Nancy Ives
Executive Director

the fair coalition
Ensuring Fair Access to Energy

February 5, 2007

Abraham E. Haspel, Ph.D.
Assistant Deputy Secretary
U.S. Department of the Interior
Office of the Secretary
1849 C Street, NW
Room 6125 (MS 7229)
Washington, DC 20240

Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, NW
Washington, D.C. 20245

Submitted via e-mail to: IEED@bia.edu

Subject: Section 1813 Comments

Dear Assistant Deputy Secretary Haspel:

On behalf of the Fair Access to Energy Coalition (FAIR), I respectfully submit FAIR's comments to the Draft Report to Congress, Energy Policy Act of 2005, Section 1813, Indian Land Rights of Way Study ("Draft Report") issued on December 21, 2006. Our submission includes the following documents: (1) Executive Summary; (2) FAIR's most significant concerns regarding the Draft Report; (3) *Imperial Valley Press* Tribal Impasse Article; and, (4) Letter to Assistant Deputy Secretary of the U.S. Department of the Interior Abraham Haspel .

Thank you for the consideration of our comments to the Draft Report. If you have any questions about these comments, please contact me at 619/540-3751.

Sincerely,

Nancy Ives
Executive Director
Fair Access to Energy Coalition

Executive Summary

The Fair Access to Energy Coalition (FAIR) appreciates the opportunity to submit comments in response to the Departments of Energy and of the Interior's ("Departments") Draft Report to Congress, Energy Policy Act of 2005, Section 1813, "Indian Land Rights-of-Way Study," issued on December 21, 2006 ("Draft Report"). FAIR represents a broad-based, non-partisan group of consumers, business interests and energy companies seeking a solution to ensure the movement of energy across Indian tribal lands on reasonable terms.

FAIR is grateful to the Departments for undertaking an extensive effort to respond to Congress' directive as outlined in Section 1813 of the Energy Policy Act of 2005 to examine the need for standards and procedures for rights-of-way (ROW) on tribal land. However, FAIR remains concerned that the Draft Report does not reflect a full understanding of the scope and impact of this emerging issue and therefore does not provide Congress with an appropriate range of concrete and workable solutions. While FAIR will provide the Departments with a redline of key sections of the Draft Report that correspond to our narrative comments by Friday, February 9th, our main concerns regarding the contents of the Draft Report can be summarized as follows:

1. The Departments should retain the general condemnation option from the August Draft Report and make this option the Departments' recommendation to Congress.

2. The Departments should explain that Congress has plenary authority over tribes and that tribal sovereignty is always subject to Congressional determination.

3. Despite the Draft Report's recognition that there are cases in which "the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty," the Departments narrowly and erroneously interpret the Energy Policy Act of 2005 as favoring tribal sovereignty over the interest of the American public.

4. The Draft Report fails to explain that all other government entities use traditional notions of fair market valuation as the "best practice" for compensating landowners for the use of their lands dedicated to the public interest.

5. The Draft Report should include in its suite of options for Congress' consideration a discussion of the Federal Power Act's approach to the use of tribal lands for hydroelectric projects.

6. The Draft Report does not accurately describe the "net benefits" approach for calculating charges for use of tribal lands.

7. The Draft Report ignores the significant economic burdens to consumers as a result of current ROW policy on tribal lands.

8. The Draft Report does not address the adverse impact of the current policy on our Nation's environment.

9. DOI's trust responsibility requires the Department to consider the disadvantageous effect on tribes if industry avoids investing in energy infrastructure on tribal lands due to the absence of standards and procedures for acquiring and renewing ROW.

10. The Draft Report fails to recognize that the tribes' monopolistic demands threaten to subvert the consumer protection authority of the Federal Energy Regulatory Commission (FERC).

11. The Departments' assertion that ROW fees are "akin to tax rates" required to provide "fiscal support" to tribes is both legally and economically unsound.

12. The Departments improperly blame energy providers for not anticipating the current trend towards monopoly pricing for tribal ROW.

13. The Departments should include recently reported trespass situations to provide an unbiased view of the breadth and urgency of the problem.

14. The Draft Report does not contain the cost-benefit analysis of policy options that it recognizes Congress needs to take informed action on this issue.

Attachments:

FAIR Comments
Imperial Valley Press Tribal Impasse Article
Letter to Assistant Deputy Secretary Abraham E. Haspel

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Fair Access to Energy's Most Significant Concerns regarding the Departments of Energy and the Interior's Section 1813 Draft Report to Congress

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1. The Departments should retain the general condemnation option from the August Draft Report and make this option the Departments' recommendation to Congress.

Among the Departments' five "Options for Consideration by Congress" contained in the August Draft Report ("August Draft") was the option of congressionally authorized "condemnation of tribal lands for public necessity". (August Draft, Section 4.4.2, pg. 31.) It is highly unfortunate that the Departments did not include this policy option in the current Draft Report because this was one of only two options (the other being binding valuation) from the August Draft that truly answered Congress' mandate to the Departments to make "recommendations for appropriate *standards* and *procedures* for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROW on tribal land". EPAct § 1813(b)(2) (emphasis added). Unlike the Draft's current recommendation – Status Quo with Congressional Case-by-Case Intervention – the eminent domain option has the benefit of providing both a *standard*[1] and a *procedure*[2] for determining fair and appropriate compensation to Indian tribes for energy ROW on tribal lands. As the August Draft noted, there is no doubt that Congress has the plenary authority under the United States Constitution to enact general legislation providing for condemnation of tribal lands – and for related adjudicative process in the Article I or III courts, if Congress sees fit – to support new and existing energy infrastructure determined to be in the public interest.[3]

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[1] Article V of the U.S. Constitution requires that "just compensation" be paid whenever private property is taken for public use.

[2] As explained in the August Draft, "[c]ondemnation usually requires a judicial proceeding in which some degree of public purpose or necessity is established to the satisfaction of the tribunal, thereby overcoming the property rights of the landowner.' August Draft at Section 4.4.2, pg. 31.

[3] "The Supreme Court has recognized that, as a sovereign government, the United States must have the power of eminent domain. (citing *United States v. Carmack*, 329 U.S. 230 (1946)). Eminent domain allows the United States the right to take lands that it determines are necessary for some public use. (citing 25 U.S.C. § 341, which provides that '[n]othing in this act [The Indian General Allotment Act of 1887] contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians…for the public use, *or to condemn such lands to public uses, upon making just compensation*.') (emphasis added). August Draft at Section 4.4.2(e), pg. 31.

Unlike the general condemnation option provided in the August Draft, the current Draft Report's recommendation offers no "standards" or "procedures" for either clarifying when there has been something that approximates an impasse or for "determining fair and appropriate compensation" to tribes for ROW on tribal lands in those instances where there are such impasses. The inclusion of standards is important to increase the chances of consensual agreement. This recommendation would be of much greater value to both Congress and other stakeholders if it addressed those two elements, as well as made some provision for a potential wave of ROW conflicts that may come in the very near future.

Therefore, the Draft Report should be modified in four important respects. First, Section 8.2, pg. 46, of the Draft Report should be amended by eliminating the present recommendation, "Status Quo with Congressional Case-by-Case Intervention", and replacing it with Section 4.4.2(e), pg. 31 from the August Draft in its entirety. Second, Section 7 should include a new Section 7.6 that matches the new recommendation taken from Section 4.4.2 (e). Third, the Draft's current Section 7.4 should be modified to require tribes to keep an inventory of all ROW agreements, with a re-inventory every three years; and specify a federal agency to be named as an arbitrator in the event of an impasse. An inventory, as suggested by the Departments, would assist all parties by establishing a baseline of ROW information from which trends could be drawn. Fourth, the options presented in Section 7 should include the Federal Power Act's approach to setting fees for use of tribal land for hydroelectric projects. See point #5 below.

2. The Departments should explain that Congress has plenary authority over tribes and that tribal sovereignty is always subject to Congressional determination.

The Draft Report properly recognizes that "the United States Constitution empowers Congress to strike a balance between tribal sovereignty and the greater national interest. In some cases, this may mean the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty." But the Department of Energy (DOE) and the Department of the Interior (DOI) do not mention this finding until Section 8.1, pg. 45, under "Departmental Observations." This fundamental finding should be moved to the Draft Report's Executive Summary and supporting analysis for this conclusion should be presented in Section 2 of the Report. In addition, the Draft Report should (1) clarify that Congress has plenary authority over the tribes; and (2) provide examples of legislation in which Congress has exercised this authority to harmonize the interests of tribes with other important national policy objectives.

First, the Draft Report should cite and explain the well-established statutory and decisional law which holds that Congress has *plenary* authority over Indian affairs.[4] "Plenary" has been defined as [f]ull, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY

[4] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.") (Internal citations omitted).

1154 (6th ed. 1990). Thus, tribal sovereignty is always subject to Congressional will.[5] Given its plenary power over tribes, Congress may strike any balance it chooses between tribal sovereignty and the national interest in reliable and affordable energy for *all* Americans.[6] Only by underscoring Congressional plenary authority can the final report fulfill its statutory mandate to recommend "appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way (ROW) on tribal land."[7]

In order for the present Congress to fully appreciate the scope of this plenary authority, the Departments should provide some historical context. To this end, Congress should be specifically informed that the federal government has long-imposed limitations on tribal powers. According to the respected Indian law treatise by Felix Cohen (Section 4.02, 2005 edition), tribal power must adhere to three basic principles:

- tribes possess, in the first instance, all the inherent powers of an sovereign state, however;
- tribes within the United States are subject to Congress and may not exercise external powers of sovereignty such as the power to enter into treaties with foreign nations; and
- tribal powers can be restricted by treaties and by express federal legislation.

Thus, treaties and statutes have limited tribal sovereignty in areas such as:

- exercising control over lands ceded to the federal government
- federal supervision of tribes
- conveyance of tribal property without federal approval
- allotment of tribal lands to individual Indians
- subjecting tribes to varying degrees of state authority
- federal criminal jurisdiction over Indians
- subjecting tribal authority to individual civil rights
- limitations on tribal adjudicative powers
- the power of a tribe to exercise jurisdiction over non-Indians within a tribal reservation

Tribal sovereignty is likewise cabined by the principle that the United States has the exclusive power to extinguish Indian title to land.[8] In other words, "Congress may effect an act of eminent domain, taking tribal land."[9]. Through rights of way statutes, Congress has authorized rights of

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[5] *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

[6] *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

[7] Energy Policy Act of 2005 ("EPAct") § 1813(b)(2).

[8] Cohen, at Section 15.09[1][a].

[9] Id. at Section 15.09[1] [b]

way across tribal lands for railroads, telegraph and telephone lines, oil and gas pipelines, and highways.[10]

Second, the Draft Report should provide examples of where Congress has exercised its plenary authority by enacting statutes such as the Indian Gaming Regulatory Act (IGRA) and the Indian Mineral Development Act (IMDA) which impose modest limitations on tribal sovereignty to enhance the contracting parties' economic relationship. The Departments should amend Section 3.3, pg. 17, of the Draft Report to discuss the specific examples of IGRA and IMDA where Congress has exercised its plenary authority over tribes in order to accommodate other important policy objectives.

In the case of IGRA, one of the key reasons Congress deemed it necessary to limit tribal sovereignty was because "[then] existing Federal law [did] not provide clear standards or regulations for the conduct of gaming on Indian lands".[11] In order to provide greater clarity and uniformity in the standards and procedures governing such gaming, Congress determined that some limitation on tribal sovereignty was necessary. For example, IGRA curtails tribal sovereignty by requiring those tribes which desire to engage in class III (casino-style) gaming to enter into a tribal-state compact with the state in which the tribe is located.[12] Before becoming effective, a tribal-state compact must also be approved by the Secretary of the Interior, thereby subjecting these agreements to federal administrative review.[13]

One tribe whose sovereignty has been constrained by IGRA is the Morongo Band in California. The report discussed this Band at Section 9.3. The Morongos operate one of the largest tribal gambling facilities in America -- the $250 million Morongo Casino Resort and Spa. See www.morongocasinoresort.com. Ironically, the Morongos complain they will lose sovereignty if they can no longer unilaterally withhold consent to rights-of-way while, at the same time, they voluntarily yield sovereignty to obtain highly lucrative gambling privileges.

Among the provisions which may be provided for in a tribal-state compact are the following: the application of criminal and civil laws and regulations of the tribe or State that are necessary for licensing and regulation of class III gaming; the allocation of criminal and civil jurisdiction between the State and Indian Tribe necessary for the enforcement of the applicable laws and regulations; remedies for breach of contract; and standards for operation (including licensing) of class III gaming and maintenance of the gaming facility.[14] Moreover, IGRA provides that class III gaming is only permitted on Indian lands if they are located within a state that permits such gaming for any purpose by any person, organization, or entity.[15] IGRA represents a relatively recent example of legislation where Congress enacted modest limits on tribal

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[10] Id. at Section 15.09[4].

[11] 25 U.S.C. § 2701(3).

[12] 25 U.S.C. § 2710(d)(1)(C).

[13] 25 U.S.C. § 2710(d)(3)(B).

[14] 25 U.S.C. § 2710(d)(3)(C).

[15] 25 U.S.C. § 2710(d)(1)(B).

sovereignty in order to establish a uniform and relatively predictable method of regulating the economic activity of casino-style gaming on tribal lands.

Similarly, under the IMDA[16] and its implementing regulations, tribes often waive sovereign immunity, defer or relinquish taxing authority, and grant land use privileges when entering into mineral development agreements. In particular, minerals agreements must include "[p]rovisions for resolving disputes"[17] which often require tribes to provide a waiver of their sovereign immunity to ensure that such agreements with non-tribal parties may be settled in a competent forum. Similarly, any minerals agreement negotiated between a tribe and a non-tribal party must be approved by the Secretary of the Interior in order to become effective.[18] The examples of IGRA and IMDA should be included in the Final Report to Congress to demonstrate how Congress can and has modestly curtailed tribal sovereignty in furtherance of important national policies that benefit both tribal and non-tribal members alike.

Third and finally, Sections 3.2.1 and 3.2.2, pgs. 14-16, of the Draft Report should be amended to inform Congress that DOI has the authority even under existing statutes to modify its regulations in order to grant ROW across many tribal lands without tribal consent. FAIR continues to believe that DOI's present regulations, which require tribal consent for ROW across *all* tribal lands, are not supported by the underlying statutes. Although FAIR continues to believe that the Departments have a duty to inform Congress of this defect, it is imperative that the Departments at the very least notify Congress that a dispute exists over the reach of DOI regulations under the present statutory regime regarding Agency approval of ROW over some tribal lands (i.e., non-IRA tribal lands) without tribal consent. Congress can then clarify the statutes so that consent may not frustrate broader and important national goals, such as the President's policy to promote American energy independence.

3. Despite the Draft Report's recognition that there are cases in which "the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty," the Departments narrowly and erroneously interpret the Energy Policy Act of 2005 as favoring tribal sovereignty over the interest of the American public.

While the Draft Report appropriately expands the discussion of the Administration's energy policy, it ends with a finding that these policies essentially favor Indian tribes and tribal sovereignty interests over all other interests, including those of Native Americans, in reliable, affordable sources of energy. (Section 2.3.1, pg. 11.) The Departments arrive at this conclusion by reviewing Title V of EPAct in isolation. Their conclusion that tribal sovereignty must, in every case, trump all other considerations is contrary to Administration policies that are designed to improve national energy independence, reliability and access for *all* Americans, not only

[16] 25 U.S.C. §§ 2101-2108.

[17] 25 C.F.R. § 225.21(b)(13).

[18] 25 U.S.C. § 2102(b).

Indian tribes. The Draft Report should be modified in Section 2.3.1, pg.11, to include the following five points:

First, the present system for procuring and renewing energy ROW across tribal lands is directly at odds with the Administration's goal of establishing the "dependable, affordable and environmentally sound production and distribution of energy." In 2001, President Bush established the National Energy Policy Development Group, directing it to "develop a national energy policy designed to help the private sector, and, as necessary and appropriate, State and local governments, promote dependable, affordable and environmentally sound production and distribution of energy for the future." (NEP, viii.)

Second, there is an obvious collision between the current tribal right-of-way policy and the President's profound commitment to reduce America's dependence on foreign energy sources. For example, as noted in FAIR's comments to the August Draft, the Departments fail to recognize that every cost, fee, tax, risk and uncertainty imposed on the U.S. natural gas transportation network can make foreign sources of energy more attractive, because the ROW fee increases will tend to impact domestically produced supplies disproportionately due to the likely geographic location of many ROW impasses. Hence, an impasse in a tribal ROW negotiation in California or New Mexico or a multi-million dollar increase in right-of-way fees passed through to a utility in Arizona may only serve to increase demand for liquefied natural gas from Indonesia, Algeria, Russia or other countries unburdened by current tribal ROW policy.

Third, the Departments erred by reviewing Title V of the Energy Policy Act in a vacuum, ignoring numerous other provisions of the Act which seek to strengthen existing laws that aim to protect U.S. consumers from unreasonable practices which could raise the price of natural gas and electricity.[19] The Departments' elevation of tribes' "internal" sovereignty interests over the larger public interest in affordable energy thus conflicts with one of the basic purposes of the Energy Policy Act itself: to reduce the cost of energy for all Americans.

Fourth, while Title V of EPAct creates a number of incentives for increased development of energy resources on tribal lands, this Title also provides important standards to ensure accountability for these incentives. For example, in an effort to strengthen and grow tribally-owned energy businesses, the Act allows federal agencies, when purchasing electricity or any other energy products or byproducts, to give preference to corporations or other business organizations in which a majority interest is tribally-owned or controlled.[20] However, when giving preference to such tribally-owned businesses, the agency is prohibited from either "(a) pay[ing] more than the prevailing market price for an energy product or byproduct; or (b) obtain[ing] less than the prevailing market terms and conditions."[21]

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[19] *See, e.g.,* Sections 315 and 1283 (prohibiting the manipulation of natural gas and electricity prices); Sections 316 and 1282 (directing FERC to prescribe rules facilitating greater transparency in reported natural gas and electricity prices); Section 1286 (expanding the authority of the Federal Energy Regulatory Commission to order refunds of unjust and unreasonable electric prices).

[20] EPAct § 2602(d); 25 U.S.C. § 3502(d).

[21] 25 U.S.C. § 3502(d)(2).

Accordingly, in enacting Title V of the EPAct, Congress recognized the importance of establishing standards to protect America's taxpayers at the same time as it encouraged the development and sale of tribally-produced energy resources. Indeed, if Americans are not to be expected to pay more than "prevailing market prices" for energy products purchased by their federal agencies from tribal-owned business entities, why should American energy consumers be expected to pay more than fair market value (FMV) for energy products that happen to traverse tribal lands? The same principle that applies when federal agencies are the direct purchasers of energy products can and should apply to transactions involving the transmission of energy products, including electricity and natural gas, across tribal lands. The Departments should expand their discussion and analysis of Title V of EPAct to point out this example of Congress' accommodation of tribal economic development with sensible fiscal accountability.

Fifth, regarding the establishment of energy corridors to ease congestion as part of EPAct 2005, the Departments note that "[i]n Sections 1221 and 368, Congress enacted authorities and processes intended to promote the siting of generation of transmission to help resolve congestion and improve reliability, but did not make these provisions applicable to tribal lands." (Section 2.2.4, pg. 10). Therefore, if the Secretaries designate a corridor across federal land that abuts or surrounds an Indian reservation, how will the Departments extend that corridor across Indian lands? Will the government have to obtain tribal consent to extend the corridor across tribal lands? If not, why should there be a different system for ROW across tribal lands that are outside the corridors? If the Departments do in fact plan to seek tribal consent, how do they plan to either (a) obtain that consent from the tribes to allow the corridor in the first place; or (b) obtain consent from the tribes when a renewal of the corridor is required across Indian lands? If the federal government envisions requesting consent from an affected tribe, this contingency has the potential to completely undermine the Departments' effort to establish corridors in the first place and it is incumbent upon the Departments to notify Congress of this fact in their Final Report.

In fact, the Departments could estimate the expected impact of current tribal ROW fee policy on these corridor costs by considering the impact of current tribal ROW fee policy on the price that companies would pay to use a new U.S. government energy corridor across the Navajo Nation. To determine the corridor cost, the Departments could apply the current Navajo ROW rate of $24,000 per mile (over an assumed 100 foot easement width) to a corridor that is 800 miles long and one-mile wide.[22] Using these figures, the Departments would find that the total cost of a corridor that traverses the Navajo Nation would amount to more than $1 billion per year. Even if the FMV for a perpetual easement on this land cost $1 billion, the calculated corridor figure is

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[22] This calculation was based on the current Navajo ROW rate of $24,000 per mile annually over an assumed 100 foot easement width. Assuming a corridor that is 800 miles in length and one-mile wide, the total cost of the corridor would be over $1 billion annually. The one-mile corridor width was the minimum width suggested by commenters for a mixed-use corridor and was discussed on pg. 7, "Summary of Public Scoping Comments for the Programmatic Environmental Impact Statement, Designation of Energy Corridors on Federal Land in the 11 Western States (DOE/EIS=0386)", DOE/DOE, February 2006.

still many billions of dollars greater because it represents a fee that must be paid every year for decades to come. Moreover, this $1 billion annual figure could well be a conservative estimate of the cost because the current tribal ROW demands do not yet appear to fully reflect energy transporters' build-around costs.

In order to properly apprise Congress of this collision between Congress' proposed energy corridors and the present regime for procuring and renewing ROW across tribal lands, the following language should be inserted in Section 2.2.4., pg. 10, line 41:

"The fact that the current federal energy corridors stop at the borders of tribal lands ignores the dramatic impact that the current ROW policy could have on easing siting constraints. For example, using current per mile tribal ROW rates, industry representatives have estimated that a corridor crossing the Navajo Nation could cost as much as $1 billion per year. The alternative would be to build the corridor around the recalcitrant reservation, assuming federal lands could be found for the build-around."

4. The Draft Report fails to explain that all other government entities use traditional notions of fair market valuation as the "best practice" for compensating landowners for the use of their lands dedicated to the public interest.

The Departments have expanded their discussion on standards and procedures for determining compensation for Energy ROW on tribal land. In particular, the Draft Report appropriately recognizes that valuation methods for non-tribal lands derive from the constitutional concept of "just compensation". (Section 5.2, pg. 27). The Draft Report further notes that some form of fair market valuation is used by the federal government both when exercising its eminent domain authority and when voluntarily purchasing property under the Federal Land Acquisition Standards. *Id*. The Draft Report also properly recognizes that market-based principles as reflected in the Uniform Standards of Professional Appraisal Practice are used universally in real estate transactions. *Id*.

The Draft Report's discussion in Section 5.2 should be expanded, however, to explain to Congress that FMV principles are universally employed by all other dependent sovereigns, such as states and municipalities, for valuing ROW across their own lands or the lands of their citizens. Of particular relevance for this report, Congress should be informed that the states containing the majority of tribal land in the western United States -- California[23], Arizona[24],

[23] California's Constitution mandates that a public entity pay "just compensation" to a property owner when it acquires a right of way through its eminent domain authority. California Const., Article I, Section 19. "Just compensation" under California law has been interpreted to mean "fair market value". CCP Section 1263.320(a) defines "fair market value" as "the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."

New Mexico[25], Colorado[26], Utah[27], Wyoming[28], and Idaho[29]-- all use FMV-based standards for valuing ROW within their borders.

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[24] Arizona's Constitution, Article 2, Section 17, provides for the condemnation of private property and states that "[n]o private property shall be taken or damaged for public or private use without just compensation." The State of Arizona acquires rights-of-way or easements through the eminent domain statutes (A.R.S. §12-1111 et seq.), the eminent domain statutes for public works (A.R.S. §12-1141 et seq.), or the transportation statutes related to condemnation (A.R.S. §28-7091 et seq.). The value of the property so taken is determined by ascertaining the most probable price estimated in terms of cash that the property would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable. A.R.S. §12-1122(C) and A.R.S. §28-7091.

[25] Under New Mexico law, the State Land Office has primary responsibility for the disposition of state lands. 1978 NMSA § 19-1-1 (2006). By regulation, the State Land Office has set fair market value as the touchstone in determining appropriate compensation. In NMAC 19.2.10.9(D)(1)(a), for example, the penalty for the first unauthorized use of a right of way is "100% of the applicable fair market value." Fair market value also determines compensation when the State of New Mexico acquires rights of way across private land through condemnation. In such cases, the compensation due for a state condemnation, whether of an easement, right of way, or otherwise, is the "actual value" as of the date the condemnation petition was filed. 1978 NMSA § 42A-1-24 (2001).

[26] Colorado's Constitution, Art. II Sec. 15, provides that "private property shall not be taken or damaged, for public or private use, without just compensation." Under Colorado law, market value generally means the price the property would have brought if sold under usual and ordinary circumstances, and it reflects the value of the landowner's lost interest and not the taker's gain. *Williams v. City & County of Denver*, 147 Colo. 195 (1961). *See also Fowler Irrevocable Trust v. City of Boulder*, 17 P.3d 797 (2001) (just compensation is how much would the property bring in cash if offered for sale by one who desired but was not obligated to sell, and was bought by one who was willing but not obligated to buy.).

[27] Utah's Constitution, Art. I. Sec. 22, provides for condemnation of property for public purposes and states that "[p]rivate property shall not be taken or damaged for public use without just compensation." Whether performing a valuation of property under the Statute or determining "just compensation" pursuant to Art. I, Sec. 22, case law establishes that the amount to be paid a condemnee is the fair market value of the condemned property. *See State v. Ward*, 112 Utah 452, 189 P.2d 113 (1948) (A condemnee is to be paid only so much as will compensate him for damages to his property.); *State v. Cooperative Sec. Corp. of Church of Jesus Christ of Latter Day Saints*, 122 Utah 134, 247 P.2d 269 (1952) (The compensation to which an owner is entitled is the difference in the fair market value of his property before and after the taking.); *City of Hilldale v. Cooke*, 28 P.3d 697, 424 Utah Adv. Rep. 55 (2001) (The measure of damages

Moreover, it is imperative that Section 5.2 of the Draft Report be amended to explain to Congress that the tribes *themselves* use a FMV methodology when determining what compensation is due their own tribal members for property taken pursuant to the tribes' domestic eminent domain statutes.[30] Similarly, Congress established FMV as the accepted standard of

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is the market value of the property and the formula for determining fair market value is what would a purchaser willing to buy but not required to do so, pay; and what would a seller willing to sell but not required to do so, ask.).

[28] The State of Wyoming has the authority to purchase or condemn any real estate for any "necessary public purpose." Wyo. Stat. Ann. § 1-26-801(a) (LexisNexis 2005). In negotiating a value for the property, the State is guided by the Wyoming Constitution, which provides, "[p]rivate property shall not be taken or damaged for public or private use without just compensation." Wyo. Const. art. I, § 33. If the State and the landowner are unable to reach an agreement on the value of the property, the court will assess "fair market value" for the property. Id. § 1-26-702(a). "Fair market value" is defined as "the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy." Id. § 1-26-704(a)(i).

[29] Idaho's Constitution, Article I, Section 14, declares that private property may be taken for public use "but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." This authority is exercised by the Idaho Department of Lands consistent with governing statutes and the Idaho Administrative Procedures Act ("IDAPA"). The definition of "market value" under the IDAPA is:

> The most probable price at a specified date, in cash, or on terms reasonably equivalent to cash, for which the property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

IDAPA 20.03.08.010.07.

[30] As a rule, Tribal Codes permit the pertinent tribal government to condemn lands of its respective land base and pay the condemnee under a standard of either (i) fair market value ("FMV"), (ii) "just compensation;" or (iii) an "appraised value." In each instance, the tribal government has enacted a system that mirrors the process employed by States and the United States to set FMV as the rubric for valuing land to be taken.

Those Codes which refer to "just compensation" do so, presumably, as a result of 25 U.S.C. § 1302(5), which reads:

compensation for Indian lands under the Indian Claims Commission Act and other pertinent statutes.[31] Accordingly, the Final Report must fairly apprise Congress that both Congress and the tribes themselves have determined that FMV is the appropriate standard for valuing tribal or other Indian lands dedicated to public use.

5. The Draft Report should include in its suite of options for Congress' consideration a discussion of the Federal Power Act's approach to the use of tribal lands for hydroelectric projects.[32]

The Department's discussion in the Draft Report of possible options for addressing the issue of the use of tribal ROW for electric transmission lines and natural gas and oil pipelines (Section 7, pgs. 43-44) largely overlooks an important and relevant precedent, namely current law applicable to the use of tribal lands for Federal Energy Regulatory Commission (FERC) licensed

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> No Indian tribe in exercising powers of self-government shall – (5) take any private property for a public use without just compensation; . . . .

At least two courts have ruled that the "just compensation" standard is to be interpreted in accordance with general principles in the United States Constitution. *See Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978) (25 U.S.C. §§ 1301-1303 is modeled after the Constitution of the United States and is to be interpreted in light of constitutional law decisions.); *Loncassion v. Leekity*, 334 F. Supp. 370 (D.N.M. 1971) (Law governing actions against individuals for damages under United States Constitution Amendments 4 and 5 should be applied to 25 U.S.C. § 1302.). As such, "just compensation" under 25 U.S.C. § 1302(5) should be interpreted as that phrase is understood in Federal condemnation actions, i.e., FMV.

[31] The Indian Claims Commission Act ("ICCA") is the major vehicle by which tribes have received compensation for the Federal government's use or taking of their lands. Although not specified in Act itself, the Indian Claims Commission and the United States courts decided on fair market value as the appropriate standard of compensation. *See, e.g., Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 450, 175 F. Supp. 926, 943 (1959) (Standard of compensation under the ICCA for lost land was "fair market value," defined as the "highest price estimated in terms of money which land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used."); *see also Tillamook Tribes of Indians v. United States*, 4 Ind. Cl. Comm. 57, 58-60 (1955) (exploring at length the use of the fair market value standard).

[32] This point and point # 6 are borrowed with permission from the Edison Electric Institute's analysis performed in consultation with Daniel Adamson, Esq. of the law firm of Davis Wright Tremaine, LLP.

hydroelectric projects. Section 7, pgs. 43-44, should be amended to include the Federal Power Act (FPA) model as another important and relevant option for Congress to consider in addressing the problem of resolving energy ROW disputes across tribal lands.

Under the FPA, tribes do not have a veto over the use of tribal lands by a FERC licensed hydroelectric project when an original license is issued or at relicensing. Instead, under Section 4(e) of the FPA federal "reservations," including tribal reservations, may be occupied by a hydroelectric project "after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created…." 16 U.S.C. § 797(e). In addition, Section 4(e) authorizes the Secretary of the Interior to impose conditions on the project necessary for the "adequate protection" of tribal reservation lands used for a hydroelectric project." *Id.*

If a tribe and a licensee cannot come to an agreement regarding payments for the use of the tribe's land for a hydroelectric project, FERC has authority to fix a charge for such payments regardless of whether it has been agreed to by the tribe with jurisdiction. 16 U.S.C. § 803(e); 18 C.F.R. § 11.4(a); *Montana Power Co. v. Federal Power Comm'n*, 459 F.2d 863 (D.C. Cir. 1972). If a tribe or DOI seeks to contest FERC's determination of 10(e) charges they may do so by petitioning for judicial review of the Commission's order setting such charges. *Id*. at 874.

Moreover, FERC does not delay the issuance of a license for a hydroelectric project if no agreement has been reached between the tribe and the licensee regarding compensation for the use of tribal lands. Instead, the Commission typically issues a license that includes an article directing "the licensee to negotiate with the tribe, and submit for Commission approval, a reasonable annual charge for the project's use of tribal lands." *Wisconsin Power & Light Co.*, 97 FERC ¶ 61,054 (2001). When this approach has not yielded an agreement, the Commission has set the annual charge issue for hearing before a FERC Administrative Law Judge. *See, e.g., Wisconsin Valley Improvement Co.*, 83 FERC ¶ 61,127 (1998).

In the vast majority of cases, a settlement is reached between the parties regarding the amount of fees for the use of tribal lands. *See, e.g., Wisconsin Power & Light Co.*, 96 FERC ¶ 62,216 (2001). This reflects the Commission's strong preference for settlements of this issue. "The Commission becomes directly involved in establishing annual charges on Indian lands only where it must, because the parties are unable to reach a reasonable accommodation." *Public Util. Dist. No. 1 of Pend Oreille County*, 77 FERC ¶ 61,146, at 61,553 (1996).

In short, the FPA provides a very workable model for the use of tribal lands for energy infrastructure that should be considered by the Departments. By not giving tribes a veto over the use of their lands for a hydroelectric project, FERC has facilitated the development of hydroelectric generation that is a key part of the power system in many areas of the country. In addition, FERC has implemented its authority to set the fees to be paid to a tribe for the use of lands for a hydroelectric project in a manner that provides a strong incentive to both the tribe and the licensee to reach a mutually beneficial and equitable settlement. In fact, it has been many years since FERC has had to unilaterally set fees for the use of tribal lands because the parties involved, both tribes and licensees, strongly prefer to resolve these matters on their own rather than take their chances by seeking a decision from the Commission. The Departments should recommend that Congress consider whether a similar approach should be applied to setting compensation for the use of tribal ROW.

6. The Draft Report does not accurately describe the "net benefits" approach for calculating charges for use of tribal lands.

While the Draft Report makes no mention of the authority of FERC to unilaterally authorize the use of tribal lands for a hydroelectric project and establish the amount of compensation, it does include a short discussion of the "net benefits" approach that has been used by FERC for calculating charges for the use of tribal lands. (Section 5.2, pg. 29). However, the Report's description of "net benefits" is incomplete and inaccurate in several respects.

To begin with, the Draft Report incorrectly states that FERC has used the "net benefits" approach "with some consistency" in "recent years." (Section 5.2, pg. 29). What the Draft Report fails to mention, however, is that FERC has not prescribed any particular methodology, let alone the "net benefits" approach, for calculating annual charges for the use of tribal lands. *Wisconsin Power & Light Co.*, 97 FERC ¶ 61,054 (2001). Instead, "the concern here is not with the method used so much as with the end result, which must be reasonable." *Portland Gen. Elec.*, 12 FERC ¶ 63,055, at 65,216 (1980).

Moreover, while it is true that one of the several methodologies that has been used in the past to determine annual charges is the "net benefits" approach, the Commission has never indicated that "net benefits" is the preferred methodology for fixing annual charges for the use of tribal lands. Moreover, the Commission has not issued an order setting Section 10(e) annual charges based expressly on the net benefits methodology for almost 25 years. *See Portland Gen. Elec.*, 20 FERC ¶ 61,294 (1982).

Under the "net benefit" approach, the cost of producing power from a hydroelectric project is compared with the cost of a hypothetical alternative generation resource. The delta between project costs and the costs of an alternative generation resource is the "net benefit." Then an approach to apportioning the net benefit between the licensee and the tribal land owner must be devised. In some cases, a 50/50 split of the net benefit is used as a starting point for allocating the net benefits. However, there is no definitive approach to this issue. In addition, the net benefit must be allocated in a manner that takes into account the percentage of the land used by the Project that is comprised of Indian lands.

A fundamental flaw in the Draft Report's description of "net benefits" is the statement that "the most straightforward allocation is to determine the portion of the net benefit that accrues to Indian lands by multiplying the net benefit by the percentage of Indian land used by the project." (Section 5.2, pg. 29). Under this approach, which has never been taken by FERC and is completely counter to FERC precedent, a tribal landowner would receive 100 percent of the net benefit of a hydroelectric project located on tribal lands and the licensee's customers and shareholders would receive no benefit whatsoever from their investment and assumption of risk associated with building a hydroelectric project. The Final Report should be revised to make clear that such an irrational and inequitable approach to setting fees for the use of tribal lands should not be applied to the use of tribal land for electric transmission and natural gas and oil pipelines.

7. The Draft Report ignores the significant economic burdens to consumers as a result of current ROW policy on tribal lands.

While FAIR appreciates the Departments' recognition that future unresolved ROW conflicts "could have a significant regional or national effect on the availability, reliability, or consumer costs of energy resources" (Section 8.1, pg. 45), the Draft Report does not go far enough in explaining the effect of the present regime on consumers. For example, the Draft does not contain Sempra's submission explaining how the activities of the Pechanga Band of Luiseno Indians blocked SDG&E's Valley-Rainbow Interconnect project, a $360 million dollar, 31-mile, 500 KV electric transmission line that Sempra proposed in 2000 to maintain reliability and serve the future energy needs of San Diego County residents.[33] SDG&E studied more than 80 routes to determine the corridors for its Valley-Rainbow Interconnect project that would have the least impact on the residents, businesses and environment in Riverside and San Diego Counties. Of these 80 routes, the preferred route was located on the southern and eastern boundary of the Pechanga Reservation.

The Pechanga tribe opposed the first route and refused to grant the right of way at any price. Additionally, the California Public Utilities Commission ("CPUC") did not approve the project because the CPUC has a policy of not considering projects beyond the next five years and the Rainbow Valley Interconnect did not fall within that timeframe.[34] As a result of a failure of this project to proceed, customers in southern California will experience over $500 million in additional congestion[35] and reliability-related costs until such time as an alternative transmission project can be placed in service.[36]

As discussed in a recent Department of Energy study, Southern California still needs new transmission capacity to access lower cost generation outside the region, improve reliability, and comply with California's renewable portfolio standard.[37] To help meet these needs, Sempra

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[33] *See* Sempra Submission, May 15, 2006, at pg. 2.

[34] *See* Sempra's June 9, 2006 supplemental submission to the Departments, pg. 13.

[35] Congestion on an electric transmission line prevents customers in a given area from accessing the cheapest possible generation; instead these customers must be served by more expensive local sources. Congestion can be alleviated by adding new transmission infrastructure or new generation capacity in strategic areas.

[36] Sempra's analysis of these costs is available for review by the Departments.

[37] *See, e.g.*, National Electric Transmission Congestion (NETC) Study, U.S. DOE, (August 2006) at p. 45. As explained by DOE, "[t]he state of California is the sixth largest economy in the world and had an estimated population in 2005 of over 36 million persons. About two-thirds of California residents live in Southern California, which faces rapidly growing electric demand. The area contains important economic,

initiated the Sunrise Power Link project in 2005. The Sunrise Power Link will cost an estimated $1.25 billion, *over nine hundred million dollars more* than the Valley Rainbow Interconnect would have cost and will traverse almost 110 additional miles.[38] In addition, Sempra is routing the Sunrise Power Link through the Anza-Borrego Desert State Park, a path that is opposed by several environmental groups. Current tribal ROW pricing policy has led Sempra to route around the Santa Ysabel Reservation, which will add approximately $4 million in costs and five miles of length to the project.

Another graphic example of rising costs is exhibited below in Table 1. It shows that if all natural gas pipeline ROW on tribal lands are renewed at a rate of $24,000 per-mile per-year and all electric transmission ROW on tribal lands are renewed at a rate of $34,000 per mile per year, tribes will collect over $700 million annually from the nation's energy transporters and their customers.[39]

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manufacturing, military and communications centers—in total, an infrastructure that affects the economic health of the U.S. and the world." DOE proceeds to note that "[e]lectrically, this is the area south of WECC transmission path 26 or SP26…. According to the California Independent System Operation (ISO), various combinations of extreme peak demand, high generation unavailability, or critical transmission losses could cause the SP26 area to be short on local generation and require the ISO to cut non-firm and firm loads to maintain grid reliability." In this same study, DOE designated Southern California as one of the two areas in the country in which it is "critically important to remedy existing or growing [transmission] congestion problems because the current and/or projected effects of the congestion are severe." (See NETC Study at p. viii.).

[38] The Sunrise Power Link project does achieve some benefits that were not available from the Rainbow Valley Interconnect project; in particular, the Sunrise Power Link allows SDG&E to access some remotely located renewable resources.

[39] Under the assumption that the pipelines and transmission lines in this analysis were installed many years ago and have produced no further diminution in the value of the property they traverse, this figure of $700 million in annual costs provides a rough estimate of the excess amount that would be paid to tribes, in the absence of FMV-based fees on tribal lands.

Table 1
Potential Annual ROW Fees for Existing Facilities on Tribal Land
Estimated using total miles of natural gas pipeline and electric transmission lines on tribal lands and current ROW fees of some tribes

		Natural Gas Pipelines
	7468	Miles of natural gas pipeline on Native American lands
X	80%	Percent of Native American lands which are Trust lands
X	$24,000	Dollars per mile per year ROW charge on Trust lands
=	**$144,025,714**	Dollars per year in ROW fees
		Electric Transmission Lines
	21225	Miles of electric transmission lines on Native American lands
X	80%	Percent of Native American lands which are Trust lands
X	$34,000	Dollars per mile per year ROW charge on Trust lands
=	**$579,897,321**	Dollars per year in ROW fees
		Total
	$723,923,036	Total annual ROW fees for pipelines plus transmission lines

Notes/Sources

Total miles of natural gas pipelines and electric transmission lines are estimates based on currently available maps. Miles of pipeline does not include midstream or gathering facilities. Loop lines may also be excluded.

Percent of Native American lands which are trust lands is from DOI trust report 2003 which reports 56 million acres of tribal land, 45 million of which are trust land.

Annual ROW charge for natural gas pipeline is from Navajo Nation submission to 1813 study ($22 million per year for 900 miles of pipeline = approximately $24,000 per year.) Annual ROW charge for electric transmission lines are from EEI study results submitted to 1813 study. Their survey results indicated a mean of $1.7 million per mile for a 50 year ROW = approximately $34,000 per year.

8. The Draft Report does not address the adverse impact of the current policy on the Nation's environment.

As previously noted, projects that are forced to build around tribal lands will traverse less advantageous routes, consume more resources, and/or impose a greater burden on the environment than would otherwise have been the case. Several industry submissions point to costly examples of build-around that have already taken place and more can be expected as new infrastructure is constructed in regions that contain tribal lands.[40] For example, as stated in point

[40] *See, e.g.,* Supplemental comments behalf of San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas), June 9, 2006 at 3-4.

7, Sempra is routing an electric transmission line project through the Anza-Borrego Desert State Park, a path that is opposed by several environmental groups, to avoid the Santa Ysabel reservation and the uncertainties associated with ROW fee renewals once the project has been installed. Thus, the impact of tribal activities on this one project alone will likely cost Southern California ratepayers over $1.5 billion in increased construction and congestion costs, as well as greater environmental impacts associated with the longer and less geographically and environmentally advantageous route. Not only will the new route raise consumer rates, it will prevent the tribes from reaping any economic benefits from the ROW crossing their land and it will disproportionately impact the surrounding environment. Both of these outcomes could have been avoided had a sensible ROW acquisition policy been in place.

9. DOI's trust responsibility requires the Department to consider the disadvantageous effect on tribes if industry starts to avoid investing energy infrastructure on tribal lands due to the absence of standards and procedures for acquiring and renewing ROW.

The Draft Report fails to recognize that a competent and enlightened trustee looks after the long-term interest of the beneficiary and that, even in the short-term, a reliable and transparent valuation standard is necessary. Failure to implement a ROW acquisition and renewal process that is consistent, transparent, objective and reasonable will mean that any tribe can demand exorbitant, unreasonable, economically stagnating, and self-defeating right-of-way "consent" fees. This will only serve to increase Indian Country's energy isolation, discourage job creation and investment, and postpone the long-overdue economic development and national economic participation of Native Americans. Because there are currently no standards whatsoever, the *status quo* carries a needless risk of underpayment to tribes, just as companies inherently risk overpayment.

A recent example of this "tribal land avoidance" phenomenon is found in Idaho Power Company's May 15, 2006 comments to the Departments, which explains in relevant part, "Idaho Power fears that in the long term, the industry is increasingly reluctant to site any new facilities on tribal lands and are actively considering alternatives to existing facilities on tribal lands. Our industry cannot continue to invest millions of dollars to maintain or develop new energy infrastructure on ROW that provide no certainty of renewal and no certainty of reasonable renewal costs. The long-term security of these lines must be more definitively guaranteed to protect the reliability and availability of the national power grid."

10. The Draft Report fails to recognize that the tribes' monopolistic demands threaten to subvert the consumer protection authority of the Federal Energy Regulatory Commission (FERC).

Under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.,* and the Federal Power Act (FPA), 16 U.S.C. § 824, *et seq.,* Congress has required FERC to ensure "just and reasonable" rates for the jurisdictional transmission of natural gas and electricity. Rules and regulations promulgated by FERC pursuant to its exclusive ratemaking authority under the NGA and FPA would prohibit a FERC-regulated natural gas or electric transmission owner from using "build around" or replacement cost theories as the basis for establishing its rates. Rather, FERC regulations require rates to be based on the original cost of the facilities (less accumulated depreciation), which would typically be much lower than the replacement cost of a pipeline or electric transmission line.[41]

The rationale for this policy is found in Congress's determination under the NGA and FPA that interstate natural gas pipelines and utilities which own electric transmission lines are natural monopolies. Congress has determined that interstate natural gas and electric transmission owners should not be permitted to extract monopoly rents from often-captive customers, and it has directed FERC to prevent such rent-seeking. *See, e.g.*, *FPC v. Hope Natural Gas Co*., 320 U.S. 591, 610 (1944); *Associated Gas Distributors v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("The Natural Gas Act has the fundamental purpose of protecting gas consumers from pipelines' monopoly power.") Permitting a Native American tribe essentially to "hijack" the pipeline or electric transmission owner's natural monopoly and to use it as a vehicle for extracting monopoly rents by imposing arbitrary "consent" costs on captive consumers would plainly circumvent Congress's determination that consumers be protected by FERC from the market power that can otherwise be exercised by – or, in this case, *through* – these essential infrastructure facilities.

Similarly, the Draft Report ignores FERC's Congressionally-imposed consumer protection mandate by asserting that tribal ROW demands are unlikely to have a significant impact on overall energy transportation costs and the total cost of energy paid by consumers. (Section 6.1.2, pg. 35.) As discussed at length in FAIR's submissions, the appropriate way to evaluate public policy is not to divide some fraction of the policy's costs by a very large number, such as all the electricity consumers in the U.S. Instead, as the Draft Report acknowledges, the appropriate method for evaluating a policy option is to compare the policy's total benefits to its total costs. In this case, the benefits remain unmeasured, while industry submissions indicate that the costs are large, as discussed in the points above.

Leaving this issue aside for the moment, however, under the NGA and FPA, it is irrelevant whether the impact of the tribes' actions on energy costs is small or large. Under the NGA and FPA, Congress has charged FERC with preventing natural gas and electric transmission owners from extracting monopoly rents, regardless of the scope of the impact of such rent extraction on

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[41] *See, e.g.*, 18 C.F.R. § 154.312(l) (2006); *see also Enbridge Pipelines*, 100 FERC ¶ 61,260, P 48 (2002); Financial Accounting, Reporting and Records Retention Requirements Under the Public Utility Holding Company Act of 2005, 115 FERC ¶ 61,098, P 12 (2006) ("The instructions found in both Parts 101 and 201 of the Commission's regulations contain provisions for implementing the ratemaking principle of original cost. Under this principle, companies are required to record utility property in the plant in service accounts at the cost to the person who first devoted the property to public service.") *Cf. Williams Pipe Line Co.*, 75 FERC ¶ 63,016, at 65,064 (1996) (rejecting oil pipeline's attempt to establish rates based on the cost of a hypothetical new pipeline, stating that "Such a result has no basis in the statute, the regulations, or any FERC precedent."). As the attached letter to Assistant Deputy Secretary Haspel explains, most pipelines have not been fully depreciated.

the actual rates paid by consumers. Tribes that make monopolistic ROW demands should be treated no differently, and in fact cannot be treated differently without undermining the fundamental consumer protection goals of the NGA and FPA.

In addition, the Departments fail to acknowledge the impending storm on the horizon that will occur if appropriate standards for ROW compensation are not established. Tribes will increasingly resort to threatening companies with trespass actions in tribal court seeking, among other remedies, massive penalties for a purported violation of tribal trespass laws. On the other hand, if, to avoid such penalties, a pipeline were to abandon its facilities and services without prior FERC authorization, it would be in violation of the NGA, which also provides for significant penalties in furtherance of the NGA's consumer protection goals. This places pipelines in an untenable "Catch 22".

Another threat is that the tribes would simply seek to take over the specific transportation or transmission facilities at issue. Here again, this would have extremely negative implications for the ultimate consumers of natural gas and electricity. First, it is highly questionable whether FERC would approve the abandonment of natural gas pipeline facilities as being in the public interest under the NGA, given the reliance on those facilities by millions of residential, commercial and other end-use customers. Second, consumers would be forced to pay an additional charge to obtain their gas or electricity. It is inconceivable that it could be in the public interest to impose such "rate stacking" on consumers. Third, assuming tribes continue to assert that their alleged sovereign status trumps any federal interest, including FERC authority to ensure that rates for the interstate transmission of natural gas and electricity are "just and reasonable", the tribes will presumably assert that the additional charge which they will impose for use of the facilities is not subject to FERC jurisdiction and thus should be unregulated. In short, the report leaves the American public completely exposed to the exercise of monopoly power by tribes, either directly through an effort by tribes to take ownership and control of facilities currently regulated by FERC, or indirectly through the payment by utilities and pipelines of monopolistic ROW fees to the tribes.

11. The Departments' assertion that ROW fees are "akin to tax rates" required to provide "fiscal support" to tribes is both legally and economically unsound.

The Departments state that "unlike federal, local and state governments, tribes can not rely primarily on taxation to provide fiscal support for these [tribal] governmental bodies and must capture the associated costs of running tribal government from contracts, and compacts with the federal government, right-of-way fees, and other economic activities such as resource development and gaming." They proceed to assert that "ROW fees are akin to tax rates on assessed real estate by local government to fund budgets to provide local services." (Section 5.3, pg. 30.)

These assertions are legally and economically unsound for the following reasons. First, Section 1813 requires the Departments to provide "recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, renewals and expansions of energy ROWs on tribal land." From a legal perspective, the issue of what constitutes fair and appropriate compensation for ROW has historically been based on the value of the land usage rights, not the fiscal needs of the landowner.[42]

Second, if ROW fees are to be treated as taxes, then the Departments have an obligation to discuss the relevant legal standards that would govern and limit the imposition of such taxes. In conformity with the Supreme Court's landmark decision in *Montana v. United States*, 450 U.S. 544 (1981), lower courts have subsequently held that tribes do not have the power to tax federally authorized ROW because those ROWs are equivalent to non-Indian fee land, the existence of the ROW does not create a consensual relationship between the ROW holder and the tribe, and the ROW does not threaten the political or economic integrity of the tribe. Following this established Supreme Court precedent, courts have struck down tribal possessory interest taxes on ROWs (*Reservation Telephone Cooperative v. Henry*, 278 F. Supp. 2d 1015 (D. N.D. 2003) and tribal ad valorem taxes on rights-of-way (*Big Horn County Electric Cooperative Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). The Supreme Court's legal constraints on tribal power delineated in *Montana* have subsequently been held by the Supreme Court to apply both to a tribe's legislative jurisdiction and adjudicative jurisdiction (*Strate v. A-1 Contractors*, 520 U.S. 438 (1997)). Consequently, if the Departments are correct that ROW fees are really tribal taxes, then significant legal barriers arise as to the ability of the tribes to assess these taxes.

Third, if ROW fees are taxes (or their functional equivalent), and assuming for the sake of argument that tribes have the legal authority to assess such taxes, then relevant regulatory and ratemaking principles should apply as well. In similar circumstances where a governmental entity (such as a municipality) has sought to impose a disproportionate tax on a utility, regulators have required the utility to recover the cost of the tax by imposing a surcharge on the ratepayers within that taxing authority, thus effectively flowing the tax back to that governmental entity's constituents, and barring the utility from spreading the cost of the tax across all utility ratepayers.[43] These rulings are based on the fundamental ratemaking principle that it would be inequitable to require all ratepayers to bear such costs and thereby cross-subsidize the specific ratepayers in the governmental area which imposed the tax. Application of that principle here, by FERC or state public utilities commissions (PUC) with jurisdiction, would assign the cost of an excessive ROW payment to the "taxing" tribe itself, assuming that the tribe is also a ratepayer of the gas pipeline or electric transmission line at issue. Although ratemaking issues are within

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[42] "The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view of the owner and not the condemnor. In other words, just compensation in the constitutional sense is what the owner has lost, not what the condemnor has gained." 4-12 Nichols on Eminent Domain Section 12.03.

[43] *See, e.g., Investigation on the [California Public Utilities] Commission's Own Motion To Establish Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities*, Decision No. 89-05-063, Investigation No. 84-05-002, 1989 Cal. PUC LEXIS 890, at LEXIS page 10 (May 26, 1989); *see also National Fuel Gas Supply Corp.*, 7 FERC ¶ 61,317 (1979) (stating FERC would consider the direct assignment of certain state taxes to ratepayers located in that state if a state's taxes became "disproportionately large" compared with taxes in other states).

the exclusive jurisdiction of FERC (or state PUC, depending on the facts of the particular case), significant regulatory litigation over these and other pertinent ratemaking issues could be avoided if the Departments would recommend an appropriate standard for determining fair ROW compensation as required by EPAct § 1813(b)(2).

As discussed at length in FAIR's previous comments, ROW fees are an extremely costly, profoundly distortionary and regressive means for funding tribal government. Moreover, even assuming ROW fees constitute *de facto* tribal taxation, shoe-horning tribes' budget-driven ROW fee demands into federally regulated energy transportation rates – paid by rich and poor Americans alike through their local utilities – is a terribly inelegant, hidden and regressive fiscal mechanism for funding tribal needs. In any other context, such a proposition would clearly run afoul of the Bush Administration's approach to tax policy, which has long involved reducing the distorting effects of taxes on private sector incentives, making taxes more transparent, and ensuring that the poorest Americans are protected from onerous taxation.

12. The Departments improperly blame energy providers for not anticipating the current trend towards monopoly pricing for tribal ROW.

The Departments should acknowledge that the business and governmental policy environment within which tribes and companies operate has shifted dramatically since companies and tribes entered into the original ROW agreements. Tribes now withhold ROW agreements to extract "consent" payments that approximate the avoided costs of build-around infrastructure (referred to herein as "replacement cost"). That was certainly not the approach to valuation when the first ROW agreements – attendant to the original installation of energy infrastructure certificated in the public interest by the United States government itself – were first entered into. Then, as should be the case now, valuation was more clearly rooted in traditional notions of fair market value, which still govern throughout America.

The Departments' discouraging comment that energy providers "should have anticipated [this problem] when [they] entered into the initial contract[s] and made additional and subsequent investments" (Section 6.5.3, pg. 42) is troubling and provides Congress with neither an understanding of the current situation nor guidance on the thorny problem of what might be the "appropriate standards and procedures" for determining fair compensation to tribes for "grants, expansions, and renewals of energy ROW" that Congress asked for in Section 1813. Indeed, it strains credulity that energy providers should have somehow anticipated that the long and broadly applicable fair-market-value approach – which is *itself* grounded in the Just Compensation Clause of the Fifth Amendment to the United States Constitution and the teaching of courts over nearly two centuries – would devolve into the current ROW policy cacophony that governs tribal lands.

Moreover, the Draft Report inaccurately describes industry's position regarding ROW renewals stating that "…companies can not expect that terms of contracts would remain static over time or would remain the same for contract renewals." (Section 6.5.2, pg. 42.) Of course, energy transporters expect to compensate landowners for the diminished value of their land resulting from the usually below-ground presence of energy infrastructure traversing their lands and for any disturbance resulting from such infrastructure installation and maintenance activities. Energy transporters, however, do not -- and *should* not -- expect to pay compensation for tribal ROW based on "hold-up" prices or "build-around" costs theories. Indeed, as set forth elsewhere in these comments, such tribal compensation theories are, at bottom, rooted in the pricing, practices and decision-making of the monopolist. To state the Departments' assertion here is, therefore, to defeat it: should the consumer who originally purchased a product from a firm that later becomes a monopolist have "expected" to pay monopoly rents for a later-needed part? In no other part of the American macro-economy would such an assertion be tolerated as a justification for policy failure . Nor should it be here.

In addition, the Draft Report fails to mention that DOI itself bears some responsibility for the confusion and ambiguity regarding the tenure of energy ROW on tribal land. For example, even though the regulations implementing the 1948 Act provide that ROW for both electric transmission lines and oil and gas pipelines "may be without limitation as to term of years", 25 C.F.R. § 169.18, Bureau of Indian Affairs offices often take the position that ROW may only be granted for a 20-year term or less. This practice, which deviates from the agency's own regulations, introduces unnecessary confusion and uncertainty into the negotiation process and often frustrates the desire of energy providers for longer-term ROW. This is a problem that the Report should address.

In sum, reasonable expectations are a function both of experience and foreseeable facts. What energy transporter could have possibly foreseen the present state of affairs (typified by exponential, standard-less and unrestrained increases in tribal ROW demands) when much of America's energy infrastructure was first installed along with the Eisenhower Administration's build-out of the national highway system in the 1950s? Then, tribal ROW payments approximated the same fair-market-value outcomes that were achieved everywhere else in America. That was consistent with energy transporters' experience. That was the foreseeable approach. The ensuing hyper-inflationary history – involving some companies being required by tribes to pay $1600 per rod in 2006 for pipeline rights-of-way originally obtained for $2 per rod in 1950 based on FMV appraisals (an 80,000% increase) – is not a history based on reasonable expectancies. It is a history driven by a massive public policy abdication: a failure to reconcile important policy choices made by the United States government in the late 1960s and early 1970s concerning tribal sovereignty with the growing challenges of modernizing America's 20th-century energy infrastructure to meet America's 21st-century energy needs.

The Departments need not look far for the more reasonable history that could have occurred, but for this policy failure. The ROW compensation levels paid by energy transporters to other "sovereigns" (federal agencies as well as state and local governments) have increased, but at rates much more in line with inflationary expectations and the objective appreciation in real property values. In *this* history, the science of property valuation actually mattered. In *this* history, competing appraisals based on uniform and widely understood standards and methods formed the basis for negotiated outcomes. In *this* history, the budgetary wants and needs of the relevant sovereigns were not considered legitimate factors in determining just compensation.

13. The Departments should include recently reported trespass situations to provide an unbiased view of the breadth and urgency of the problem.

On December 24, 2006, the *Imperial Valley Press* in California reported on a ROW impasse resulting in a trespass situation in the Imperial Valley that threatens a key power corridor and will likely impact consumer prices. FAIR requests that it be reflected in the final report as yet the latest example of the pressing problem that exists today and which will only increase without fundamental changes to the process for procuring and renewing energy ROWs across tribal lands. (Article attached.)

14. The Draft Report does not contain the cost-benefit analysis of policy options that it recognizes Congress needs to take informed action on this issue.

The Departments acknowledge in the Draft Report that, "[b]ecause of the time and fiscal constraints on this study, the Departments have not conducted individual cost-benefit analysis for each approach. Should Congress choose to consider any of these approaches, the Departments recommend that the first step, prior to enactment, be a benefit-cost analysis of the selected option(s) by an independent entity to determine that the overall benefits exceed the costs." (Section 7, pg. 43.)

This key caveat acknowledges that the Departments' draft report contains no analysis of the costs or benefits of either the status quo or any proposed changes to the status quo. As a result, the Draft Report fails to provide meaningful policy guidance to Congress. Because the Draft Report does not even attempt to provide the cost-benefit data Congress requires to take informed action, it cannot – as written – competently discharge its statutory mandate. FAIR recommends that this key caveat be moved from page 43 of the Draft Report to the first paragraph in the Executive Summary.

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ATTACHMENTS

Imperial Valley Press 12/24/2006, Page A01

Torres tribe: Imperial Irrigation District is trespassing

By DARREN SIMON
Staff Writer

The Torres-Martinez Desert Cahuilla Indians have declared the Imperial Irrigation District is trespassing on tribal land and is asking the U.S. Bureau of Indian Affairs to intervene. That move is the latest in a land dispute that saw the district pay the tribe $1 million earlier this year. At stake is a key power corridor the district depends on to move energy from the Imperial Valley to its customers in the Coachella Valley.

The $1 million the district paid this year to the tribe was meant to buy the district time to negotiate a permanent settlement to the district's use of six and half miles of tribal land along the Salton Sea for a power line. While the money did allow continued negotiations over the district's ongoing use of the land, the district and the tribe announced recently the negotiations have failed.

"The district had been negotiating in good faith with tribal representatives over a right- of-way dispute for most of the year," said IID General manager Charlie Hosken.

Members of the tribe, itself an IID energy customer, could not be reached for comment. But in a Dec. 1 notification to the district, the tribe states: "The Tribal Council may seek judgment in any court of competent jurisdiction to enforce all fines, penalties and other sanctions arising from these violations."

For 50 years the district had a lease to use the disputed land and had paid $7,500 to the tribe for that entire period. But eight years ago the lease ended and since then the district had not paid to use the land. The issue came to a head this year as the tribe demanded payment and said without fair retribution it would declare the district to be trespassing.

Hosken, who initially took over negotiations on behalf of the district, agreed to pay $1 million to the tribe and to negotiate an ongoing monthly payment the district would pay to the tribe for use of the land.

"The tribe's demands, though, if we had agreed to them, would have cost our ratepayers in the Imperial and Coachella valleys more than the total we now pay for all existing rights-of-way in our service area," Hosken said.

IID officials declined to say what monthly payment the tribe was seeking. Officials also declined to say how much the district offered to pay the tribe. There was no information on when the Bureau of Indian Affairs would consider the dispute or on how the dispute could impact the district's use of transmission lines on tribal land in the meantime. Staff Writer Darren Simon can be contacted at dsimon@ivpressonline.com or at 337-3445.

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October 11, 2006

<u>VIA HAND DELIVERY</u>

Abraham E. Haspel, Ph.D.
Assistant Deputy Secretary
United States Department of the Interior
Office of the Secretary
1849 C Street, NW
Room 6125 (MS 7229)
Washington, DC 20240

Re: *Section 1813 Study: Pipeline Rate Base and Natural Gas Act Questions*

Dear Secretary Haspel:

I greatly appreciated the opportunity to meet with you last month. Thank you for the time you and your busy staff took to confer with me about the substantial interplay between interstate pipeline transmission rates and regulations established by the Federal Energy Regulatory Commission ("FERC") and the issues presented in the Department's important work under Section 1813 of the Energy Policy Act of 2005.

Further to our meeting, this letter addresses several of the questions you raised about pipeline rate base issues and the requirements of the Natural Gas Act.

Pipeline rate base figures are significant to the issues addressed by the Section 1813 study. As we discussed, the Navajo Nation is effectively attempting to require El Paso Natural Gas Company ("EPNG") to pay a right of way "consent" fee based on the cost of building a new pipeline around the Navajo reservation. Rules and regulations promulgated by FERC pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. § 717, *et seq.,* would never permit a FERC-certificated pipeline to use such "build around" or replacement cost theories as the basis for establishing its rates.[1] Rather, FERC regulations require a pipeline to use only its net

1 *Cf. Williams Pipe Line Co.,* 75 FERC ¶ 63,016, at 65,064 (1996) (rejecting oil pipeline's attempt to establish rates based on the cost of a hypothetical new pipeline, stating that "Such a result has no basis in the statute, the regulations, or any FERC precedent.").

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undepreciated rate base levels (*i.e.*, the original cost of its facilities, less accumulated depreciation) as the foundation for calculating "just and reasonable" rates.[2]

As we discussed last month, the rationale for this ratemaking policy is found in Congress's determination under the NGA that interstate pipelines are natural monopolies (with cost structures characterized by extremely high ratios of fixed to variable costs). Congress has determined that interstate pipelines should thus not be permitted to extract monopoly rents from their customers, and it has directed FERC to prevent such rent-seeking by pipelines.[3] FERC carries out this Congressional command by using its exclusive power to limit pipeline rates to "just and reasonable" levels under Section 4 of the NGA. 15 U.S.C. § 717c. Under its rate-setting authority, the Commission exercises continuing and comprehensive rate-regulatory power over the certificated pipeline for its used and useful life, until it is abandoned with FERC's consent. It would plainly circumvent the will of Congress to permit a Native American tribe essentially to "hijack" a pipeline's natural monopoly and to use it as a vehicle for extracting rents that an interstate pipeline would not be permitted to extract in the first instance, by imposing arbitrary "consent" costs on consumers based on the cost of building an entirely new pipeline.

In response to your specific questions regarding (A) whether interstate natural gas pipelines in general have fully depreciated their pipeline investments, and (B) whether EPNG in particular has fully depreciated its interstate natural gas pipeline facilities which cross the Navajo reservation, the short answer to both questions is no. Most interstate natural gas pipelines still have a large amount of undepreciated investment. This fact can be confirmed by reviewing the annual report filed by each pipeline with the Federal Energy Regulatory Commission ("FERC").[4] In general, most pipelines (including older pipeline systems) have not been fully depreciated because they are continually investing in new infrastructure, and because FERC typically requires a pipeline to depreciate its facilities in accordance with the expected life of the natural gas reserves attached to its pipeline system, which often is a period of 30-40 years or more for major onshore pipelines.[5]

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2 *See, e.g.*, 18 C.F.R. § 154.312(l) (2006); *see also Enbridge Pipelines*, 100 FERC ¶ 61,260, P 48 (2002); Financial Accounting, Reporting and Records Retention Requirements Under the Public Utility Holding Company Act of 2005, 115 FERC ¶ 61,098, P 12 (2006) ("The instructions found in both Parts 101 and 201 of the Commission's regulations contain provisions for implementing the ratemaking principle of original cost. Under this principle, companies are required to record utility property in the plant in service accounts at the cost to the person who first devoted the property to public service.").

3 *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Associated Gas Distributors v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("The Natural Gas Act has the fundamental purpose of protecting gas consumers from pipelines' monopoly power.").

4 The Annual Reports for Major Gas Pipelines (Form 2) are publicly available using the FERC Form 2 viewer software (*available at* http://www.ferc.gov/docs-filing/eforms/form-2/view-inst.asp) or via the FERC e-Library system (*available at* http://www.ferc.gov/docs-filing/elibrary.asp).

5 The FERC's depreciation methodology recognizes that "expected life" is a combination of physical life and economic life. Physical life represents how long the facilities will actually last while economic life is tied to the gas reserves attached to the pipeline.

In addition, with regard specifically to El Paso, the attachment to this letter demonstrates El Paso has approximately $272 million of undepreciated interstate pipeline facilities (or "rate base") on the Navajo reservation alone. Gas transported through these facilities is consumed by customers located in California, Nevada, Arizona, New Mexico, and Texas, and constitutes the preferred source of supply for El Paso's customers. Thus, it can fairly be said that the entire El Paso system, which has undepreciated pipeline facilities of approximately $2 billion, critically relies on these facilities. Under El Paso's last FERC-approved annual depreciation rate of approximately 1.6 percent,[6] it would take El Paso approximately 60 years to fully recover its current undepreciated investment, even without accounting for additional future investments including significant capital enhancements required by the federal Pipeline Safety Improvement Act of 2002, 49 U.S.C. §§ 60101 *et seq.* In fact, for the past twenty years, EPNG has depreciated its mainline transmission facilities in accordance with FERC-approved rates at a pace equal to an approximately 60-year useful life.

I hope this information is helpful in your deliberations on the important public policy issues addressed by the Section 1813 study. If you have any further questions, please do not hesitate to telephone me.

Sincerely,

Kenneth M. Minesinger

Kenneth M. Minesinger
Counsel for El Paso Natural Gas Company

cc: Kevin Kolevar
Bob Middleton
Darryl François

6 *See El Paso Natural Gas Co.*, 99 FERC ¶ 61,148, at 61,613 n.3 (2002). El Paso currently has a pending FERC rate case in which it has proposed to increase its depreciation rate to 2.2 percent.