

Energy Rights-of Way (ROWs) on Tribal Lands

[The valuation of energy ROWs on tribal lands should continue to be based on tribal consent with terms negotiated between Indian Tribes and energy companies, rather than foregoing tribal consent.]

Section 1813 of Public Law (P.L.) 109-58, the Energy Policy Act of 2005 (EPAct), requires the study of issues related to the grant, expansion, and renewal of energy rights-of-way (ROWs) on tribal lands and it requires the U.S. Department of the Interior (DOI) and U.S. Department of Energy (DOE) (Departments) to jointly conduct a study of issues associated with energy ROWs on tribal lands and report to Congress on the findings of the study. Section 1813(a)(2) further requires the Departments to consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers in the course of the study in studying the following:

1. An analysis of historic rates of compensation paid for energy ROWs on tribal land;
2. Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land;
3. An assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROWs on tribal land; and
4. An analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy ROWs on tribal land.

The following common themes surfaced in the course of the public discussion about the study:

- Tribal sovereignty is manifested in the statutory and regulatory requirements of tribal consent in energy ROW matters.
- Tribal self-determination policies are important in advancing oversight of energy ROWs and expanding energy production. \
- Congress exercises plenary authority over affairs regarding Indian issues consistent with treaty and trust responsibilities.
- Uncertainty and lack of transparency in the valuation process are of concern.
- Costs of energy ROW renewals are rising, in conjunction with other costs associated with energy production and delivery.
- With some exceptions, trends toward shorter term lengths (in years) for energy ROWs and longer negotiation periods are appearing. (Page viii.)

Section 2.4. Departmental Findings

Recent national energy transportation policy generally stresses the need to invest in aging transmission infrastructure and expand transmission to relieve congestion and improve reliability. These general energy transportation policies and enactments, however, recognize the unique laws that apply to tribal lands and do not alter existing laws and regulations for obtaining an energy ROW on tribal lands.

For the past 60 years, national energy transportation laws and policies specifically applicable to tribal lands have sought tribal consent for the grant, expansion, or renewal of energy ROWs on tribal lands. These laws and policies also promote tribal involvement in the determination of energy ROW routes, protection of cultural and natural resources, and emergency matters. The most recent of the Federal Government's statutory and policy expressions—EPA Act Title V—encourages tribes to assume greater decision-making control over energy ROWs. (Page 5.)

Section 3.4. Departmental Findings

The Departments encourage tribal economic development and have a duty to assure that the management of trust assets is in accordance with the best interest of tribes and tribal members. In addition, the proper discharge of the Federal responsibility to manage Indian trust assets also includes deference to and promotion of tribal control and self-determination.

Tribes have become increasingly involved in the process for approving the grant, expansion, or renewal of energy ROWs on tribal lands. As tribes have described to the Departments in their comments, they currently negotiate ROW issues (e.g., routes; compensation; terms; environmental, cultural, and emergency protections) pursuant to the 1948 Act and its implementing regulations.

A tribe's determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self-determination. Any reduction in the tribe's authority to make that determination is a reduction in the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination. Granting a ROW on tribal land only with the consent of a tribe is in accordance with the Federal policy promoting tribal self-determination and self-governance. The tribal consent requirement has been virtually unchanged since 1951. It reflects a longstanding interpretation of the pertinent statutes by the agency charged with their administration. (Page 21.)

Section 5.3. Departmental Findings

The Departments find that negotiation between the interested parties is an appropriate method for determining compensation. During the primary terms of many of these energy ROWs, the self-governance of tribes has evolved. On the basis of existing treaties, laws, regulations, and Executive Orders, tribes have become more involved in the day-to-day decision-making and

management of activities on tribal lands. This involvement includes decisions on renewing energy ROWs that may have been put into place three, four, or even five decades ago.

Over this time, the responsibilities of tribal governments have also evolved. Many tribes have developed government structures to manage the increased responsibilities assumed by the tribes, such as cultural resource management and the provision of health, safety, and environmental protections. Unlike private property owners along a particular ROW, sovereign tribes do not rely on local or State governments to oversee the health, safety, and environmental reviews, permits, and requirements associated with placing and monitoring energy facilities. The individual tribes must bear the responsibility and costs associated with carrying out such governmental functions.

In the past, the compensation for ROWs could reflect the valuation for highest and best use, because much of the management of Indian lands was being performed by the Federal Government. Today, however, many tribes must use their own governmental bodies to perform these tasks for the general well being of their members. But tribes, unlike Federal, local, and State governments, cannot always rely primarily on taxation to provide the fiscal support for these governmental bodies and must capture the associated costs of running tribal government from contracts and compacts with the Federal Government, ROW fees, and other economic development activities, such as resource development and gaming. ROW fees therefore are comparable to property tax rates on assessed real estate established by local governments to fund budgets to provide local services.

The Departments find that the parties themselves could enhance the negotiation processes and benefit from mutually agreed-upon practices, procedures, and actions that would improve the understanding of and collaboration among the parties. (Page 36.)

Section 6.1.3. Departmental Findings

As a result of our analysis, the Departments have found that (a) total energy transportation costs are a small component of overall consumer energy costs; (b) in general, a relatively small percentage of the energy transportation infrastructure is on tribal lands; and (c) as of now, no difficulties associated with ROW negotiations have led to security or reliability impacts that affect consumer cost. (Page 42.)

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others. A tribe's authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty—the right to govern its people, resources, and lands.

The present right of tribes to govern their members and territories flows from a historical and preexisting independence and right to self-government that has survived, albeit in diminished form, through centuries of contact with other cultures and civilizations. (Page viii.)

After careful consideration of the information presented and the alternative approaches identified, the Departments offer the following recommendations for granting, expanding, or renewing ROWs on tribal lands:

- The valuation of energy ROWs on tribal lands should continue to be based on terms negotiated between the parties.
- If a failure in the negotiations over the grant, expansion, or renewal of an energy ROW has a significant regional or national effect on the supply, price, or reliability of energy resources, the Departments recommend that Congress consider resolving such a situation through specific legislation rather than making broader changes that would affect tribal sovereignty or self-determination generally. (Page ix.)

See: http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct_1813_Final.pdf

Section 1813: Energy Policy Act of 2005, Section 1813 Study on Indian Land Rights-of-Way

http://teeic.anl.gov/er/transmission/case/1813/docs/Meetings/20_April_1813_Scoping_Mtg_transcript.pdf (Carol Harvey, Denver Testimony)

http://teeic.anl.gov/er/transmission/case/1813/docs/apr2006/Ltr_to_Francois_re_Sec_1813_Analysis_4_21_06.pdf (Letter, April 25, 2006, Charts, 27 pp.)

http://teeic.anl.gov/er/transmission/case/1813/docs/apr2006/Ltr_to_Francois_re_Sec_1813_Analysis_dvd.pdf (Navajo Stories DVD, shown in April 2006 at Denver Public Scoping Meeting.)

http://teeic.anl.gov/er/transmission/case/1813/docs/aug2006/Harvey_SECTION_1813_DRAFT_REPORT_COMMENTS.pdf (Letter, August 31, 2006, 18pp)

http://teeic.anl.gov/er/transmission/case/1813/docs/Meetings/1813_August_30_Albuquerque_Transcript.pdf (Carol Harvey, Albuquerque Testimony)

Energy Policy Act of 2005, Section 1813 Study on Indian Land Rights-of-Way: Transcript of Comments made on the 1813 Draft Report at the August 30, 2006 Public Meeting at Albuquerque