power Line Right-of-Way**

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January 20, 2006

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Since 1967 Arizona Public Service (APS) and Southern California Edison (SCE), have transmitted millions (perhaps even billions) of dollars worth of electric power, originating at the Four Corners Power Plant west of Farmington, New Mexico, through transmission lines that cut across Hopi land as part of the Western power grid. The status of the rights-of-way (ROW) granted by the Hopi Tribe in 1966 and 1967 are now in question and have been for many years.

Years of negotiations “between the Department of the Interior, the Western Energy Supply and Transmissions Associates (which included APS, Southern California Edison and others), the Navajo Nation, Hopi and Hualapai Tribes” (according to BIA Field Solicitor Richard R. Greenfield) resulted in the approval of two steam generated electrical power plants and, ultimately, the original rights-of-way. These ROW’s were granted for a period of 25 years with options to renew for another 25 years. Lacking the Tribe’s approval of a renewal of another 25-year ROW, APS has been in trespass on Hopi land since 1992. Further, as APS does not possess a valid ROW, sale of the electrical capacity to SCE may have been illegal. Inquiries made to former Chairmen and the Hopi offices of Revenue Commission, Treasurer, and Realty have not revealed any evidence that the Hopi Tribe ever authorized the renewal of the ROW.

The transmission lines in question are commonly referred to as the “500kv lines” or the “El Dorado 500kv” transmission lines. They cross approximately 30.5 miles of the HPL, cutting a 200-foot wide path through the northern areas of Hopi land south of Hard Rock and the Dinnebito areas north of Hotevilla.

Former Hopi Chairman Vernon Masayesva had this to say about the ROW: “The Hopi Tribe’s resolution approving a 50 year ROW to APS is vague. APS interprets the resolution to mean they are given the option to renew the ROW on the same terms and conditions stipulated in the first 25 years. The Hopi Tribe takes the position that the second 25 years is subject to conclusion of a successful negotiation. Based on this I ordered the parties to begin preliminary negotiations and APS agreed to renegotiate.”

On June 3, 1994, the Field Solicitor for the Bureau of Indian Affairs, Phoenix Field Office, Mr. Richard R. Greenfield, submitted a very thorough opinion on the status of the right-of-way, “In particular, that portion of the right-of-way which passes through the Hopi Reservation.” This was done in response to a request from the Chairman of the Hopi Tribe in March of 1994 to the Area Director of the BIA to review all the pertinent data and provide an opinion.

Mr. Greenfield concluded that, in no uncertain terms, “the right-of-way has expired and in the absence of tribal consent, the Secretary [Secretary of the Interior, then Bruce Babbitt] does not have the authority to renew the APS right-of-way.”

In a January 1995 letter to the then President of the Navajo Nation, Albert Hale, the then Vice Chairman of the Hopi Tribe, Wayne Taylor, Jr., in his capacity as Chairman of the Hopi

Right-Of-Way Team, urged the mutually advantageous renewal of a “joint negotiation strategy” between the Hopi Tribe and Navajo Nation to assure that negotiations with APS and Southern California Edison (SCE) conclude to the best advantage of both tribes. In that letter, Vice Chairman Taylor referred to the “common understanding and belief that the original rights of way on both the Hopi and Navajo Reservations that were granted to APS in 1966 and 1967 have expired, and that the transmission line has essentially been operated in a mode of trespass since 1991 and 1992.”

Subsequently, in a February 1995 letter, Chairman Ferrell Secakuku put the Phoenix Area Director of the BIA, Mr. Walter Mills, on written notice “to make it certain that the written record is absolutely clear, (1) that the Hopi Tribe does not consent to the granting of these rights-of-way pursuant to APS’ pending applications and (2) that the Hopi Tribe has withdrawn any prior tribal consent to the granting of right-of-way renewals that might be contained in any document including, but not limited to, Tribal Council Resolution Nos. H-18-66, H-19-66, and H-11-67.”

The historical record is clear that the Tribe’s position in 1995, as reflected in both Vice Chairman Taylor’s correspondence and the letter from Chairman Secakuku, was that the rights-of-way had expired, that APS could not unilaterally exercise its option to renew and that APS was in trespass.

A call to Chairman Taylor’s office requesting a statement as to the Tribe’s official position on the most current status of the power line ROW resulted in a referral to the Tribe’s General Counsel. General Counsel, Scott Canty, in turn stated that due to attorney-client-privilege he could not comment and referred this reporter to the Hopi Tribe’s Energy Team, chaired by Councilperson Deanna Etnire, as the appropriate source for the Tribe’s position. After leaving several messages with the Tribal Secretary, Councilperson Etnire returned the calls and referred the matter to the Chairman’s office stating that “his office is handling this.”

Just before the end of Chairman Taylor’s administration, he did reply with the following statement:

“The Tribe attempted to negotiate a renewal of the ROW with APS in the mid to late 90’s but this effort ended in a stalemate. We even attempted a mediated solution, but without success. It is an open question whether the ROW has in fact expired since the agreement, reached in the 1960’s, arguably provided for an automatic 25-year renewal upon payment by APS. APS did in fact pay the Tribe and therefore believes that it already has an effective 25 years extension of the agreement. The Tribe disagrees. One of the difficult issues is the matter of arriving at an accurate and useful valuation of the ROW and that work remains to be done. While this matter remains a matter requiring Tribal attention, the work has not been completed due to the priority attention demanded by efforts to achieve an extension of the Mohave Power Plant and a preservation of existing annual revenue streams from that source.”

The APS position that it “already has an effective 25 years extension of the agreement” does not conform to the governing federal regulations, as they do not provide for “an automatic 25-year renewal upon payment by APS.” They specifically require approval of the Tribe.

About the validity of the renewal in 1992, Masayesva responded, “APS deposited around \$23,000 with BIA Hopi Agency to exercise their option to renew. Based on this APS feels their second 25 year ROW is in effect.”

Masayesva adds, “The Hopi position as stated by former Chairman Ferrell Secakuku and Wayne Taylor, Jr., in letters to the Navajo Tribe and the [Phoenix Area Director of the BIA] is very clear: APS does not have a valid ROW since 1992 when the first 25 years expired. The

U.S. Solicitor [Field Solicitor Greenfield] agreed with the Hopi Tribe, saying they are prohibited by law from approving a second 25 year ROW absent the approval of the Hopi Tribe. The Hopi Tribe has never accepted a resolution approving the second 25 year terms and conditions. Without this the Federal Government cannot approve or disapprove the ROW.”

According to the Code of Federal Regulations 25, §169.12 (1996), “Consideration for right-of-way grants,” “...the consideration [payment] 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...The Secretary [of the Interior] 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.” What this appears to mean is that the Tribe should not have had to attempt a valuation of the ROW at their own expense and the BIA should have assisted in making sure that the payment for the ROW, even in the case of a renewal, was “not less than...the fair market value of the rights granted, plus severance damages....”

A 1994 study valued the Hopi right-of-way for a 25-year period at anywhere from \$7 million, on the conservative end, to \$34 million, on the aggressive end, if paid all at once in the beginning of the period. This number would have to be multiplied many times over if paid over time due to the cost of interest. That same year SCE was paying APS around \$4.5 million per year to use the power lines. Over 25 years that’s \$112.5 million, or 4,891 times as much as the Tribe received from APS for the ROW. In 1992 APS sent a check for \$23,000 to cover the entire second 25-year period of the ROW. While APS was getting \$4.5 million per year from SCE, the Tribe was receiving less than \$1,000 per year. A briefing paper of unknown origin from the same period alleged that APS had spent approximately 1% of the total line costs on land acquisition (cost of the ROW) for the Hopi ROW while for a similar transmission line on non-Indian land they spent 19% of the total line cost on land acquisition. Such allegations of gross discrepancies between proceeds to tribes and proceeds to non-Indian entities for resources of otherwise equivalent value are not uncommon.

A Tribal Council Resolution in 2002 appropriated funds to pay for another study that would determine the current value of the right-of-way. Determining the current value would be critical to determining the loss of revenue to the Tribe and a starting point for renewed negotiations with APS to pay fair market value, plus 25 years of interest, for the right-of-way. That study has not been completed.

When asked for a statement regarding the issue of the ROW and allegations of trespass, APS spokesperson Mark R. Fallon replied with the following:

“APS, which owns and operates the transmission line, and Southern California Edison, which owns the electric capacity on the line, sent the Bureau of Indian Affairs a check in 1992 to renew the Rights-Of-Way, as required in the original agreement. The check was cashed.

“Shortly thereafter, APS and SCE were told by officials of the Hopi Tribe and Navajo Nation that they wished to renegotiate the Rights-Of-Way. Following initial meetings initiated by utility officials, the Hopi Tribe and Navajo Nation indicated that they would contact APS and SCE officials when they were prepared to continue those discussions.

“At APS, we value our long-standing relationship with the Hopi Tribe and Navajo Nation and are always willing to sit down and discuss any issue of common interest.”

The statement implies that the Tribe never again contacted APS to continue those discussions. It also did not include the dollar amount for the 1992 check to the BIA. It implies that, according to the original agreement, all APS had to do to renew the ROW was to send a check. This ignores the fact that both the version of the Code of Federal Regulations in force at

the time and current regulations CFR 25, § 169.19 and § 169.3 (1996) clearly state the Secretary may not exercise that authority “without the consent of the proper tribal officials” and that both original ROW’s and renewals require “prior written consent of the tribe.”

From their statement, it is reasonable to assume that APS is claiming that the ROW is valid.

APS’ role in this situation is clear as they were the original party to the ROW agreements in 1967. SCE’s roll is less clear; they appear to be only a tenant, subletting usage rights from APS. They are regular front-line participants in all negotiations regarding the ROW. Masayesva views their involvement as inappropriate, asking “Why is SCE even at the table in these negotiations?” adding “The role that SCE has in the ROW is questionable. We know SCE was given the right to use all of the electric carrying capacity (500KV) of the El Dorado line. We also know that APS gets between 4 and 5 million [dollars] annually from SCE. We have no idea what SCE is getting from other utility companies for using the lines.”

“Since the ROW is now in dispute, SCE would be liable for using our land to enrich themselves illegally. This to me is the big issue. Again, the only way to resolve this is to take SCE to court.”

When asked for the amount of the check and additional information regarding the nature of correspondence exchanged at the time the check was sent, Fallon replied,

“There were two checks issued to the Hopi Agency, Bureau of Indian Affairs, totaling \$23,007.12. The checks were accompanied by a transmittal letter to the BIA, with copy to the Chairman of the Hopi Tribe, which communicated that APS' submittal was intended for the exercise of the 25-year renewal option included in the original Right-Of-Way agreement. Our records indicate that the BIA Hopi Agency received payment and deposited the checks issued by APS for renewal.”

Asked if a renewal agreement was signed by the parties, his response was,

“Yes, there were communications between APS, the BIA and the Hopi Tribe regarding renewal of the original Right-Of-Way agreement. An application for renewal was signed by APS and mailed to the Hopi Agency of the BIA and the Hopi Tribe.”

APS did not provide any documentation to support their statements.

As early as February, 1992, the Hopi Tribe notified APS that “any renewal of the right-of-way must comply with CFR 25, § 169 and that it was the Tribe’s desire to renegotiate the right-of-way agreement. CFR 25, § 169 is the section of the Code of Federal Regulations that requires prior tribal approval for both original rights-of-way and renewals.

According to Masayesva, there are few options for resolving this problem that would remedy the damage already done to Hopi. “The years of good faith effort by the Hopi Tribe to negotiate with APS has fallen apart. The reason is simple; Hopi negotiations have failed to build up a strong leverage to compel these giant corporations to negotiate as equals. This is a lesson future negotiators should learn including negotiators sitting at the table to complete new coal leases. Never sit at the negotiating table until you make a strong position, something the big companies will listen to. If you don’t they will just roll over us again.”

Masayesva concludes that “This disagreement can and should be tested by the Hopi Tribe by simply notifying APS that they are trespassing on Hopi lands. The Tribe has the right to set the penalty for each day of trespass.”

**Following is some text and information that was edited out of the article before publishing.**

APS and SCE have been, and continue, transmitting millions of dollars worth of electrical power through these transmission lines crossing the Hopi Reservation without Tribal approval. The evidence leads to the conclusion that they are in trespass, without any valid right-of-way.

Considering the evidence, a reasonable person could safely assume that:

- APS does not have a current lawful Hopi right-of-way,
- the BIA exceeded its authority if it renewed the ROW for another 25 years,
- the Federal Government failed in its trust responsibility to assist the Tribe in getting a fair market price for the ROW renewal in 1992,
- APS' sale or transfer of the "electric capacity on the line" to SCE is not lawful, and
- as SCE's ownership of the "electric capacity on the line" is not valid, there remains a major unresolved issue as to SCE's role and relationship with APS and their legal standing in ongoing negotiations between APS and the Tribe.

- \*Footnote: According to the Durango Herald, in an article on December 11, 2005, "Southern California Edison, alone, owns 48 percent of two generators at the Four Corners Power Plant." The Herald goes on to say that "Four Corners was the nation's No.1 emitter in 2004 of total nitrogen oxide – releasing 40,742 tons of the gas" and "was No. 24 nationally in the emission of carbon dioxide with 15.1 million tons ["which many scientists credit as the major cause of global warming"] and No. 37 in the release of mercury with 590 pounds." Further, according to the Herald, "...they are perennially rated among the dirtiest in the nation in terms of noxious emissions. According to the Environmental Integrity Project in Washington, D.C., the Four Corners plant is among the 50 dirtiest power plants in the nation based on its discharge of nitrogen oxide, carbon dioxide and mercury."