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May 15, 2006

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Mr. Darryl Francois  
Attention: Section 1813 ROW Study  
Office of Indian Energy and Economic Development  
1849 C Street, N.W.  
Mail Stop 2749-MIB  
Washington, D.C. 20240

**Re: Response to contentions raised by energy industry  
representatives in their January 20 comments and  
presentations at the March 7-8 and April 18-20 meetings.**

Dear Sir/Madam:

On Behalf of the Pueblo of Isleta, the Pueblo of Sandia and the Pueblo of Zia (collectively "Tribal Clients"), we submit the following additional comments on the study of energy rights-of-way on tribal land required by Section 1813 of the Energy Policy Act of 2005.<sup>1</sup>

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<sup>1</sup> Pub. L. No. 109-58, tit. XVIII, 119 Stat. 594, 1127-28.

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Our January 20 submission to the Departments proposed that “it would be helpful to discuss . . . early in the process any concerns about energy rights-of-way on tribal lands that have been raised with your Departments by the energy industry and any other entities.” (p. 25). In these comments, we respond to the principal contentions presented by nontribal entities to date, either in their initial comments to the Departments in January or their presentations at the March 7-8 scoping meeting and April 18-20 meeting.

Under Section 1813 of the Energy Policy Act of 2005, the Departments’ study is to address four issues:

- (1) an analysis of historic rates of compensation paid for energy rights-of-way on tribal land;
- (2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land;
- (3) an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land; and
- (4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.<sup>2</sup>

Because the main arguments raised by the energy industry address the second and fourth issues, we focus primarily on those issues in our response, but also address more briefly the other two areas Congress mandated the study to cover.

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<sup>2</sup> 119 Stat. at 1128.

I. Tribal self-determination and sovereignty interests.

As we set forth in our January 20 comments (pp. 3-11), the longstanding legal principle that tribal lands can be used only on a basis tribes have consented to, the firm federal commitment to the policy of tribal self-determination, and the trust responsibility the Departments and Congress owe to the tribes all compel rejection of the changes industry representatives seek in the current system of having compensation for energy rights-of-way set by bilateral negotiations. There is no principle more central to tribal sovereignty than the right to control the use of tribal lands. From the earliest days of the Republic, in decisions emanating from the Marshall Court, the courts have held that the principal purpose of the treaties or statutes establishing and protecting Indian land ownership is to enable tribes to maintain distinct self-governing political communities on reservation lands.<sup>3</sup> To further protect these rights, federal law has recognized since 1823 that Indian lands may be acquired for non-Indian use only with tribal consent.<sup>4</sup> There is therefore no greater infringement on tribal sovereignty and self-determination than that which would result from extinguishing the rule that tribal consent is required for the use of tribal lands.

Significantly, energy industry representatives have not disputed the validity or force of these basic principles in their comments. In fact, many industry comments and presentations – at least facially – stated their support for tribal sovereignty and self-determination.<sup>5</sup> At the same time, as we show

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<sup>3</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557-62 (1832).

<sup>4</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>5</sup> *E.g.*, March 7 Presentation by Nancy Ives of FAIR Access to Energy Coalition (hereafter “Ives Presentation”), at 1 (“promoting tribal self-governance and self-determination” is an “important, long-standing national polic[y]”); *id.* at 2 (“Let me be clear. FAIR strongly supports self-determination of Native American tribes. We respect tribal sovereignty and we believe that tribal self-governance deserves great weight in this analysis.”); March 7 Statement of Meg Hunt of Edison Electric Institute (hereafter “Hunt Statement”), at 2 (“EEI and its members recognize and respect the sovereignty of the Native American Nations with regard

in Parts III and IV, *infra*, most industry representatives would deny that these values and principles should have any impact on their own relations with Indian tribes. Instead, they propose that tribal sovereignty and self-determination be subordinated to the industry's objective of obtaining rights-of-way over tribal lands more cheaply. If the most fundamental of sovereign interests – the right of Indian tribes to control the use of their lands – were to be subordinated to private demands here, it would place the contours of tribal sovereignty in the hands of any group of tribal opponents, making its existence dependent on whether it interfered with that group of opponents' declared needs. In our view, which we do not elaborate further here, these "bedrock" principles cannot be so easily dispensed with, and the fundamental tribal self-determination and sovereignty interests at stake here compel the conclusion that energy companies must continue to obtain tribal consent for rights-of-way over tribal lands.

## II. Historic rates of compensation.

Most industry comments support the use of "case studies" of particular rights-of-way<sup>6</sup> to complete the Congressionally-required analysis of "historic rates of compensation paid for energy rights of way," but do not explain how case studies can be used to reliably address that question. As Mr. Middleton of the Interior Department acknowledged at the April 20 meeting, there are tens of thousands of energy rights-of-way on tribal lands. Like the reservations of which they are a part, each has its own cultural, environmental, economic, geographical, and historical setting, which must be considered in evaluating the compensation paid for that right-of-way. As we stated in our January comments, the number and diversity of these rights-of-way make it impossible to use case studies to draw generally applicable conclusions with regard to historic rates of compensation for energy rights-of-way on tribal lands. This conclusion is more readily apparent when one

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to tribal lands. We understand that sovereignty [is a] . . . bedrock issue for the tribes.”).

<sup>6</sup> *E.g.*, January 19 comments of Fair Access to Energy Coalition, at 2 (stating it would supply case studies). *But see* January 20 comments of Association of Oil Pipelines, at 3.

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recognizes that “rights-of-way” are, of course, Indian reservation lands. No one would suggest that the historic value of all Indian reservation lands could be assessed by choosing case studies that show what was actually paid for Indian lands in the past.

A case study approach also raises other significant questions. What criteria would be used to select rights-of-way for case studies from among the thousands of energy rights-of-way? What connection would be claimed to exist between these case studies and the thousands of other energy rights-of-way which are not selected for a case study? How would that connection be validated? No answer to these questions is suggested by the energy companies, or by the Departments in adhering to this proposed workplan.

In the absence of any satisfactory response to these questions, there is genuine risk that the most extreme examples urged by industry will be seen as representative. All too often, tribes have had to defend their rights – in areas such as sovereign immunity, gaming rights, and the land in trust process – from attacks that seek to generalize from examples picked by tribal opponents because they represent the extreme. This tactic requires tribes to prove the negative in order to defend their position – to show that the worst case scenario cannot or will not occur. Any argument offered by tribes is then rejected as inadequate by simply invoking a single extreme example. In the process, the question of what the mean or median is simply disappears. This process is unfair and provides no basis for informed policy-making.

We therefore continue to believe, as stated in our January 20 comments (pp. 22-23), that a comprehensive inventory of all existing rights-of-way over tribal lands for energy purposes is the only way to adequately address historical rates of compensation or draw any other reliable conclusions about energy rights-of-way on tribal lands.<sup>7</sup> We are confident that such a inventory would show that tribes have historically been grossly under-compensated for uses of tribal lands by energy companies.

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<sup>7</sup> In addition, as stated in our January comments (pp. 21-22), the Departments should analyze the extent to which energy companies have violated the terms and conditions of the rights-of-way they hold over tribal lands, and the Interior Department’s record in enforcing these terms and conditions.

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We recognize that the Departments believe that such a comprehensive inventory cannot be completed by the August deadline. If this is so, we believe the better course is to ask Congress for an extension of time, rather than to submit a study that the Departments know will be flawed. We also recognize that some have said that such a comprehensive inventory cannot be done, no matter the time frame. If this is so, we believe the Departments should forthrightly acknowledge it. For since at least 1938, the Department of the Interior has been responsible for maintaining records of existing rights-of-way on Indian lands.<sup>8</sup> If that responsibility has not been met, that obviously has implications for the fairness of the historic compensation tribes have received for energy rights-of-way on tribal lands. Among other things, there is no way of knowing whether any compensation is being paid for rights-of-way for which records of payment are not available.

Some industry representatives have sought to dismiss the issue of past under-compensation as irrelevant<sup>9</sup> to the study. The short answer to this claim, of course, is that Congress itself specified in Section 1813 that the historic rates of compensation tribes have received is relevant to the Departments' study. This view is correct for the following reasons. First, if past compensation was inadequate, it would underscore the importance of the present-day tribal consent requirement, which, by guaranteeing tribes decision-making power over the disposition of their lands, protects against that kind of under-compensation occurring in the future. Second, if in fact an Indian tribe subsidized the use of tribal land by energy companies under a prior agreement, this is unquestionably a legitimate factor for a tribe to

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<sup>8</sup> 25 C.F.R. §§ 256.5, 256.90 (1938).

<sup>9</sup> *E.g.*, March 7 Remarks of Thomas L. Sansonetti of the Fair Access to Energy Coalition (hereafter "Sansonetti Remarks"), at 3-4 ("claimed past inequities . . . [are] irrelevant to the future. Just because an inequity has or has not occurred in the past, does not mean it will not [sic] occur in the future.") ("an analysis of historical rates of compensation . . . can be dealt with by supplying a few case studies").

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consider in setting the compensation it seeks for renewing a right-of-way.<sup>10</sup> The energy companies offer no reason why this is not so. Third, if past compensation was inadequate, but that which is now paid for energy rights-of-way negotiated bilaterally between tribes and energy companies is not inadequate, this would provide a powerful endorsement of the current process. Finally, if tribal interest in past under-compensation is irrelevant, then one must ask why the energy company's claim of over-compensation under more recent agreements is relevant. This is a fair question, since both inquiries turn on agreements that pre-date the Departments' study. For all of these reasons, the energy companies' desire to draw the line to exclude what Congress directed be done and include only that which they deem helpful to their position should be rejected.

Some industry representatives would go even further. As we discuss in Part IV, *infra*, they seek the right to renew expired rights-of-way at values established by some "neutral" body, such as the Department of the Interior. At the same time, the energy companies would require this "neutral" body to ignore past under-compensation, which is hardly a "neutral" position, and in any event should be rejected for the reasons we have shown. Furthermore, if a comprehensive inventory of historic compensation tribes have received for energy rights-of-way would reveal that some of the most egregious under-compensation occurred in agreements that were in fact negotiated on tribes' behalf by the Department of the Interior,<sup>11</sup> as we believe it would, it would hardly recommend that Interior be the designated "neutral" body.

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<sup>10</sup> We view this consideration, of course, as limited to the under-compensation that a company or its predecessor paid to a particular tribe for that right-of-way, and not as a way to hold the company responsible for redressing a broader set of wrongs that may have been inflicted by others on that tribe or on tribes in general.

<sup>11</sup> See, e.g., March 7 Presentation of Western Area Power Administration (hereafter "WAPA Presentation"), at 2, 4 (rights-of-way over tribal lands in the 1940s were agreed to between the Bureau of Reclamation and Bureau of Indian Affairs and are now being renewed by tribes themselves at far higher rates of compensation).

We next address the principal claims that industry representatives have advanced.

III. National energy transportation policies.<sup>12</sup>

A primary argument advanced by the energy industry is that national energy security demands that the tribal consent system be replaced with some uniform and predictable compensation standard set or applied by the federal courts, the Department of the Interior, or some other federal body. This argument is premised on the view that any one tribe's failure to agree with a company on the terms for a right-of-way (especially a renewal) could disrupt the nation's energy supply.<sup>13</sup> Notable in industry comments regarding this study, however, is the complete absence of any claim by any industry representative that the current requirement that energy companies obtain tribal consent to rights-of-way has actually resulted in either disruption of supplies of any energy product to any specific region or community<sup>14</sup> or a significant increase in the delivered price of any energy product in any specific region or community.

The most any industry representative has claimed is that this could happen in the future, and that if it did happen, that could upset deliveries in

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<sup>12</sup> We do not repeat here our more detailed analysis in our January 20 comments (pp. 11-19) that the policy established in the Energy Policy Act of 2005 specifically to further tribal self-determination and control over energy related agreements on tribal lands and the serious under-service of tribal reservations in electric power and natural gas which that Act sought to rectify are the controlling national energy policies relevant to this study.

<sup>13</sup> *E.g.*, Sansonetti Remarks, at 2; April 18 Statement of Bob Gallagher of the New Mexico Oil and Gas Association, at 2, 4.

<sup>14</sup> The only negotiation we are aware of where a tribe did not agree to a renewal of an energy right-of-way sought by a company is the Yellowstone pipeline over the Flathead Reservation in Montana. This renewal was rejected primarily because of environmental impacts the pipeline had on the reservation. As we understand, this did not result in disruption of supplies.

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communities.<sup>15</sup> But the evidence presented so far shows instead that – as tribes as well as a number of energy companies<sup>16</sup> have stated – tribes and energy companies have consistently reached agreement on the terms for rights-of-way across tribal lands through often creative bilateral negotiations. In sum, the evidence of what has happened shows that the energy companies' argument about what could happen is at best speculation, and at worst fear-mongering.

The real concern of the energy companies is, as a number of industry representatives have expressed, that they want to pay less for rights-of-way on tribal land. They contend, variously, that the prices they agreed to pay tribes in these bilateral negotiations were “too high,” or were higher than they historically have paid to tribes, or higher than what the companies view as “fair.”<sup>17</sup> Tribes, too, have complained that prices they have received for rights-of-way have been too low. This, of course, is inherent in the nature of bilateral negotiations on virtually any topic – one party or the other (or sometimes both) may be dissatisfied with the negotiated price or other terms finally agreed upon. We submit there is no reason to change a process simply because some energy transporters would have preferred to pay less to some tribes than they ultimately agreed to pay.

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<sup>15</sup> *E.g.*, Sansonetti Remarks, at 2.

<sup>16</sup> *E.g.*, March 7 Presentation by Sonya M. Tetnowski of the Bonneville Power Administration, at 6-9 (recounting 64 successful tribal right-of-way negotiations, emphasizing special features such as relocating lines, providing a combination of goods, services and monetary benefits).

<sup>17</sup> January 17 comments of Public Service Company of New Mexico (PNM), at 1 (stating rising cost of renewals is its greatest concern); January 19 comments of Avista Utilities; WAPA Presentation, at 2, 4 (complaining that tribes “negotiate not on land value but on electrical capacity, electrical improvements and a share of transmission line revenue” and contrasting this process with the 1940s when the Bureau of Indian Affairs and Reclamation made the right-of-way agreements over Indian lands); Hunt Statement at 1 (complaining about “significant fee increases” for rights-of-way).

A related interest claimed by the energy industry has been the protection of consumers and the need to keep consumer energy prices low.<sup>18</sup> This argument asks the Departments to simply assume that any increases in the cost paid a tribe for an energy right-of-way across land belonging to the tribe results in significantly increased delivered prices to consumers for energy products. Yet no nontribal entity has identified a single circumstance where compensation paid to a tribe for a specific grant, expansion or renewal of any energy right-of-way has actually resulted in any substantial increase in delivered prices to the ultimate consumers of any energy product in any specific market.

It is true that a number of industry representatives have stated that energy prices have significantly increased in recent years and these increases burden consumer and businesses (especially low-income individuals and small businesses).<sup>19</sup> But these price increases have plainly had a myriad of causes. No industry representative has correlated the increase in any delivered energy price in any specific market with any specific compensation it or any energy transporter has paid a tribe.

The absence of any demonstrated correlation between compensation paid tribes and increased consumer prices likely reflects the fact that transportation costs are a relatively small component of total costs for any energy product. For example, at a recent hearing before the House Energy and Commerce Committee, Subcommittee on Energy and Air Quality on November 2, 2005, concerning natural gas and heating oil for American homes, FERC Chairman Joseph T. Kelliher testified that interstate transportation costs for natural gas and crude oil petroleum products “are relatively small, the transportation component for natural gas can be approximately 6 percent of its delivered cost, while it is approximately 1 percent of the delivered cost for petroleum products.”<sup>20</sup> Philip D. Wright of

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<sup>18</sup> *E.g.*, Ives Presentation, at 1; March 6 letter from Colorado Governor Bill Owens, at 1-2; Hunt Statement, at 2.

<sup>19</sup> *E.g.*, Ives Presentation, at 2-3.

<sup>20</sup> Testimony of Joseph T. Kelliher, at i, 6.

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Williams Pipeline Company testified at the same hearing that “[p]ipeline transportation and storage is the smallest part of the cost of natural gas delivered to residential and commercial customers – typically about 10 percent of the total retail cost of natural gas.”<sup>21</sup> Right-of-way acquisition costs, moreover, are a similarly small component of transportation costs – between 3.4 percent and 6 percent of gas pipeline transportation costs – and are dwarfed by labor and material costs.<sup>22</sup>

In addition, in light of the market-based pricing of most oil and gas and most wholesale electricity sales, we question whether any instances of a significant delivered price increase can be identified that can be attributed to right-of-way compensation paid a tribe. That is, the delivered price in an unregulated industry is set by consumer market conditions, not the cost to the company. The absence of any specific claim that right-of-way compensation has resulted in a significant price increase (in contrast to generalized complaints about high energy prices<sup>23</sup> or statements that higher costs generally result in higher prices<sup>24</sup>) constitutes strong evidence that there is no reason to change the existing legal regime of establishing compensation for tribal lands by bilateral negotiations.

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<sup>21</sup> Testimony of Philip D. Wright, at 2.

<sup>22</sup> R.W. Beck, Inc., Oil & Gas Bulletin, Natural Gas Transmission: Pipeline Project Development Process, at 1, *available at* [http://www.rwbeck.com/oil-and-gas/O-GBulletin-Pipeline\\_Dev\\_Process.pdf](http://www.rwbeck.com/oil-and-gas/O-GBulletin-Pipeline_Dev_Process.pdf); *id.*, Oil & Gas Bulletin, Natural Gas Transmission: Pipeline Construction Cost, at 2, *available at* [http://www.rwbeck.com/oil-and-gas/O-GBulletin-Pipeline\\_Cap\\_Cost.pdf](http://www.rwbeck.com/oil-and-gas/O-GBulletin-Pipeline_Cap_Cost.pdf).

<sup>23</sup> *E.g.*, Ives Presentation, at 1 (“record-high energy bills”).

<sup>24</sup> *Id.*, at 2 (“Ultimately, the American consumer bears the financial burden of” tribal right-of-way payments.); Sansonetti Remarks, at 2 (“The unfortunate victims of future ROW stalemates over compensation will be . . . millions of consumers . . . .”); January 18 comments of Sempra Energy Utilities, at 1; January 20 comments of the Western Business Roundtable, at 1.

IV. Standards and methods for determining fair and appropriate compensation.

All tribes support the current legal regime where compensation is set by individual bilateral negotiations between tribes and energy companies wishing to use tribal lands as a fair and appropriate method. Most energy industry representatives proposed this system be changed. In this Part, we address the principal alternatives industry representatives have advanced in their comments and presentations.

A. The claim that a “uniform” and “consistent” standard or formula should be used for establishing compensation.<sup>25</sup>

The short answer to this claim is that Indian tribes are sovereigns with a right to control the use of their lands. No sensible person would argue that this right can be protected by adopting “uniform” and “consistent” methods for acquiring that sovereign’s property without its consent. Second, “tribes” themselves are not homogenous units identical to one another. Each has its own government, and each has a right to assess proposals to use tribal lands based on the impacts of that proposal on its citizens, territory and resources. Third, each proposed energy right-of-way over tribal lands has its own characteristics – such as whether or not a particular right-of-way over tribal lands for transporting energy: (1) provides utility services to reservation communities, as opposed to simply passing through to serve other communities; (2) is associated with energy production on those or other tribal lands; (3) negatively impacts or threatens the public health, welfare or safety of reservation residents or reservation natural resources;<sup>26</sup> (4) impacts lands of special historic, cultural or religious significance; (5) traverses a large

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<sup>25</sup> *E.g.*, Sansonetti Remarks at 1. *But see* April 19 Presentation by Sonya Tetnowski of Bonneville Power Administration, at 23, that each tribe is unique and must be dealt with individualistically.

<sup>26</sup> In his remarks on April 18, James W. Shepard of WRC Inc., representing FAIR, agreed that proposed construction of gas pipelines and electric transmission lines are commonly resisted by communities they would cross because of their environmental impacts, including on habitat and endangered species.

compact contiguous tract (thereby saving an energy company numerous transaction costs by virtue of tribal ownership of these lands). Indian tribes are responsible for evaluating these factors and protecting tribal interests in determining whether to consent to a proposed right-of-way, and if so, on what terms. The formula which the energy companies seek would deny the tribe's right to exercise this decision making power over tribal lands – a right which is the very essence of their sovereignty. It would also fail to take account of the specific and unique characteristics of each right-of-way, as we discuss next.

B. The claim that fair compensation can be set pursuant to some standard formula.<sup>27</sup>

The suggestion proffered by a number of energy representatives that fair compensation can be determined by a standard formula based on fair market value and adding certain quantified costs would make tribal interests that cannot be valued in economic terms irrelevant to their acquisition for energy rights-of-way. This would make the historical, cultural and religious significance of tribal lands irrelevant to their use by energy companies. Yet we are confident that no gas pipeline or 500 Kv line runs through the Grand Canyon, the Lincoln Memorial, or "Old Faithful" in Yellowstone Park. Surely, if a pipeline in any one of these areas of national significance was proposed, the non-economic value of the land would be considered.

Similarly, a generic set of land valuation factors cannot take into account the great diversity that exists with respect to tribal lands and resources, the values and circumstances implicated by a proposed right-of-way, and the responsibilities imposed on Indian tribes when an energy company seeks to use tribal lands for a right-of-way. The Indian way of life – which it is the function of self-governing tribes to protect and maintain – depends on control of tribal lands and the natural resources found on those lands. Thus, the courts have held that tribes own and exert governmental control over all natural resources on their reservations – even where the treaty, statute or executive order creating the reservation is completely silent

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<sup>27</sup> *E.g.*, April 18 Presentation by Thomas Sansonetti of FAIR, at 2.

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as to those resources and simply reserves or sets aside lands. These resources include rights to use the lakes, streams and other waters of the reservation,<sup>28</sup> all minerals and timber resources on the reservation,<sup>29</sup> and rights to hunt and fish on reservation lands.<sup>30</sup> Tribal members depend on these resources for a myriad of essential purposes; for example, on game and fish for “food, clothing, and shelter,”<sup>31</sup> as well as for sustaining the tribal economy. Indeed, the Supreme Court long ago recognized that “[t]he right to resort to the fishing places . . . [was] not much less necessary to the existence of the Indians than the atmosphere they breathed.”<sup>32</sup> Similarly, the Supreme Court has recognized that Indian lands are “arid, and, without irrigation, were practically valueless,”<sup>33</sup> and has held that tribes are entitled to sufficient water and other resources “to make the reservation livable,”<sup>34</sup> and “to maintain . . . their way of life.”<sup>35</sup> Thus, the use and control of reservation lands and natural resources are essential for tribal life on a reservation and to internal self-government for tribes. A generic valuation formula would completely exclude these concerns.

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<sup>28</sup> *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Arizona v. California*, 373 U.S. 546, 598-600 (1963) (water rights reserved despite silence in treaties, statutes and executive orders creating reservations).

<sup>29</sup> *United States v. Shoshone Tribe of Indians of Wind River Reservation*, 304 U.S. 111, 117-18 (1938).

<sup>30</sup> *Menominee Tribe v. United States*, 391 U.S. 404, 405-06 (1968).

<sup>31</sup> Felix S. Cohen’s *Handbook of Federal Indian Law*, p. 1120 (2005 ed.).

<sup>32</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

<sup>33</sup> *Winters*, 207 U.S. at 576.

<sup>34</sup> *Arizona v. California*, 373 U.S. at 599.

<sup>35</sup> *Menominee*, 391 U.S. at 406. *See also Arizona*, 373 U.S. at 598-99, concluding Indians are entitled to sufficient “water necessary to sustain life” on their reservations and observing that “water from the [Colorado River] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”

C. The claim that tribal compensation for rights-of-way should be set by federal appraisal standards.<sup>36</sup>

This claim appears related to the first one, in that an implicit premise in the proposed “uniform” and “consistent” standard may be that homogeneity and uniformity can somehow be presumed for tribal lands because the United States has an overarching fiduciary duty to protect all tribal lands. While that duty unquestionably exists, it furnishes no basis to subject all tribal lands to the same valuation standards as public lands or other federally owned lands. Indian lands are legally distinct from public lands, as the law has long recognized.<sup>37</sup> That principle is supported by fundamental distinctions.

First, as noted, tribal lands have a unique purpose and a unique historic, cultural and often religious significance that federal lands generally lack, serving as they do as historic and permanent homelands for tribes. Second, tribal lands can rarely be replaced by acquiring additional lands with the same historical, cultural and religious significance. Third, unlike the federal government (and state governments where their public lands or private lands within the state are crossed by energy transportation facilities), tribal governments have limited authority to impose taxes on companies operating those facilities to defray the costs of governmental services they provide to their reservations generally and more specifically to address the impacts and threats caused by the transportation of energy over their lands, communities and reservation natural resources. Fourth, while the federal

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<sup>36</sup> *E.g.*, Ives Presentation, at 1 (proposing tribes should obtain compensation “using uniform appraisal standards available to offices such as the Bureau of Land Management and the U.S. Forest Service”); January 20 comments of Arizona Public Service, at 2; January 20 comments of Association of Oil Pipelines, at 2; January 19 comments of Avista Utilities, at 2; January 20 comments of Edison Electric Institute, at 3.

<sup>37</sup> *See, e.g.*, *Cramer v. United States*, 261 U.S. 219, 228 (1923); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113-14 (1919); *United States v. Schwarz*, 460 F.2d 1365, 1372 (7th Cir. 1972).

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government may rationally choose to undervalue lands it owns so as to promote the national economy by facilitating energy transportation, tribes have no reason to provide comparable subsidies to the energy industry – particularly in light of the fact that (as set forth in our January 20 comments at 12-15) Indian reservations are today the most underserved communities in the Nation with respect to access to energy products such as electricity and natural gas.

Finally, it bears reiterating that – as set forth in our January 20 comments and in Part I, *supra* – replacing tribal consent to a right-of-way based on a negotiated price set by bilateral negotiations with a federal standard would be inconsistent both with 200 years of jurisprudence holding that tribal consent is legally required for use of a tribe’s lands and the well-established federal policy of tribal self-determination. If this industry proposal were adopted, tribal decisions about appropriate compensation for use of a tribe’s lands would be replaced by the regressive and discredited system of federal paternalistic control over tribal lands by federal agents that existed in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.

D. The claim that some “objective” standard and method should be set to establish tribal compensation.<sup>38</sup>

Some industry representatives argue that some “objective” standard and method should be set to establish compensation, claiming that this would constitute some “middle ground” between two supposedly “extreme positions” – one of subjecting tribes to the condemnation power of eminent domain or the other of continuing the existing system where tribal consent is required for rights-of-way over tribal lands.<sup>39</sup>

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<sup>38</sup> E.g., Sansonetti Remarks, at 1.

<sup>39</sup> *Id.* at 1, 3 (“The Fair Access to Energy Coalition submits that there is a middle ground . . . an objective, consistent, transparent, accountable and uniform standard for valuing rights-of-way across tribal lands.”) (“The eventual answer may be found in the Executive Branch . . . or through mediation or binding arbitration . . . [or] with the Judicial Branch’s federal court system.”).

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Claiming to hold a “middle ground” is of course a well recognized and attractive tactic for characterizing one’s own position as reasonable and persons holding other positions as extremists. But in this situation, the industry representatives are not really adopting a middle ground between two “extremes” for two reasons.

First, this industry proposal is essentially that – wherever a tribe and energy company cannot agree in right-of-way negotiations – some mandatory system of “neutral” dispute resolution would (1) provide the company the right-of-way grant it desires and (2) establish a monetary amount to be paid to the tribe. This of course is exactly what eminent domain does; both eminent domain and the industry proposal would grant a right-of-way without tribal consent and provide for payment to the tribe as set by some binding outside authority. Industry representatives propose this outside authority could be a federal court, a federal agency like the Department of Interior, Energy or Justice or FERC, or an arbitrator.<sup>40</sup> Under either eminent domain or the system proposed by industry, the right-of-way is granted to the company without the tribe’s consent and the tribe is paid something it has not agreed to. This is simply condemnation in another form.

Moreover, as discussed in Parts IVA and IVB above, tribal lands have unique historical, cultural and religious significance that cannot be measured in objective economic terms. Finally, there is nothing “extreme” about the tribal consent requirement, which has been required by Supreme Court decisions from the Marshall Court forward where non-Indians seek to use tribal lands and, specifically for rights-of-way, by federal law for many

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<sup>40</sup> *E.g., id.* It is telling that the energy industry is not satisfied by tribal proposals that such a dispute resolution mechanism is available in the form of tribal courts, or that tribal regulations addressing right-of-way negotiations should be encouraged, suggestions which better reflect the goals of Title V of the Energy Policy Act of 2005. *E.g.*, March 7 Remarks of Margaret Schaff of the Affiliated Tribes of Northwest Indians Economic Development Corporation, at 9 (recommending that the federal government focus resources on improving tribal land records systems and encouraging the drafting of tribal regulations governing right-of-way negotiations, suggestions that have been ignored by industry representatives).

decades. Replacing the consent requirement, as industry representatives propose, is the extreme position. By proposing to place the final authority to grant a right-of-way and set compensation in a federal agency, moreover, industry representatives would entrust the compensation determination to the very agencies that historically have shamefully failed to obtain fair value for tribal lands. As with many of their other proposals, industry representatives would replace tribal self-determination with the very federal paternalistic control over tribal lands that and has long and rightly been discarded.

E. The claim that right-of-way terms should be perpetual.

A number of industry representatives contend that rights-of-way over tribal lands should have a perpetual duration.<sup>41</sup> Federal law already allows most energy rights-of-way over Indian lands for an indefinite term,<sup>42</sup> except that it appears to limit rights-of-way for oil and gas pipelines to twenty year terms.<sup>43</sup> Thus, except for oil and gas pipelines, tribes and energy companies are now free to negotiate a right-of-way for any term they wish to agree upon.

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<sup>41</sup> January 20 comments of Bonneville Power Administration, at 2; January 20 comments of Association of Oil Pipelines, at 2; WAPA Presentation, at 5.

<sup>42</sup> The basic statute allowing rights-of-way over Indian lands, 25 U.S.C. §§ 323-328, allows rights-of-way to be granted subject to regulations of the Secretary of the Interior. *Id.*, § 328. This statute itself does not limit the term of any right-of-way. The Secretary's regulations do generally limit rights-of-way to periods not to exceed 50 years, but contain an exception for rights-of-way for certain purposes – including “electric power projects, generating plants, switchyards, electric transmission and distribution lines (including poles, towers, and appurtenant facilities), and for service roads and trails essential to [such]. . . purposes,” which “may be without limitations as to term of years . . . .” 25 C.F.R. § 169.18.

<sup>43</sup> While Section 169.18, *supra*, of the regulations also appears to also authorize rights-of-way for oil and gas pipelines for any term of years the parties agree to, another federal statute and another provision of the regulations seem to limit such pipelines to a right-of-way term of not to exceed 20 years. 25 U.S.C. § 321; 25 C.F.R. § 169.25(b).

Many tribes, however, have refused to agree to perpetual or very long rights-of-way, wisely in our view in light of the historic under-compensation of tribes for energy rights-of-way and the uncertainties both tribes and companies face about conditions in the distant future. As with the amount of compensation, we submit that the issue of the term for a right-of-way should be the subject of bilateral bargaining between the particular tribe and company involved. If industry representatives are contending that they should be allowed to have a right-of-way over tribal lands for a longer period than a tribe will agree to, or to renew without a tribe's consent a right-of-way that was limited to a particular term and has now expired, those positions should be rejected for exactly the same reasons that the industry proposals seeking grant of a right-of-way for some amount of compensation that has not been agreed to by a tribe are unacceptable. These positions offend the longstanding federal law and policy discussed in our January 20 comments and referenced in Part I, *supra*, and would return federal Indian policy to the paternalistic practices discarded almost a century ago and industry representatives have put forward no sufficient basis to justify even considering such a change.

F. The desire for "predictability" and "certainty".

Some industry representatives claim that the existing process of bilateral negotiations presents them with uncertainty and unpredictability, which they claim may imperil or reduce capital investment in energy transportation facilities.<sup>44</sup> Initially, we emphasize that – like most other industry claims – this set of claims is general and abstract. No industry representative has identified any specific situation where a capital investment in energy infrastructure was not made because of uncertainty

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<sup>44</sup> *E.g.*, February 15 Comments of Idaho Power Company, at 4; Hunt Statement, at 1-2; Sansonetti Remarks, at 1-2.

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about reaching agreement with a tribe.<sup>45</sup> Nor does the claim seem plausible on its face.

To the extent a company transporting energy is a regulated entity, it is entitled to recover its capital costs, so investment by such a company should not be deterred. More broadly, no industry representative has shown how any uncertainties about either (1) reaching right-of-way agreements with tribes or (2) agreeing upon the compensation that must be provided to tribes compare with the multitude of other uncertain factors respecting the production, transport and sale of oil, gas and electric energy. Energy markets are by nature volatile and, particularly in recent years, have been subject to pronounced fluctuations because of a great variety of factors. There has certainly been no demonstration by any industry representative that unpredictability over negotiations with tribes has been a significant contributor to this volatility in any market in any specific time period.<sup>46</sup> As discussed in Part III, *supra*, transportation costs are a relatively small component of the total costs of energy products, and right-of-way acquisition costs are a relatively small component of total transportation costs.

Since, moreover, in virtually all situations tribes and energy companies have successfully concluded right-of-way agreements, those agreements do provide certainty and stability over the time periods they exist. Finally, we believe – and know of no claim otherwise – that any energy transportation company involved in these agreements fully depreciates the capital

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<sup>45</sup> For example, Dr. Lisa Cameron, a consulting economist retained by FAIR, claimed at the April 18-20 meeting that abstract principles of economic theory show that increased tribal compensation would reduce capital investment in energy infrastructure, but steadfastly resisted repeated efforts by tribal representatives to have her identify specific instances where this had actually occurred in today's deregulated market.

<sup>46</sup> Moreover, if the delivered price to consumers of the energy product transported is a deregulated price set by market conditions, the burden of any uncertainty will not usually be borne by consumers.

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investment it makes in any facility constructed on tribal lands over the period of any right-of-way agreement it concludes with the tribe.

Sincerely,



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the Pueblo of Sandia and the  
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DE:RC:AR/ks

cc: James E. Cason, Associate Deputy Secretary  
U.S. Department of the Interior

Kevin M. Kolevar, Director  
Office of Electricity and Energy Reliability