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SECTION 1813 OF THE ENERGY POLICY ACT OF 2005: IMPLICATIONS FOR TRIBAL SOVEREIGNTY AND SELF-SUFFICIENCY

Paul E. Frye*

I. OVERVIEW

Rights-of-way across Indian lands are often as valuable as other resources located within Indian country. The statutes governing grants of rights-of-way on Indian lands are found at title 25 U.S.C. §§ 311 to 328. Applicable regulations are found in 25 C.F.R. part 169. Federal control over rights-of-way is sufficiently pervasive for compensable trust duties in the exercise of that control.¹

Title 25 U.S.C. §§ 311 to 328 form a “comprehensive scheme which completely covers the subject of rights of way.”² Sections 311 to 321, concerning rights-of-way for specific purposes,³ were enacted circa 1900; Congress enacted sections 323 to 328 in 1948 to provide for rights-of-way for all purposes. The policy behind the comprehensive right-of-way scheme is to protect Indians from “improvident grants of rights-of-way”⁴ and to “fully . . . protect Indian interests.”⁵ The statutes and regulations are to be construed liberally in favor of the Native Americans.⁶

The interplay of the specific and general right-of-way statutes is illustrated by several cases. *Southern Pacific Transportation Co. v. Watt*⁷ discussed the interplay of

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1. *U.S. v. Mitchell*, 463 U.S. 206, 223–24, 225 n. 29, 226 n. 31 and accompanying text (1983); *Coast Indian Community v. U.S.*, 550 F.2d 639, 654 (Ct. Cl. 1977).

2. *Plains Elec. Generating & Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375, 1380 (10th Cir. 1976); see *Mitchell*, 463 U.S. at 211.

3. 25 U.S.C. § 311 (2000) (public highways); *id.* at §§ 312–318, 320 (railroads and related telegraph and telephone lines); *id.* at § 319 (independent telephone and telegraph lines); *id.* at § 321 (pipelines). Sections 322 and 322a are special sections relating to the Pueblo Indians in New Mexico.

4. *Loring v. U.S.*, 610 F.2d 649, 651 (9th Cir. 1979).

5. *S.P. Transp. Co. v. Watt*, 700 F.2d 550, 552 (9th Cir. 1983).

6. *Star Lake R.R. v. Lujan*, 737 F. Supp. 103, 109 (D.D.C. 1990), *aff’d*, 925 F.2d 490 (D.C. Cir. 1991) (per curiam).

7. 700 F.2d 550.

the 1899 railroad right-of-way statute⁸ with the 1948 general right-of-way statutes. The court concluded that the 1899 Act included no grant of the power of eminent domain to the railroads⁹ and established conditions with which prospective grantees must comply.¹⁰ Most importantly, the court concluded that the Secretarial requirement of tribal consent—mandated for rights-of-way under the 1948 Act—was properly applied to the 1899 Act.¹¹ Similarly, *Plains Electric Generating and Transmission Cooperative v. Pueblo of Laguna*¹² found a 1926 condemnation statute¹³ to have been impliedly repealed by a right-of-way statute passed in 1928¹⁴ and by the 1948 Act.¹⁵ In effect, *Plains* results in the necessity of obtaining the consent of the Pueblo Indians for rights-of-way across their common land.¹⁶ Finally, in *Blackfeet Indian Tribe v. Montana Power Co.*,¹⁷ the court discussed the interplay of the 1904 oil and gas pipeline right-of-way statute¹⁸ with the 1948 Act. The *Blackfeet* court read the 1904 Act and the 1948 Act as “coexisting,”¹⁹ and held that, with tribal consent, the Secretary of the Interior could grant a fifty-year easement under the 1948 Act even though the more specific 1904 Act limited the term of oil and gas rights-of-way to twenty years.²⁰

The regulations governing rights-of-way over Indian trust land include special provisions for rights-of-way for specific purposes,²¹ and the general provisions of Part 169 also apply to those specific rights-of-way.²² In the absence of a Secretarial determination to the contrary, the right-of-way regulations promulgated under authority of earlier statutes will also apply to rights-of-way under the 1948 Act.²³

The generally applicable provisions contain requirements for tribal and allottee consent to grant or renew a right-of-way,²⁴ permission to survey,²⁵ the content of and

8. 25 U.S.C. §§ 312–318.

9. 700 F.2d at 554–55.

10. *Id.* at 555. In reaching its holding, the court assumed the 1899 Act was a grant *in praesenti*. The court, however, strongly suggested that it was not. *Id.*

11. *Id.* at 556.

12. 542 F.2d 1375.

13. Pub. L. No. 69-211, ch. 282, 44 Stat. 498 (1926) (allowing condemnation of Pueblo lands).

14. Pub. L. No. 70-296, 45 Stat. 442 (1928), amended by Pub. L. 94-416, 90 Stat. 1275 (1976) and codified at 25 U.S.C. § 322. Section 322 has independent significance as well. In 1976, it extended the provisions of 25 U.S.C. § 357 (authorizing condemnation of allotments) to the Pueblo Indians, practically foreclosing the otherwise tenable argument that the 1948 Act (dealing with voluntary conveyances of rights-of-way) had repealed § 357 by implication. See *Yellowfish v. City of Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982).

15. *Plains*, 542 F.2d at 1378–79.

16. Lands of Pueblo Indians are held in common typically under grants from the King of Spain. See *U.S. v. Sandoval*, 231 U.S. 28, 39 (1913).

17. 838 F.2d 1055 (9th Cir. 1988).

18. 25 U.S.C. § 321.

19. *Blackfeet*, 838 F.2d at 1058.

20. *Id.* at 1059.

21. E.g. 25 C.F.R. § 169.23 (2006) (railroads); *id.* at § 169.25 (oil and gas pipelines); *id.* at § 169.26 (telephone and telegraph lines); *id.* at § 169.27 (power projects); *id.* at § 169.28 (public highways).

22. See 25 C.F.R. § 169.23(a) (railroads); *id.* at § 169.25(a) (oil and gas pipelines); *id.* at § 169.26(a) (telephone and telegraph lines); *id.* at § 169.27(a) (power projects); *id.* at § 169.28(a) (public highways).

23. See 25 C.F.R. § 169.23(a) (railroads); *id.* at § 169.25(a) (oil and gas pipelines); *id.* at § 169.26(a) (telephone and telegraph lines); *id.* at § 169.27(a) (power projects).

24. 25 C.F.R. §§ 169.3, 169.19.

25. 25 C.F.R. at §§ 169.3, 169.4.

stipulations to be included in an application for rights-of-way,²⁶ maps of definite location,²⁷ survey requirements,²⁸ and the amount and means of disbursement of consideration to the landowners.²⁹ The 1948 Act and the regulations permit the Secretary to grant easements over allotted land without allottee consent in limited instances.³⁰ Of some practical significance is the regulatory requirement in 25 C.F.R. § 169.12 that the Secretary of the Interior furnish the landowners with appraisals to assist them in negotiations, a requirement often honored in the breach.

The regulations governing right-of-way termination require the filing of an affidavit of completion. The failure to do so “promptly” subjects the right-of-way to cancellation.³¹ The regulations require the entire process to be completed anew if “any change” from the original route is needed “on account of engineering difficulties or otherwise.”³² Finally, the regulations prescribe the tenure of the right-of-way,³³ allow for renewals,³⁴ and specify grounds for termination.³⁵ The most recent decision on the termination regulations, *Star Lake Railroad Co. v. Navajo Area Director*,³⁶ construes 25 C.F.R. § 169.20, including the “may” and “shall” language which could otherwise cause confusion to developers and landowners alike.

The term Indian country “is most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable.”³⁷ In 1948, Congress provided generally that rights-of-way passing through Indian reservations would retain their status as Indian country for criminal jurisdiction purposes.³⁸ Congress soon thereafter applied that definition to civil jurisdiction.³⁹ Congress specifically included such rights-of-way in its definition of Indian country to correct the “absurd results” of Supreme Court cases that construed the 1834 definition of Indian country for purposes of criminal jurisdiction.⁴⁰ The absurd results that Congress thought it corrected when it included reservation rights-of-way in the definition of Indian country was the jurisdictional uncertainty introduced by the Supreme Court related to rights-of-way. As explained by Richard Collins:

The Court in *Clairmont v. United States*, voided a conviction on the ground that the offense

26. *Id.* at § 169.5.

27. *Id.* at § 169.6.

28. *Id.* at §§ 169.7–169.11.

29. *Id.* at §§ 169.12–169.14.

30. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.3(c).

31. 25 C.F.R. § 169.16.

32. *Id.* at § 169.17.

33. *Id.* at § 169.18.

34. *Id.* at § 169.19.

35. *Id.* at § 169.20.

36. 737 F. Supp. 103, 108–109 (D.D.C. 1990), *aff'd*, 929 F.2d 490 (D.C. Cir. 1991) (per curiam).

37. *Cohen's Handbook of Federal Indian Law* 182 (Nell Jessup Newton et al. eds., LexisNexis 2005).

38. 18 U.S.C. § 1151(a) (2000).

39. *See Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n. 5 (1987) (Title 18 U.S.C. § 1151 “applies to questions of both criminal and civil jurisdiction.”); *DeCoteau v. Dist. Co. Ct.*, 420 U.S. 425, 427 n. 2 (1975) (“[T]he Court has recognized that [title 18 U.S.C. § 1151] generally applies as well to questions of civil jurisdiction.”).

40. Richard B. Collins, *Implied Limitations on the Territorial Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 527 (1979).

occurred on a right-of-way to which the Indian title had been extinguished. A similar conviction was sustained in *United States v. Soldana*, on the ground that the right-of-way in question was not owned in fee simple by the grantee. Criminal convictions thus turned on the refinements of easement law.⁴¹

The modern Court reintroduced those anomalies in its dictum in *Strate v. A-1 Contractors*.⁴² In *Strate*, the Court overlooked Congress' definition of Indian country for territorial purposes, then attempted to apply the "refinements of easement law" and ultimately ran roughshod even over those refinements.⁴³ This dictum has spawned wholesale jurisdictional uncertainty in the lower courts, especially in the Ninth Circuit Court of Appeals.⁴⁴

II. CONSENT AND CONDEMNATION

The federal right-of-way statutes "reflect a federal policy of avoiding or minimizing the disturbance of the Indians' quiet possession of the restricted domains they now occupy. . . . [That policy is] consistent with the public interest in preserving the status of the . . . tribe[s] as . . . 'quasi-sovereign nation[s].'"⁴⁵ Congress has permitted condemnation of Indian allotted lands for certain rights-of-way in title 25 U.S.C. § 357 but has not permitted condemnation of tribal trust lands, even by federal agencies.⁴⁶ Moreover, when the Department of the Interior promulgated a proposed rule to eliminate the requirement of tribal consent for rights-of-way in certain instances—including a situation where significant energy resources were at stake—Congress stepped in, studied the situation, and, in effect, directed the Department to rescind that part of the proposed rule.⁴⁷ The House Report determined that the reference in title 25 U.S.C. § 324 to Indian nations organized under the Indian Reorganization Act (IRA) was not intended by Congress to mean that the consent of non-IRA tribes was not required. To the contrary,

[t]he legislative history of the 1948 Indian Right-of-Way Act . . . shows no congressional intent that consent ought not be sought from "unorganized" tribes. The purpose of including the consent requirement for "organized" tribes was merely to prevent implied

41. *Id.* at 527 n. 286 (internal citations omitted).

42. 520 U.S. 438 (1997).

43. *See id.* at 456 (negating tribal court civil jurisdiction in a case involving an accident between two non-members on a highway right-of-way where the grantee did not have fee simple title and equating or "align[ing] the right-of-way . . . with land alienated to non-Indians").

44. *See Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc) (affirming tribal court jurisdiction over accident involving college-owned truck on a public highway within reservation); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc) (Hoopa Tribe may regulate conduct of non-member on fee land within reservation); compare *Big Horn Co. Elec. Coop. v. Adams*, 219 F.3d 944, 950–52 (9th Cir. 2000) (rejecting tribal taxes on utility property on easement granted by the Secretary of the Interior where right-of-way grant was equivalent of non-Indian fee land); *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999) (no tribal court jurisdiction over a "tort claim arising from an accident on a right-of-way granted to a railroad by Congress").

45. *N.M. Navajo Ranchers Assn. v. Interstate Com. Commn.*, 702 F.2d 227, 233 (D.C. Cir. 1983).

46. *See U.S. v. Winnebago Tribe of Neb.*, 542 F.2d 1002 (8th Cir. 1976); *U.S. v. 10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970); *Bear v. U.S.*, 611 F. Supp. 589, 599 (D. Neb. 1985), *aff'd*, 810 F.2d 153 (8th Cir. 1987).

47. *See H. R. Rpt. 91-78 at 20* (Mar. 13, 1969).

supersession of the [IRA] and the Oklahoma Indian Welfare Act.⁴⁸

In addition, the House Report emphasized that provisions of Indian treaties, such as the 1868 Treaty with the Navajo, independently require tribal consent to rights-of-way: “Some of the ‘unorganized’ Indian tribes have been guaranteed by treaties that no non-Indians shall ever be permitted to settle upon or pass over their lands without their consent. Such treaty stipulations are entitled to equal recognition with the [IRA].”⁴⁹

The House Report, after almost two years of study and communication with the Department of the Interior, concluded that the “Secretary’s proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation” and that the Secretary’s assertion of such power is “contrary to law, as well as to good government, and should not be entertained.”⁵⁰ The House Report quoted with favor the Bureau of Indian Affairs’ opposition to the proposal, based in part on the fact that the consent requirement “has greatly enhanced the ability of [non-IRA] tribes to manage their own property and has strengthened their bargaining position with oil and gas pipeline companies, electric power companies, and other applicants for rights-of-way on their reservations.”⁵¹ The House Report noted the incongruity of the Secretary’s proposal with modern federal policy,⁵² quoting President Johnson’s message on Indian affairs which urged the United States to engage in “partnership—not paternalism” and “affirm [the Indians’] right to freedom of choice and self-determination.”⁵³

The House Report’s conclusions were based in large part on the principle of consent of the governed.⁵⁴ That principle, although dishonored occasionally, is the foundation of modern Indian legislation.⁵⁵ Finally, the House Report observed that straying from the consent requirement would likely result in “protracted and costly litigation in the Court of Claims.”⁵⁶

Congress gave further protection for Indian nations generally in the Quiet Title Act, which does not waive the United States’ sovereign immunity in suits seeking to establish rights in Indian lands.⁵⁷ Because the United States is an indispensable party in such cases,⁵⁸ those suits will be dismissed.⁵⁹ Therefore, the court in *United States v. Pend Orielle Public Utility District*⁶⁰ ruled that “[t]he Utility may not condemn tribal

48. *Id.* at 26 (citing S. Rpt. 80-823 (Jan. 14, 1948)).

49. *Id.* at 9.

50. *Id.* at 3.

51. *Id.* at 8.

52. H.R. Rpt. 91-78 at 3, 17–19.

53. *Id.* at 18.

54. *See id.* at 3, 17–19.

55. *See* Richard B. Collins, *Indian Consent to American Government*, 31 *Ariz. L. Rev.* 365 (1989).

56. H.R. Rpt. No. 91-78, at 12.

57. *See* 28 U.S.C. § 2409a(a) (2000) (providing that waiver of government’s sovereign immunity in quit title actions “does not apply to trust or restricted Indian lands”).

58. *See Minn. v. U.S.*, 305 U.S. 382 (1939).

59. *See e.g. Alaska v. Babbitt*, 38 F.3d 1068, 1072–74 (9th Cir. 1994); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n. 4 (9th Cir. 1991) (stating the Quiet Title Act poses an “insuperable hurdle” to a suit to establish title to an easement across reservation land).

60. 28 F.3d 1544 (9th Cir. 1994).

lands embraced in a reservation under the [Federal] Power Act or any other federal statute.”⁶¹ This is consistent with case law holding that a certificate of public convenience and necessity from the Federal Energy Regulatory Commission does not give the holder of the certificate the power to condemn federal lands.⁶²

No law permits condemnation of tribal trust lands.⁶³ However, the General Allotment Act of 1887⁶⁴—and other statutes providing for the allotment of reservation land to individual tribal members⁶⁵—was designed to assimilate Indians into the dominant society and, ultimately, to destroy Indian tribes as institutions.⁶⁶ Thus, although the requirement of *tribal* consent to rights-of-way is firmly established⁶⁷—even when the right-of-way is sought under a statute other than the 1948 Act⁶⁸ (which contains the tribal consent requirement) and when the United States is the plaintiff⁶⁹—rights-of-way may be acquired over trust allotments by condemnation under title 25 U.S.C. § 357.⁷⁰ Under § 357, the condemnation action must further a public purpose under the laws of the state where the land is located. In addition, there may be federal prerequisites to a condemnation action; for example, in the case of railroads, a certificate of public convenience and necessity from the Interstate Commerce Commission is required.⁷¹

While the substantive law of the state will govern in actions under § 357,⁷² the federal courts have exclusive jurisdiction over such actions,⁷³ the United States is an indispensable party,⁷⁴ and state procedure will not apply.⁷⁵ Just compensation is

61. *Id.* at 1548 (citations omitted).

62. See *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 883–84 (10th Cir. 1974); see also *Skokomish Indian Tribe v. U.S.*, 410 F.3d 506, 512 n. 4 (9th Cir. 2005) (en banc) (The tribe may seek damages and equitable relief for flooding of its reservation authorized by the Federal Power Act.).

63. See *Pend Oreille*, 28 F.3d at 1548.

64. 48 Stat. 388 (1887).

65. See *Cohen's Handbook of Federal Indian Law*, *supra* n. 37 at 1040–41.

66. See *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n. 1 (1976); *Quinault Allottee Assn. v. U.S.*, 485 F.2d 1391, 1396 (Ct. Cl. 1973).

67. 25 C.F.R. § 169.3; *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (8th Cir. 1983); *S.P. Transp. Co.*, 700 F.2d 550 (9th Cir. 1983); *Plains Elec.*, 542 F.3d 1375; *Transwestern Pipeline Co. v. Acting Dep. Asst. Sec. Indian Affairs*, 12 IBIA 49 (Dept. Int., Int. Bd. Indian App. 1983).

68. See *S.P. Transp. Co.*, 700 F.2d at 555 n. 3 (discussing railroad right-of-way under the 1899 Act).

69. See *Winnebago Tribe of Neb.*, 542 F.2d 1002; *10.69 Acres of Land*, 425 F.2d 317; *Bear*, 611 F. Supp. 589.

70. See e.g. *Neb. Pub. Power Dist.*, 719 F.2d at 961; *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982); *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1154–55 (10th Cir. 1977).

71. See *Tampa Phosphate R.R. Co. v. Seaboard Coast Line R.R.*, 418 F.2d 387, 393 (5th Cir. 1969); see also *N.M. Navajo Ranchers Assn.*, 702 F.2d at 233 (stating the Interstate Commerce Commission must take into consideration effect on tribe's ability to be self-sufficient in decisions to grant or deny certificate of public convenience and necessity).

72. See *Star Lake R.R. v. Fourteen Rights-of-Way*, 13 Indian L. Rptr. 3005, 3007 (D.N.M. 1985) (reviewing cases applying state law to condemnation actions brought under 25 U.S.C. § 357).

73. *Minn.*, 305 U.S. at 389.

74. *Id.* at 386; see also *Nicodemus*, 264 F.2d at 615; *U.S. v. City of McAlester*, 604 F.2d 42, 45–47 (10th Cir. 1979); *Town of Okemah v. U.S.*, 140 F.2d 963, 965 (10th Cir. 1944). The Secretary of the Interior is not indispensable when the United States itself is a party. *Transok Pipeline Co.*, 565 F.2d at 1153 (declining to follow dictum in *U.S. v. Okla. Gas & Elec. Co.*, 127 F.2d 349 (10th Cir. 1943), *aff'd*, 318 U.S. 206 (1943)).

75. *Okla. Gas & Elec. Co. v. U.S.*, 609 F.2d 1365, 1366 n. 2 (10th Cir. 1979); *Town of Okemah*, 140 F.2d at 966 (federal rules regarding service of process govern in cases brought under title 25 U.S.C. § 357.).

required⁷⁶ with the property being valued at the time of the taking.⁷⁷

A tribal court may not grant a right-of-way over a trust allotment.⁷⁸ However, where the United States supports the position of the tribal government, access to mineral properties over both federal and tribal lands may be blocked by tribal officials.⁷⁹ Litigants have employed section 357 to resolve old trespass claims, succeeding in one case to bar historic damages by invoking a state statute of limitations.⁸⁰ Section 357 does not, however, contemplate “inverse condemnation.”⁸¹ Finally, § 357 may not be successfully employed to condemn interests in allotted lands which are beneficially owned in part by an Indian tribe.⁸² A tribe may acquire such fractional interests by gift deed, by purchase, or by complying with the requirements of the amended Indian Land Consolidation Act.⁸³

III. RIGHTS-OF-WAY FOR SPECIFIC PURPOSES

A. Railroads

Railroads may acquire rights-of-way through trust land either by having complied with the requirements of the 1899 Act or by complying with the requirements of the 1948 Act.⁸⁴ The 1948 Act itself prescribes no specific limitations on railroad rights-of-way, nor does it set forth any detailed procedures under which applications for railroad rights-of-way will be processed.⁸⁵ Its most significant feature is the consent requirement of title 25 U.S.C. § 324.

The 1899 Act itself contains no tribal consent requirement. However, the Act does contain numerous provisions with specific requirements to obtain a right-of-way through Indian land. Examples of these requirements include construction of passenger and freight stations at government town sites,⁸⁶ the filing and approval by the Secretary of a map of the survey of the proposed line,⁸⁷ detailed procedures to be employed where the applicant is unable to reach agreement with the Indian “occupant or allottee” on the matter of compensation,⁸⁸ forfeiture provisions,⁸⁹ and—most importantly for railroads

76. See *U.S. v. City of Pawhuska*, 502 F.2d 821, 824 (10th Cir. 1974).

77. See generally *Chippewa Indians v. U.S.*, 305 U.S. 479 (1939).

78. See *Fredericks v. Mandel*, 650 F.2d 144 (8th Cir. 1981).

79. See *Super. Oil Co. v. U.S.*, 353 F.2d 34 (9th Cir. 1965).

80. *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987); cf. *Hammond v. Co. of Madera*, 859 F.2d 797 (9th Cir. 1988) (awarding trespass damages of reasonable rental value, consequential damages flowing from trespass, and attorney fees to allottees from county for constructing, maintaining, and utilizing county roads in violation of right-of-way statutes and regulations).

81. *U.S. v. Clarke*, 445 U.S. 253, 258 (1980).

82. *Neb. Pub. Power Dist.*, 719 F.2d at 961.

83. See 25 U.S.C. §§ 2201–2221 (2000 & Supp. 2006).

84. See *S.P. Transp. Co.*, 700 F.2d at 554; see also *Blackfeet*, 838 F.2d at 1058 (regarding interplay of the 1904 Act concerning pipeline rights-of-way and the 1948 Act).

85. See 25 U.S.C. §§ 323–328.

86. *Id.* at § 312.

87. *Id.* at § 314.

88. *Id.* The completion of such procedures appears to be a precondition to filing any action related to a desired right-of-way in federal court. *Id.*; see e.g. *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752, 767 (1947) (holding that Congress may condition access to the federal courts upon completion of administrative

proposed for the transport of natural resources on or through Indian lands—width limitations of fifty to one hundred feet on either side of the center line, depending on the necessity for heavy cuts and fills.⁹⁰ The Act requires compliance with “such rules and regulations as may be prescribed” by the Secretary.⁹¹ These regulations require the consent of Indian tribes,⁹² and that regulatory requirement has been upheld.⁹³

The regulations combine the features of both acts. The consent requirement for tribes and allottees under the 1948 Act is found at 25 C.F.R. § 169.3 and is applicable to all types of rights-of-way. Both title 25 U.S.C. § 324 and 25 C.F.R. § 169.3(c) allow for the grant of a right-of-way over allotted lands without landowner consent if:

1. the land is owned by more than one person, and a majority of the interests consent;
2. the whereabouts of an owner is unknown and a majority of the owners whose whereabouts are known consent;
3. the heirs or devisees of a deceased owner have not been determined, and the grant will not cause substantial injury to the land or any owner; or
4. the owners are so numerous that it would be impractical to obtain their consent, and the grant will cause no substantial injury to the land or any owner.⁹⁴

In addition, the regulations allow the Secretary to grant a right-of-way over an allotment without the consent of a minor or an insane owner if there is no substantial injury to either the land or the owner which could not be adequately satisfied by monetary damages.⁹⁵ Irregular or fraudulent consent forms will not satisfy either the 1948 Act or 25 C.F.R. § 169.3.⁹⁶

Several requirements found in the 1899 Act—the width limitations, the requirement that the line will be used as a common carrier of passengers and freight, and the requirement that stations be constructed at each government town site—also appear in the regulations.⁹⁷ These regulations govern applications under the 1948 Act “[e]xcept when otherwise determined by the Secretary.”⁹⁸

Under the 1899 Act, all requirements of the statute and regulations must be complied with; construction will not suffice.⁹⁹ Prior to the 1948 Act, it was opined that

determinations); *Marrone v. U.S. Immig. & Naturalization Serv.*, 500 F.2d 418, 420 (2d Cir. 1974) (requiring exhaustion of administrative remedies).

89. 25 U.S.C. § 315 (Forfeiture may result from “fail[ure] to construct and put in operation one-tenth of its entire line within one year, or to complete [the entire line] within three years.”).

90. *Id.* at § 313.

91. *Id.* at § 312.

92. 25 C.F.R. § 169.3(a).

93. *S.P. Transp. Co.*, 700 F.2d at 552.

94. 25 C.F.R. § 169.3(c)(2)–(5). Only the first two of these sections would likely apply to a railroad right-of-way, because the construction of a railroad would almost certainly involve “substantial injury to the land.”

95. *Id.* at § 169.3(c)(1).

96. See *N.M. Navajo Ranchers Assn.*, 702 F.2d at 231–33; see generally *Coast Indian Community*, 550 F.2d 639.

97. See 25 C.F.R. § 169.23(b) (width limitations); *id.* at § 169.23(f) (common carrier of passenger and freight); *id.* at § 169.23(g) (stations at government town sites).

98. 25 C.F.R. § 169.23(a).

99. *U.S. v. S.P. Transp. Co.*, 543 F.2d 676, 691–92 (9th Cir. 1976) (rejecting railroad’s argument that actual construction acquires right-of-way).

the regulations limiting the width of the rights-of-way, based in the 1899 Act, could not be waived by the Secretary.¹⁰⁰ After the passage of the 1948 Act and in light of a recent analogous case,¹⁰¹ this conclusion is open to question as to applications made under the 1948 Act.

The forfeiture provisions of title 25 U.S.C. § 315 are absent from the regulations, but termination for non-use or abandonment under 25 C.F.R. § 169.20(b) & (c) can take place.¹⁰² An early decision held that only the United States may assert forfeiture under § 315,¹⁰³ and that holding has received additional support in principle.¹⁰⁴ It is doubtful, however, that the Indian landowner has no independent recourse to seek damages, cancellation, or forfeiture.¹⁰⁵

Special regulations apply to railroad rights-of-way across Indian lands in Oklahoma,¹⁰⁶ implementing the Act of February 28, 1902.¹⁰⁷ Once again, applications under the 1948 Act in Oklahoma must also conform to these special regulations “[e]xcept when otherwise determined by the Secretary.”¹⁰⁸

B. Bureau of Indian Affairs (BIA) Roads

For access purposes, BIA roads may be needed.¹⁰⁹ The regulations state that the BIA roads are for “[f]ree public use.”¹¹⁰ Part 169 of 25 C.F.R. governs the grant of easements for rights-of-way for BIA roads,¹¹¹ and these regulations require tribal and allottee consent.¹¹²

C. Telephone and Telegraph Lines

Title 25 U.S.C. § 319 and 25 C.F.R. § 169.26 specifically deal with rights-of-way for telephone and telegraph lines. The regulations promulgated under § 319 will also be applied to applications under the 1948 Act.¹¹³

100. *Ariz. E. R.R.*, 52 Int. Dec. 594 (1929); *Rights of Way-Station Grounds-Sec. 2, Act of March 2, 1899*, 30 Int. Dec. 599 (1901) (per Van Devanter).

101. *Blackfeet*, 838 F.2d 1055.

102. *Star Lake R.R.*, 737 F. Supp. at 108. It seems clear, however, that the forfeiture provisions of § 315 have survived the passage of the 1948 Act, at least for any railroad right-of-way obtained under the 1899 Act.

103. *Clarke v. Boysen*, 39 F.2d 800, 815 (10th Cir. 1930).

104. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983) (Secretarial involvement in lease cancellations is required under title 25 U.S.C. § 415 and 25 C.F.R. § 162.14 despite contrary language in lease approved by the Secretary.).

105. See generally *Poafpybiitty v. Skelly Oil Co.*, 390 U.S. 369, 373–74 (1968).

106. 25 C.F.R. § 169.24.

107. Pub. L. No. 57-26, 32 Stat. 43 (1902).

108. 25 C.F.R. § 169.24(a). The difference between, and interplay of, the 1899 Act and the Act of February 28, 1902, are explored to a limited extent in *Midwestern Devs., Inc. v. City of Tulsa*, 259 F. Supp. 554 (N.D. Okla. 1966), *aff'd*, 374 F.2d 683 (10th Cir. 1967).

109. 25 C.F.R. § 170.1. 25 C.F.R. part 170 regulates the planning, design, construction, maintenance, and general administration of BIA roads.

110. *Id.* at § 170.8. A caveat, however, is the traveling public. BIA roads are notoriously badly maintained, and a recent decision holds that the discretionary function exception to the Federal Torts Claims Act bars claims against the government for damages caused by the BIA’s failure to maintain its roads. *Walters v. U.S.*, 2007 WL 209982 (8th Cir. Jan. 29, 2007).

111. *Id.* at § 170.5(a).

112. *Id.* at §§ 169.3 & § 170.5(a).

113. *Id.* at § 169.25(a).

Contrary local regulation of rights-of-way for telephone and telegraph lines is preempted by federal law.¹¹⁴ Section 319 does not authorize grants of easements for rights-of-way for electric power lines.¹¹⁵

D. Pipelines

Title 25 U.S.C. § 321 and 25 C.F.R. § 169.25 specifically deal with rights-of-way for oil and gas pipelines. The regulations promulgated under § 321 will also apply to pipeline rights-of-way under the 1948 Act.¹¹⁶ Individual Indian surface users within a reservation may not interfere with the laying of pipelines if the tribe consents.¹¹⁷ This result is consistent with the decisions concerning other types of rights-of-way.¹¹⁸

The court in *Blackfeet Indian Tribe v. Montana Power Co.*¹¹⁹ reconciled the 1948 Act and title 25 U.S.C. § 321 (the 1904 Act). The court determined that the two statutes can be read as coexisting, holding that the two statutes "gave the Tribe a choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute."¹²⁰ The court found it unnecessary to determine which of the rights-of-way at issue was granted pursuant to which statute,¹²¹ even though the 1904 Act specifies a maximum twenty-year term.

E. Public Highways

Title 25 U.S.C. § 311 and 25 C.F.R. § 169.28 address rights-of-way for public highways on Indian trust lands. The authority conferred by § 311 is available only to public bodies, not to private corporations.¹²² While § 311 expressly confers authority on the Secretary to grant rights-of-way only for highways, the United States Supreme Court has held that § 311 allows the construction of public utility lines within the highway rights-of-way after the dissolution of the Indian reservation.¹²³ While Secretarial permission is required to obtain a right-of-way under § 311,¹²⁴ Secretarial consent to condemnation for public highways is not.¹²⁵

114. *Muskogee Natl. Tel. Co. v. Hall*, 118 F. 382 (8th Cir. 1902).

115. See *Swendig v. Wash. Water Power Co.*, 265 U.S. 322, 327-28 (1924).

116. 25 C.F.R. § 169.25(a).

117. See *Appleton v. Kennedy*, 268 F. Supp. 22 (N.D. Okla. 1967) (Osage Reservation).

118. See *E. Band of Cherokee Indians v. Griffin*, 502 F. Supp. 924 (W.D.N.C. 1980) (concerning right-of-way for public highway under 25 U.S.C. § 311); *Hunger v. Andrus*, 476 F. Supp. 357 (D.S.D. 1979) (same); see also *Dennison v. Tucson Gas & Elec. Co.*, 1 Navajo Rptr. 95 (1974) (holding that electric power line over tribal trust land may be constructed with payment of compensation to holder of grazing permit).

119. 838 F.2d 1055.

120. *Id.* at 1059.

121. *Id.* at 1057 n. 2.

122. *U.S. v. Okla. Gas & Elec. Co.*, 318 U.S. at 210.

123. *Id.* at 217. Buried telephone cables may also be placed inside the highway right-of-way. *U.S. v. Mt. Sts. Tel. & Telegraph Co.*, 434 F. Supp. 625 (D. Mont. 1977).

124. *Bennett Co. v. U.S.*, 394 F.2d 8, 15 (8th Cir. 1968); cf. *San Felipe Pueblo v. Hodel*, 770 F.2d 915, 917 n.2 (10th Cir. 1985) (holding that later consent by tribe validates Secretary's action taken without tribal consent).

125. E.g. *U.S. v. Minn.*, 113 F.2d 770, 774 (8th Cir. 1940).

F. *Rights-of-Way “For All Purposes”*

The 1948 Act¹²⁶ governs rights-of-way for all purposes across any Indian trust lands. The 1948 Act expressly requires the consent of individual Indian allotment owners and IRA tribes.¹²⁷ The regulations apply the consent requirement to all tribes.¹²⁸ Just compensation is required,¹²⁹ and a BIA official exceeds his or her authority in approving a right-of-way under the 1948 Act if the consent is lacking or irregular or if compensation to the Native American owner is insufficient.¹³⁰ In determining appropriate compensation, the Department must consider “the beneficial use and economic value of the right-of-way.”¹³¹ Existing statutory authority empowering the Secretary to grant rights-of-way is expressly preserved.¹³²

As one court has stated, “[t]he Act is puzzling. Section 2 [25 U.S.C. § 324] requires tribal consent to all grants of rights-of-way, but Section [4]^[133] continues in force many laws which grant the Secretary authority to grant rights-of-way without tribal consent.”¹³⁴ As a practical matter, the Secretary had resolved this uncertainty of whether the Act requires tribal consent by requiring by regulation—continuously since 1951—that tribal consent be obtained in all cases for all rights-of-way, and this regulation has received the sanction of both the courts and Congress.¹³⁵ The courts have also harmonized the 1948 Act with earlier right-of-way statutes, reasoning that the earlier and later acts can and should be read to coexist.¹³⁶

IV. THE IMPLICATIONS FOR FUNDAMENTAL TRIBAL RIGHTS OF SECTION 1813 OF THE 2005 ENERGY POLICY ACT¹³⁷

The Navajo Nation granted pipeline rights-of-way to the El Paso Natural Gas Company (EPNG) in the 1950s and thereafter, all of which were to expire by their own terms on October 17, 2005. The EPNG system extends for almost nine hundred miles across the Navajo Reservation. The system includes a number of lines of varying sizes—from thirty to forty-two inches in diameter—capable of delivering 3.8 billion cubic feet of gas per day and actually delivering an average 2.5 billion cubic feet per day. As the expiration date approached without an agreement for renewal in sight, and as reports of compensation obtained by the Navajo Nation for other pipeline rights-of-way surfaced, the Navajo Nation learned that EPNG was pursuing a strategy designed to

126. 25 U.S.C. §§ 323–328.

127. *Id.* at § 324.

128. 25 C.F.R. § 169.3(a).

129. 25 U.S.C. § 325.

130. *Coast Indian Community*, 550 F.2d at 650–54.

131. Memo. from Assoc. Sol., Div. of Indian Affairs, to Asst. Sec. Indian Affairs 3 (Sept. 6, 1995).

132. 25 U.S.C. § 326.

133. The court cited to § 3 but probably intended to refer to § 4 of the 1948 Act. *See id.*

134. *Mt. Sts. Tel. & Telegraph Co.*, 434 F. Supp. at 629 n. 6.

135. *See supra* nn. 46–70 and accompanying text.

136. *Blackfeet*, 838 F.2d at 1058.

137. Part IV closely tracks the author’s statement on tribal sovereignty submitted in response to the Section 1813 public scoping meeting held March 7 to 8, 2006. Paul E. Frye, *Section 1813 of the Energy Policy Act of 2005: Implications for Tribal Sovereignty Territorial Management, and Economic Self-Sufficiency* 6–26, http://1813.anl.gov/documents/docs/Presentations/NN_EPNG_Arg_sov_paper_3_26_06.pdf (Mar. 26, 2006).

obtain renewal of its rights-of-way without Navajo Nation consent. The El Paso Corporation (EPNG's parent corporation) had other problems, including the financial burden of settlement with the State of California to resolve claims that it had manipulated energy markets in the California energy crisis¹³⁸ and various shareholder allegations. Those allegations included that the El Paso Corporation had misrepresented its financial condition to the shareholders' detriment—engaging in Enron-style wash trades, overstating reserves, providing risk-free investment opportunities to insiders, improperly reporting mark-to-market values, filing false financial statements, conducting and hiding off-balance sheet activities, failing to disclose material performance guarantees, and manipulating energy markets.¹³⁹

On March 8, 2005, in a letter written to Senator Pete Domenici (New Mexico), the New Mexico Oil and Gas Association, of which EPNG is a member, proposed amendments to the 1948 Act that would allow the Secretary of the Interior to issue "a grant or renewal of a right-of-way, or expansion of a right-of-way by amendment" over tribal land when the applicant and the tribe "cannot agree to the terms for the tribe's consent."¹⁴⁰ The tribe would be allowed "just compensation" defined as the "fair market value of the rights granted, plus severance damages, if any, to the remaining estate, determined in accordance with generally accepted principles of property valuation."¹⁴¹ Indian nations objected, and the proposal was not introduced by Senator Domenici or anyone else. On September 29, 2005, EPNG submitted a letter and legal analysis to Department of the Interior Solicitor Wooldridge, requesting that the Department grant the renewals over the Navajo Nation's objections.¹⁴² That submission urged that the Navajo Nation's Treaty of 1868 constituted the Nation's consent, the Department's rule requiring consent of non-IRA tribes such as the Navajo Nation was unlawful, and requiring Navajo consent was inconsistent with EPNG's rights under its FERC certificate.¹⁴³

Section 1813 of the Energy Policy Act of 2005¹⁴⁴ is essentially Senator Domenici's compromise. The initial version of that section required the Secretaries of Interior and Energy to examine only the proper standards and procedures for determining

138. See Gary Chazen, *Details Emerge on \$1.7B El Paso Settlement*, <http://sacramento.bizjournals.com/sacramento/stories/2003/03/17/daily42.html> (Mar. 21, 2003) (reporting that El Paso had settled California's claim for damages in the amount of \$3.3 billion by agreeing to pay the state \$1.7 billion).

139. See *Wyatt v. El Paso Corp.*, 2002-CV-2717 (S.D. Tex.). The *Wyatt* case was consolidated with twenty-seven other complaints by El Paso shareholders in the Southern District of Texas, and El Paso settled those claims and similar derivative lawsuits for \$273 million. *Inside FERC* 14 (Aug. 7, 2006).

140. Ltr. from Bob Gallagher, Pres., N.M. Oil & Gas Assoc., to Pete V. Domenici, Sen., *Energy Rights-of-Way on Tribal Lands* (March 8, 2005) (including proposed revisions to 25 U.S.C. § 324).

141. *Id.*

142. Ltr. from Thomas L. Sansonetti, Partner, Holland & Hart, to Sue Ellen Wooldridge, Solicitor, U.S. Dept. Int., *Renewal of El Paso Natural Gas Company's Rights-of-Way for Interstate Pipelines Crossing Lands of the Navajo Nation* (Sept. 29, 2005) (on file with author).

143. EPNG's view that the Secretary of the Interior may not impose conditions—such as the requirement of tribal consent—that could conceivably unduly burden the project was based on inferences drawn from *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). The Court of Appeals for the District of Columbia Circuit recently rejected that reasoning in *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

144. Pub. L. No. 109-58, § 1813, 119 Stat. 594, 1127–28 (2005); *Text: Section 1813, Energy Policy Act of 2005*, <http://1813.anl.gov/text/index.cfm> (accessed Oct. 29, 2006).

fair compensation for rights-of-way on tribal land and relevant national energy transportation policies relating to energy rights-of-way on tribal land. Other senators, notably Senator Jeff Bingaman (New Mexico), viewed that focus as too limited, and the bill was expanded to include requirements that the study examine historic rates of compensation paid for energy rights-of-way on tribal land and an assessment of the tribal self-determination and sovereignty interests implicated by such rights-of-way. That expanded version eventually became Section 1813.

The tribal response to Section 1813 was swift and unequivocal. The National Congress of American Indians (NCAI) recognized that “the language of section 1813 could be read to justify the Federal government overriding fundamental principles of tribal sovereignty and decision-making when they conflict with ‘relevant national energy transportation policies.’”¹⁴⁵ NCAI resolved to assist the Secretaries in the study “to fulfill the goals of section 1813 while preventing any erosion of tribal sovereignty or authority.”¹⁴⁶

On March 7 and 8, 2006, the Departments of Energy and Interior held a scoping session for the Section 1813 study.¹⁴⁷ The tribal presence and participation were impressive. Former Senator Ben Nighthorse Campbell set the tone of the meeting with opening remarks that outlined the genesis of the study requirement and its incompatibility not just with modern federal policy generally, but also with other provisions of the 2005 Energy Policy Act that he authored which deal with Indian energy resource development.¹⁴⁸

The comments at the scoping session were wide-ranging. The EPNG, Idaho Power Company, and Fair Access to Energy Coalition, a front for EPNG represented at the scoping session by EPNG’s counsel, were the most emphatic in urging that a real problem exists and may be appropriately fixed by federal legislation.¹⁴⁹ Business owners complained that energy bills were too high and contended that unreasonable Indians must be the cause. The Edison Electric Institute—whose members were concerned about the uncertainty of the terms under which rights-of-way for electric power lines could be renewed—ultimately expressed a desire for dialogue with tribes.¹⁵⁰ Other comments included those of Colorado politicians contacted by EPNG, which is headquartered in Colorado Springs. A letter submitted by Colorado State Senator and Assistant Majority Leader Jim Isgar recommended that, if the costs associated with the compensation by tribes for energy rights-of-way “are an insignificant percentage of

145. NCAI, *Res. No. TUL-05-110: Section 1813 of the Energy Policy Act of 2005*, <https://www.ncai.org/ncai/data/resolution/annual2005/TUL-05-110.pdf> (Nov. 4, 2005).

146. *Id.*

147. Meeting transcripts and comments are available at <http://1813.anl.gov/documents/index.cfm>.

148. See Ben Nighthorse Campbell, *Commentary for the Section 1813 Tribal Energy Right-of-Way Study* http://1813.anl.gov/documents/docs/ScopingComments/Ben_Nighthorse_Campbell.pdf 6 (Apr. 19, 2006).

149. See e.g. Nancy Ives, *Presentation by FAIR Access to Energy Coalition Public Scoping Hearing on Sec. 1813 Study*, http://1813.anl.gov/documents/docs/Presentations/FAIR_presentation_060307.pdf (Mar. 7, 2006); Thomas L. Sansonetti, *The Fair Access to Energy Coalition Presentation to the Departments of Energy and of the Interior*, <http://1813.anl.gov/documents/docs/Presentations/Sansonetti-FAIR%20presentation.pdf> (Mar. 7, 2006).

150. E.g. *Energy Policy Act of 2005, Section 1813 Study on Indian Land Rights-of-Way: Transcript of Presentations and Comments Made at the March 8, 2006 Scoping Meeting*, http://1813.anl.gov/documents/docs/Meetings/8_March_1813_Scoping_Mtg_transcript.pdf 75 (Mar. 8, 2006).

overall consumer energy costs, we may very well conclude that the cultural value associated with preservation of tribal governments is worth that cost.”¹⁵¹ The words used here, and the clear negative pregnant, reflect challenges that the Indian nations must overcome in engaging in an open dialogue with elected officials.

Other industry comments presented a different picture than EPNG. Those industry representatives talked of the benefits of including Indian nations as partners.¹⁵² They argued that the present system encouraged and empowered the Indian nations to become actively involved in the energy production and transmission industry. Furthermore, this active involvement accrued to the ultimate benefit of the industry, the consumer, and the country’s energy security.

Presentations and comments of the Indian leaders and representatives predominated, and those comments were both persuasive and, in some cases, impassioned. Those comments focused on three items: the unfairness of historic compensation levels for rights-of-way,¹⁵³ the lack of any real present problem (except for EPNG’s inability to come to terms with the Navajo Nation),¹⁵⁴ and the potential implications for tribal sovereignty, self-determination, and self-sufficiency of any “solution” to the “problem” which would allow any company or agency to avoid the tribes’ fundamental right to exclude nonmembers and condition the entry of those seeking to do business in the tribal territory.¹⁵⁵ The remainder of this article examines that latter issue.

The objective of the proponents of the section 1813 study is to obtain rights-of-way (initial grants and renewals) over Indian tribal lands on terms to which the Indian nation does not consent. This effort implicates the following sovereign interests of the Indian nations:

1. treaty guarantees (for tribes with treaties);
2. the fundamental rights of an Indian nation to exclude nonmembers and the correlative right to condition the entry of nonmembers seeking to do business in the tribal territory;
3. regulatory authority, including tax authority, of Indian nations over nonmembers conducting business within the tribal territory pursuant to a grant of right-of-way;
4. tribal land use planning;

151. Ltr. from Jim Isgar, Colo. St. Sen., to Whom It May Concern, *Testimony to Scoping Hearing* (Mar. 2, 2006) (available at http://1813.anl.gov/documents/docs/Presentations/Assistant_Majority_Leader.pdf).

152. E.g. Ltr. from Bill Barrett Corp., to Off. of Indian Energy & Econ. Dev., *Section 1813 Scoping Comments* (Mar. 8, 2006) (available at http://1813.anl.gov/documents/docs/Presentations/Bill_Barret_Corp.pdf).

153. E.g. Maurice Lyons, Tribal Chariman, Morongo Band of Mission Indians, *Tribal Case Study: Section 1813 Report* (May 15, 2006) (available at http://1813.anl.gov/documents/docs/ScopingComments/MOR_5_14_1813_Case_Study_Final.pdf).

154. E.g. *Position Paper of the Jicarilla Apache Nation on DOE/DOI Study of Energy Rights of Way on Tribal Land* 13-15 (May 12, 2006) (available at http://1813.anl.gov/documents/docs/ScopingComments/Jacarilla_Apache_Nation_Revised_Position_Paper.pdf); Ltr. from Council of Energy Resource Tribes to Off. of Indian Energy and Econ. Dev., *Section 1813 ROW Study* 6 (May 15, 2006) (http://1813.anl.gov/documents/docs/ScopingComments/Council_of_Energy_Resource_Tribes.pdf).

155. E.g. Ltr. from Rebecca A. Miles, Chairmen Nez Perce Tribal Exec. Comm., to Off. of Indian Energy and Econ. Dev., *Section 1813 ROW Study* (Apr. 28, 2006) (available at http://1813.anl.gov/documents/docs/ScopingComments/Nez_Perce_section1813_ROW_Study.pdf).

5. sanctity of contracts made with tribes and approved by the United States;
6. tribal rights to property (such as improvements) upon the expiration or other termination of a right-of-way;
7. the ability of Indian nations to develop the tribal economy and fund essential government services by either taking advantage of business opportunities related to access over its lands or obtaining compensation for granting access to nonmembers; and
8. the continued adherence of Congress to the policy favoring tribal self-determination and self-sufficiency or, alternatively, its drift to divestiture of fundamental tribal rights as inconsistent with the dependent status of Indian nations and the perceived interests of non-Indians.

The following addresses these issues often with reference to the Navajo situation, but the issues and analysis will apply to Indian country generally.

A. *Treaty Guarantees*

Under the Constitution, treaties are the “supreme law of the land.”¹⁵⁶ The United States entered into many treaties with Indian nations until 1871 when treaty-making was abolished.¹⁵⁷ Rights under these treaties are threatened by the proponents of the Section 1813 study.

The foundation of the relationship between the Navajo Nation and the United States is a treaty negotiated in 1849 and ratified by Congress in 1850.¹⁵⁸ Under that treaty, the Navajo submitted to the federal government’s “sole and exclusive right of regulating the trade and intercourse” with the Navajo.¹⁵⁹ In exchange, the United States promised to give the treaty a “liberal construction” and to “legislate and act as to secure the permanent prosperity and happiness” of the Navajo people.¹⁶⁰ These commitments indicate the federal government’s “willing assumption” of trust duties with respect to Navajo resources.¹⁶¹ The United States also promised to “at its earliest convenience, designate, settle, and adjust [the Navajos’] territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.”¹⁶²

After subsequent skirmishes with local settlers and military authorities, the Navajo people were marched on the Long Walk to a concentration camp in eastern New Mexico.¹⁶³ There, about one-fourth of the Navajos died, and the federal government

156. U.S. Const. art. VI.

157. See *Cohen’s Handbook of Federal Indian Law*, *supra* n. 37, at 74–75.

158. *Treaty between the United States of America and the Navajo Tribe of Indians*, 9 Stat. 974 (1849).

159. *Id.*

160. *Id.* at 975.

161. See *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 n. 1 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part) *on reh’g*, 782 F.2d 1171 (1985), *cert. denied*, 497 U.S. 970 (1986).

162. 9 Stat. at 975.

163. See Garrick Bailey & Robert Glenn Bailey, *A History of the Navajos: The Reservation Years* 25 (U. Wash. Press 1986); David M. Brugge, *The Navajo Hopi Land Dispute: An American Tragedy* 23 (U.N.M. Press 1994) (citing Lynn Robison Bailey, *Bosque Redondo: An American Concentration Camp* (Socio-Technical Bks. 1970)); Arthur S. Fleming, et al., *The Navajo Nation: An American Colony* 15 (U.S. Commn.

recognized the failure of that ignoble experiment. Consequently, a second treaty was negotiated and ratified in 1868.¹⁶⁴ That treaty designated an area of about one hundred miles square to be “set apart for the use and occupation of the Navajo tribe of Indians” and further provided in Article II that the

United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over . . . the territory described [in the Treaty].¹⁶⁵

The United States Supreme Court construed the 1868 Treaty in *Williams v. Lee*¹⁶⁶ as providing “that no one, except United States Government personnel, was to enter the reserved area.”¹⁶⁷ The EPNG pipelines pass through this treaty reservation, as well as other lands set apart for exclusive Navajo use by later statutes and executive orders.

Article IX of the 1868 Treaty also provides that the Navajo will not “oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States.”¹⁶⁸ EPNG contends that this promise constitutes advance tribal consent to its projects. However, treaties with Indian tribes must be construed as a whole and, “[p]laced in context, it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe.”¹⁶⁹ This is consistent with the construction of similar provisions in treaties made with other tribes.¹⁷⁰ Thus, the position of EPNG has been squarely rejected by the Secretary of the Interior, acting through the Interior Board of Indian Appeals.¹⁷¹

Certainly, Congress has not interpreted Indian treaties such as the 1868 Navajo Treaty as either obviating the need for tribal consent or providing a blanket authorization for private or public entities, licensed or not, to occupy or use tribal lands. The Navajo treaty provision on which EPNG relies is present in numerous treaties with Indian nations, yet Congress has passed several pieces of legislation specifically designed to permit rights-of-way over all tribal lands.¹⁷² These laws “reflect a federal policy of

on Civil Rights 1975).

164. *Treaty with the Navajo Indians*, 15 Stat. 667 (1868).

165. *Id.* at 668.

166. 358 U.S. 217 (1959).

167. *Id.* at 221.

168. 15 Stat. at 670.

169. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 600 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985); *see also id.* at 600 n. 2 (noting “oil and gas operations [are not] a ‘work of utility’ for purposes of the Treaty”).

170. *See Bennett Co.*, 394 F.2d at 15–16; *U.S. v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D. 1958), *vacated as moot*, 259 F.2d 271 (8th Cir. 1958).

171. *See Transwestern Pipeline Co.*, 12 IBIA 49; 43 C.F.R. § 4.1 (2005) (noting that the Office of Hearings and Appeals acts as an authorized representative of the Secretary).

172. 25 U.S.C. §§ 311, 319 (highways, telephone lines and telegraph lines around 1900); *id.* at §§ 312–318 (railroads, telegraph and telephone lines and telegraph lines in 1899); *id.* at § 320 (reservoirs or materials within reservations related to railroad construction and operation in 1909); *id.* at § 321 (“the construction, operation, and maintenance of pipelines for the conveyance of oil and gas through any Indian reservation” in 1904); *id.* at §§ 323–328 (the 1948 Indian Right-of-Way Act, relating to “rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian

avoiding or minimizing the disturbance of the Indians' quiet possession of the restricted domains they now occupy" and should be implemented "consistent with the public interest in preserving the status of the . . . tribe as a 'quasi-sovereign nation.'"¹⁷³ The United States Department of Justice stated—in response to a similar effort by the Transwestern Pipeline Company to obtain rights-of-way over the Navajo Reservation without Navajo Nation consent that EPNG's interpretation of this treaty provision "is completely at odds with the central purpose of the 1868 Treaty which was to secure the benefits of peace and provide the Navajo Tribe with a 'permanent home' set apart from non-Indian settlers."¹⁷⁴

In any event, applications submitted without evidence of tribal consent are not encompassed in the treaty provision upon which EPNG and others may rely. That provision refers to works of utility and necessity "ordered or permitted by the laws of the United States." As stated in the government's brief in *Transwestern Pipeline Co. v. Clark*,¹⁷⁵ when an application for an easement across Indian lands lacks evidence of consent required by treaty, statute, or Interior regulations, such a

pipeline is not "ordered or permitted by the laws of the United States." A certificate of public convenience and necessity issued by the [Federal Energy Regulatory Commission] may indicate compliance with the laws administered by that agency, but not necessarily with laws administered by other agencies, including land management agencies such as the Department of the Interior.¹⁷⁶

Decisions of the Court "have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since."¹⁷⁷ The desire of a relatively few energy companies to obtain rights-of-way through Indian lands without tribal consent threatens the currently recognized treaty rights of Indian nations.

B. *Right to Exclude; Right to Condition Entry of Nonmembers*

The tribal right to control use of reservation lands is not reserved to treaty tribes. Congress confirmed pre-existing powers of Indian tribes in 1934, and those pre-existing powers included the power to exclude nonmembers of the tribe from entering the reservations.¹⁷⁸ That power necessarily includes the ability to set conditions on the entry of nonmembers seeking to enter the reservation and conduct business there.¹⁷⁹ "A tribe needs no grant of authority from the federal government in order to exercise this

tribes").

173. *N.M. Navajo Ranchers Assn.*, 702 F.2d at 233.

174. Memo. in Support of Mot. for P.S.J., *Transwestern Pipeline Co. v. Clark*, Nos. CIV 83-1884 & 84-0251 (D.N.M. Sept. 11, 1984).

175. *Id.*

176. *Id.* at 20–21; cf. 25 C.F.R. § 169.3(a) (requiring applications to include evidence of tribal consent); accord *City of Tacoma*, 460 F.3d at 65.

177. *U.S. v. Mazurie*, 419 U.S. 544, 558 (quoting *Williams*, 358 U.S. at 223).

178. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141–44 (1982); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983); *Powers of Indian Tribes*, 55 Int. Dec. 14, 48 (1934).

179. *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976); *Ortiz-Barraza v. U.S.*, 512 F.2d 1176, 1179 (9th Cir. 1975).

power.”¹⁸⁰

To effect this fundamental right, the Indian nations have long been recognized as having the power to remove nonmembers who are not occupying tribal land under lawful authority.¹⁸¹ The power to remove is incidental to the “general power of a government as a landowner to remove intruders.”¹⁸² Obviously, persons occupying land past the terms of their grants no longer operate under lawful authority, yet the proponents of the Section 1813 study seek legislative dispensation to effectively deprive Indian nations of their ability to seek monetary relief from or otherwise deal with trespassers.¹⁸³ The present effort to undermine the tribal consent requirement for initial grants and renewals alike threatens the fundamental right of all tribes to exclude or remove nonmembers and to condition the entry of those seeking to do business within the tribal territory.

C. Regulatory Authority

The United States Supreme Court reversed the presumption of tribal civil and regulatory authority over nonmembers in *Montana v. United States*.¹⁸⁴ The Court now presumes that Indian nations lack such authority with two exceptions: (1) where there are qualifying “consensual relationships” between the Indian nation and the nonmember and (2) where the nonmember’s conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁸⁵ The courts are construing those exceptions narrowly in many instances.

If an Indian nation is divested of its right to maintain its fundamental gate keeping function, either under a treaty or under its right to exclude, then the federal agency that is authorized to grant rights-of-way over tribal lands will not necessarily have any incentive to ensure that the rights-of-way it grants are conditioned on continuing tribal authority to regulate and tax. If, under the authority of a federal statute, a federal agency grants an easement without tribal consent and without such conditions, the affected Indian nation may have severe difficulty in maintaining its authority to regulate and tax the entity conducting business on tribal land. Especially with the implications of *Strate* and its progeny,¹⁸⁶ reliance on *Montana*’s consensual relationship exception, would seemingly foreclose. *Montana*’s other exception—threatens or has a direct effect on—would be a slender reed to grasp in many cases.¹⁸⁷ Thus, any change to the present requirement of tribal consent as a condition to a grant of easement for right-of-way imperils the tribes’ tax base, its related ability to provide the benefits of an organized society to its members and nonmembers alike, and its ability to protect the health, welfare, and safety of the

180. *Ortiz-Barraza*, 512 F.2d at 1179.

181. *Powers of Indian Tribes*, 55 Int. Dec. at 49.

182. *Id.* at 49 (citing *Canfield v. U.S.*, 167 U.S. 518, 524 (1897)).

183. See Ltr. from David K. Owens, Exec. V.P., Edison Electric Institute, to the Off. of Indian Energy & Econ. Dev., *Section 1813 ROW Study 5* (May 15, 2006) (available at (http://1813.anl.gov/documents/docs/ScopingComments/Edison_Electric_Institute.pdf)).

184. 450 U.S. 544 (1981).

185. *Id.* at 565–66.

186. See nn. 42–44 and accompanying text.

187. See e.g. *Red Wolf*, 196 F.3d at 1064–65 (noting that the second *Montana* exception is triggered only when the threat to the tribe’s well-being is “demonstrably serious”; the threat or actuality of death or injuries to just a few tribal members is not enough).

tribal community.

D. Tribal Land Use Planning

Modern congressional policy recognizing inherent tribal sovereignty was affected in 1934 with the enactment of the IRA.¹⁸⁸ Section 16 of IRA attempted to secure the preexisting powers of Indian tribes, and one subsection thereof is prefaced with the phrase “[i]n addition to all powers vested in any Indian tribe or tribal council by existing law.”¹⁸⁹ The Interior Solicitor was asked to state what those powers were.¹⁹⁰ Solicitor Nathan Margold did so, and those views regarding a statute to be administered by the Department are entitled to great weight.¹⁹¹

After an exhaustive examination of the case law, the Solicitor determined:

It clearly appears, from the foregoing cases, that the powers of an Indian tribe are not limited to such powers as it may exercise in its capacity as a landowner. In its capacity as a sovereign, and in the exercise of local self-government, it may exercise powers similar to those exercised by any State or nation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress.¹⁹²

Zoning and land use planning are such typical governmental functions. These functions have special importance to Indian nations, whose central values include a greater respect or reverence for land and sacred sites.¹⁹³ The Supreme Court has recognized the power of Indian tribes to zone, without regard for county zoning ordinances, “closed” reservation land.¹⁹⁴ That power permits Indian nations to protect sacred places and other places of cultural significance—places that a federal administrator would likely not treat with any special care.¹⁹⁵

Congress has attempted to remedy or ameliorate the checkerboard state of land titles and jurisdiction resulting from the disastrous allotment policy.¹⁹⁶ After passing a variety of specific statutes intended to reestablish Indian title to “surplus” lands,¹⁹⁷ Congress prohibited any further allotment of Indian reservation lands in § 1 of IRA, which applies to both IRA and non-IRA tribes.¹⁹⁸ Congress has attempted to foster tribal land consolidation in “opened” Indian reservations in general legislation such as the various iterations of the Indian Land Consolidation Act, which permits the Indian nations to adopt land consolidation plans with the approval of the Secretary of the

188. Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

189. 25 U.S.C. § 476(e).

190. See *Powers of Indian Tribes*, 55 Int. Dec. 14.

191. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Merrion*, 455 U.S. at 139, 146 n. 12 (relying on *Powers of Indian Tribes*, 55 Int. Dec. 14).

192. *Powers of Indian Tribes*, 55 Int. Dec. at 55.

193. *Cohen's Handbook of Federal Indian Law*, *supra* n. 37, at 940.

194. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

195. See *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

196. See *Cohen's Handbook of Federal Indian Law*, *supra* n. 37, at 78–79.

197. See e.g. Pub. L. No. 70-563, 45 Stat. 853, 899–900 (1928) (construed in *HRI, Inc. v. EPA*, 198 F.3d 1224, 1251–54 (10th Cir. 2000)); Pub. L. No. 66-359, 41 Stat. 1225, 1239 (1921).

198. See e.g. *Begay v. Albers*, 721 F.2d 1274, 1279–80 (10th Cir. 1983).

Interior.¹⁹⁹ In addition, both Congress and the executive branch have continued to act to consolidate the tribal territory on a tribe-specific basis, using many different approaches, including use of § 206 of the Federal Land Policy and Management Act of 1976.²⁰⁰

Granting a federal agency the power to approve rights-of-way through reservation lands is inconsistent with a tribe's ability to withdraw lands for special purposes, such as parks. Elimination of the tribal consent requirement, with respect to the location of an easement or other terms and conditions of its use, compromises the ability of the Indian nations to exercise the fundamental governmental function of zoning and land use planning needed to protect the health and safety of their members and visitors, promote an aesthetically pleasing environment for the community, and protect places of religious or cultural significance. Additionally, elimination of the tribal consent requirement would exacerbate the checkerboard problem, thus violating longstanding federal policy.

E. Sanctity of Contract

Governments, including tribal governments, enter into contracts. Those contracts are interpreted under general contract law.²⁰¹ The United States can be held liable for violating or impairing contract rights in the Court of Federal Claims under the Tucker Act and the "Indian Tucker Act."²⁰²

Typically, right-of-way agreements with Indian nations are for a limited term of years. Many agreements require the right-of-way grantee to leave peaceably at the termination of the right-of-way agreement, and these agreements may also provide that the tribe will become the owner of the improvements at that time. BIA requires that the right-of-way agreement be consistent with federal regulations in 25 C.F.R. part 169, including the regulations that require tribal consent for any renewal of the right-of-way. Recent tribal agreements underscore that requirement by explicitly providing that there shall be no right or expectation of renewal.

The Contract Clause of the United States Constitution²⁰³ is, by its very language, a limitation on the states only.²⁰⁴ However, the Due Process Clause of the Constitution provides essentially the same restraint against federal impairments of contract.²⁰⁵ And when there is no emergency—as the Departments of Energy and Interior expressly found in the Section 1813 draft reports²⁰⁶—and where a statute provides neither limited nor

199. 25 U.S.C. § 2203.

200. 43 U.S.C. § 1716 (2000); *see e.g.* Pub. L. 97-287, 96 Stat. 1225 (1982) (authorizing exchange of land between the United States and the Navajo Nation); Pub. L. 94-114, 89 Stat. 577 (1975) (Submarginal Lands Act, conveying title to lands in trust for seventeen identified tribes); 57 Fed. Reg. 33,733 (July 30, 1992) (announcing exchange of lands within Navajo checkerboard area); Notice of Realty Action, 47 Fed. Reg. 56,409 (1982) (announcing exchange of federal lands within Navajo Indian country for lands outside that area purchased by Navajo Nation); 25 Fed. Reg. 8546 (Sept. 3, 1960) (withdrawing 241,000 acres of land in checkerboard area for Navajo use).

201. *See U.S. v. Winstar Corp.*, 518 U.S. 839 (1996); *Lynch v. U.S.*, 292 U.S. 571, 579 (1934).

202. 28 U.S.C. §§ 1491, 1505; *see Winstar*, 518 U.S. at 913; *Johnson v. U.S.*, 79 F. Supp. 208, 211 (Ct. Cl. 1948).

203. Art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

204. *Thorpe v. Housing Auth.*, 393 U.S. 268, 278 n. 31 (1969).

205. *Lynch*, 292 U.S. at 579; *N.W. Natl. Life Ins. Co. v. Jordan*, 447 F.Supp. 856, 859 (D. Nev. 1978); *Johnson*, 79 F. Supp. at 211.

206. *See infra* nn. 228–32 and accompanying text.

temporary relief from a true public exigency, a statute impairing contract rights does not pass constitutional muster.²⁰⁷

Industry proponents of changes to Indian right-of-way legislation often focus on the asserted public interest in allowing renewals of the grant over tribal objections. In cases where the right-of-way or related lease agreements call for a limited term, require that the grantee leave peaceably on the expiration of the term, provide that the improvements shall become the property of the tribe at that time, or provide that the grant is subject to the applicable regulations, any modification of the tribal consent requirement by the Congress would impair these contracts, subjecting the tribes and industry alike to uncertainty because the sanctity of federally approved contracts in Indian country is not inviolate.

F. Property Rights

Powers of Indian Tribes notes that the “powers of an Indian tribe with respect to property derive from two sources. In the first place, the tribe has all the rights and powers of a property owner with respect to tribal property.”²⁰⁸ If any legislation would permit rights-of-way over tribal land without consent and without just compensation, the United States would be liable for a taking.²⁰⁹ “Tribal land is the property of the Indian tribe. It is not the property of the United States.”²¹⁰

In addition, as noted above, many Indian nations have contract-based expectations and property rights to the improvements constructed within rights-of-way on tribal lands upon the expiration or other termination of the grant. Some, including the Navajo Nation, have property or expectancy interests in compressor stations and other personalty appurtenant to the pipeline right-of-way under the terms of business site leases executed by the parties and approved by the Department of the Interior under title 25 U.S.C. § 415. Thus, any legislative action to extend the term of rights-of-way or related lease rights without tribal consent would not only impair contracts but also constitute a separate unconstitutional taking of tribal property.

As discussed below, the Indian nations are not acquiring these property interests simply to extract more money from pipeline or other companies in the renewal setting, although that is surely a legitimate interest.²¹¹ Rather, the acquisition of these improvements and facilities has been instrumental in tribes’ efforts to attain self-sufficient economies and to increase production and transmission of energy resources from and through tribal lands for the benefit of the tribal community and the non-Indian public.

207. See *Lynch*, 292 U.S. at 579; *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 430–34 (1934).

208. *Powers of Indian Tribes*, 55 Int. Dec. at 50.

209. See generally *U.S. v. Creek Nation*, 295 U.S. 103 (1935) (conveyance of tribal property based on incorrect survey of tribal lands required “just compensation”; otherwise, conveyance “would not be an exercise of guardianship, but an act of confiscation”) (quoting *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919)).

210. H.R. Rep. No. 91-78, at 6 (1948)(footnote omitted).

211. See H.R. Rpt. 91-78, at 8.

G. *Economic Self-Sufficiency*

The Navajo Nation was described a generation ago as an energy colony of the United States.²¹² Other Indian nations have contributed to national energy security and the comfort of their non-Indian neighbors, yet, like the Navajo, many tribal communities lack basic services such as electricity, natural gas service, or running potable water in homes.²¹³ Several Indian nations have recognized that access through and rights-of-way within tribal lands are valuable assets that can be leveraged to provide a foundation for a self-sustaining tribal economy. Doing so is consistent with federal policy generally²¹⁴ and with the energy policy of the United States, specifically.²¹⁵

For example, the Southern Ute Tribe recognized that outside developers were not aggressively developing the Tribe's natural gas and coal bed methane resources, and that pipeline access was part of the problem. It used its power to consent to rights-of-way to obtain ownership of pipeline systems within the reservation, used its business acumen to establish its own gathering company (the Red Cedar Gathering Company), and charged that company with providing service to areas of the reservation where development had languished for lack of gas gathering infrastructure. As a result, the Southern Ute Tribe is producing more energy for the United States and has achieved a level of tribal economic self-sufficiency unheard of even a generation ago.²¹⁶

Similarly, a right-of-way for crude oil gathering pipelines and a main transportation line serving two refineries located partly within the Navajo Nation expired several years ago. Because the Navajo Nation had the power to consent (or not) to a renewal, the Navajo Nation was able to engage in negotiations with the owner of the refineries, plan for a smooth transition of ownership and operations of the pipelines to the Nation's wholly owned and federally chartered petroleum company—the Navajo Nation Oil and Gas Company (NNOGC)—and agree on fair tariffs to be submitted by NNOGC to the Federal Energy Regulatory Commission. That acquisition and related revenues provided funds for further upstream development of oil and gas resources by NNOGC, and NNOGC, with industry partners such as Resolute Natural Resources Company, has acquired producing (and typically neglected) oil properties within the reservation. The end result has been a reversal of the decline curves for these properties, more oil production for the United States, more revenues for the Navajo Nation to provide needed public services to its people, and stability and certainty for the refinery

212. Fleming, et al., *supra* n. 163, at 22 (“[T]he status of the [navajo] reservation today is very much like that of an underdeveloped nation in the grip of a colonial system.”).

213. See e.g. Dennis Romboy, *Oil is Both Boon and Bane of the Reservation*, <http://deseretnews.com/dn/view/0,1249,650193412,00.html> (Sept. 25, 2006) (reporting that, even in the oil-rich part of the Navajo Nation, one-third of Navajo households lack plumbing and eighty percent lack telephones).

214. See *Cabazon Band of Mission Indians*, 480 U.S. at 217–18.

215. See Indian Tribal Energy Development and Self Determination Act of 2005, Pub. L. No. 109-58, §§ 501-506, 119 Stat. at 763–79; Indian energy provisions of the 1992 Energy Policy Act, codified at 25 U.S.C. §§ 3501–3506 (For example, § 3503(a) provides federal assistance for tribal energy vertical integration projects “to assist Indian tribes in pursuing energy self-sufficiency . . . in order to increase development of the substantial energy resources located on such Indian reservations.”).

216. See Jeanne Dugan, *Business Empire Transforms Life for Colorado Ute Tribe*, Wall St. J. A1 (June 13, 2003); Brian Newsome, *Southern Ute Tribe's Earnings Exceed Projections*, http://www.durangoherald.com/asp-bin/article_generation.asp?article_type=biz&article_path=/business/biz020422.htm (Apr. 22, 2002).

owner, a valued business partner.

Similar successes are being seen on other reservations, such as the Jicarilla Apache Nation and the Northern Ute Tribe.²¹⁷ In these cases, the opportunities for tribal self-sufficiency, development of tribal economies, and greater energy production from tribal lands result from the ability of the tribes to control land use, including rights-of-way. Any legislation to undermine that power would seriously compromise these important tribal and federal interests.

H. The Direction of Federal Indian Policy

The Section 1813 study has the capability of providing crucial support for a continuation of the modern federal policy of tribal self-determination and self-sufficiency. It also could portend a return to the nineteenth-century model of disregard of the rights of tribes as sovereigns and landowners.

The House Report provides the starting point for this discussion. It found that dilution of the tribal consent requirement would be contrary to “property rights [and] democratic principles” and contrary to “law, as well as to good government.”²¹⁸ The report also found that circumventing tribal consent would violate “the pattern of modern Indian legislation,”²¹⁹ specifically the policy of honoring tribal self-determination.²²⁰

Since the House report was published in 1969, Congress and the executive branch have consistently reaffirmed and strengthened the policy of tribal self-determination, tribal self-sufficiency, and government-to-government respect.²²¹ The Energy Policy Act of 1992 continued and applied that policy to tribal energy resources, including specifically “the generation and transmission of electricity . . . [and] natural gas distribution”²²² and the development and enforcement of tribal laws and regulations regarding energy resources on Indian reservations.²²³ The Energy Policy Act of 2005 advanced that ball even further, with its provisions authorizing the Indian nations to control and develop their energy resources largely without federal supervision.²²⁴ More recently, Secretary of Energy Samuel Bodman promulgated the Department’s American Indian and Alaska Natives tribal government policy that acknowledges that the “most important doctrine derived from this relationship [between the Indian nations and the federal government] is the trust responsibility of the United States to protect tribal

217. See Lucinda Dillon Kindead, *Utes Thriving after Nearly Going Broke*, <http://deseretnews.com/dn/view/0,1249,650192878,00.html> (Sept. 25, 2006).

218. H.R. Rpt. 91-78, at 3 (Mar. 16, 1969).

219. *Id.*

220. *Id.* at 18.

221. See e.g. 25 U.S.C. §§ 450, 458aa; William J. Clinton, Exec. Or. 13175, 3 C.F.R. 304 (2001); George Bush, *Statement on Signing the Department of the Interior and Related Appropriations, 1991*, 26 Wkly. Comp. Pres. Docs. 1768 (Nov. 5, 1990); Ronald Reagan, *Statement on Indian Policy*, 1983 Pub. Papers 96; Richard Nixon, *Special Message to Congress on Indian Affairs*, 1970 Pub. Papers 564, 573; Lyndon B. Johnson, *A Message Relating to the Problems of the American Indians*, H.R. Doc. 90-272 (Mar. 6, 1968); see *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).

222. 25 U.S.C. § 3503(a)(2).

223. *Id.* at § 3504(a).

224. See *supra* n. 48 and accompanying text.

sovereignty and self-determination.”²²⁵

The notion that Indian rights-of-way regulations jeopardize interests of non-Indian consumers is a smokescreen.²²⁶ The proponents of the Section 1813 study would reverse federal policy of respect for tribal self-determination—the only federal Indian policy that has ever worked—to serve the narrow corporate interests of a small number of energy companies who seek to diminish tribal rights in the interest of increasing corporate profits.

V. CONCLUSION

The Departments of Energy and Interior have produced two draft reports under Section 1813. The factual findings of the initial Draft Report produced by the Departments of Energy and Interior supported the tribes’ position that adherence to the consent principle is consistent with both national energy transportation policies and with federal policy favoring tribal sovereignty and self-determination and is not inconsistent with consumer interests. Specifically, the initial Draft Report concluded:

1. The requirement of tribal consent derives from the inherent sovereignty of the tribe, and is a significant component of the federal government’s policy of tribal self-determination.²²⁷
2. National energy transportation policies strongly support tribal decision-making regarding energy right-of-ways on tribal land.²²⁸
3. The Departments found no evidence that the requirement of tribal consent has contributed to any emergency situation regarding energy.²²⁹
4. Existing law provides the federal government with adequate authority to address any emergency situation that might arise in the future.²³⁰
5. Determining right-of-way compensation through the process of negotiation is consistent with the long-standing expressions of tribal sovereignty and self-determination

225. U.S. Department of Energy *American Indian & Alaska Native Tribal Government Policy* 1, <http://www.eh.doe.gov/oepa/guidance/cultural/finalindianpolicy.pdf> (Jan. 20, 2006).

226. The Navajo Nation, for example, submitted an analysis of the impact of Navajo right-of-way considerations on EPNG’s consumers, which determined that those consumers would pay an additional seven cents per month if EPNG accepted the Navajo Nation’s opening offer. Charles J. Cicchetti, *The Economic Implications of Navajo Right of Way Fees* 16, http://1813.anl.gov/documents/docs/NavCom/C-1-Charles_Cicchetti_report.pdf (May 15, 2006). More striking, that study showed that the proposed Navajo right-of-way consideration “would likely be less than one percent of comparable *ad valorem* taxes in the end-use states” although the governmental subdivisions imposing such taxes may provide no land rights. *Id.* at 14. A second study submitted by the Navajo Nation determined that the proposed Navajo right-of-way fees were comparable to those demanded by other governmental entities shouldering equivalent governmental duties. Municipal Admin. Servs., Inc., *A Report on Rights-of-Way (ROW) Compensation Review of Certain Local Governments* 6 tbl. 2, http://1813.anl.gov/documents/docs/NavCom/C-2_George_White_Report.pdf (May 12, 2006).

227. Dept. of Energy & Dept. of Int., *Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study* § 2.4, <http://1813.anl.gov/documents/docs/draftstudy/DraftStudyAug2006.pdf> (Aug. 7, 2006).

228. *Id.* at § 3.

229. *Id.* at § 3.2.1.

230. *Id.*

in the federal-tribal relationship.²³¹

6. Issues surrounding compensation to tribes for energy right-of-ways are not consequential to the general public.²³²

7. It is unlikely that difficulties arising from right-of-way negotiations in the future could lead to significant cost impacts to energy consumers or to significant threats to physical delivery of energy supplies.²³³

Senator Domenici, who was the moving force behind Section 1813 of the 2005 Energy Policy Act, and Representative Joe Barton (Texas), the Chairman of the House Committee on Energy and Commerce, reacted to the initial Draft Report by, in effect, extending the deadline for the completion of the final report to analyze further the “difficult issues” inherent in Section 1813, Representative Barton using language from EPNG’s playbook.²³⁴

Consequently, the Departments published a second Draft Report and requested comments on it.²³⁵ With the benefit of comments from the tribes and industry on the initial Draft Report, the Departments reaffirmed and strengthened their key conclusions. The Departments found that “[t]he principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent,” that a “tribe’s authority to confer or deny consent to an energy [right-of-way] across tribal land derives from its inherent sovereignty—the right to govern its people, resources, and lands,” and that any reduction in the tribe’s authority to govern its territory would compromise “its sovereignty and abilities for self-determination.”²³⁶ It found that “[g]ranting a [right-of-way] on tribal land only with the consent of a tribe is in accordance with the federal policy promoting tribal self-determination and self governance.”²³⁷ The second Draft Report, therefore, recommends that “[v]aluation of energy [right-of-ways] on tribal land should continue to be based upon terms negotiated between the parties.”²³⁸

The Departments also found that national energy policies favor “tribal involvement in determining [right-of-way] routes, protections for cultural and natural resources, and emergency matters.”²³⁹ In reaching this conclusion, the Departments relied on the President’s National Energy Policy and the Energy Policy Act of 2005.²⁴⁰ Moreover,

231. *Id.* at § 4.1.

232. Dept. of Energy & Dept. of Int., *supra* n. 227, at § 4.3.

233. *Id.* at § 4.4.2.

234. Ltr. from Rep. Joe Barton to Secs. Bodman & Kempthorne 2 (Sept. 8, 2006) (“In the long run, consumers and our whole Nation benefit from *fair access to energy supplies*.” (emphasis added)); Ltr. from Sen. Pete V. Domenici to Secs. Bodman & Kempthorne (Sept. 15, 2006) (“While I appreciate your commitment to providing a final report to Congress in a timely fashion, I consider it more important that the report be comprehensive.”) (on file with author).

235. See 71 Fed. Reg. 77,060 (Dec. 22, 2006) (noticing the publication of the *Draft Report to Congress, Energy Policy Act of 2005, Section 1813: Indian Land Rights-of-Way Study* (Dec. 21, 2006)).

236. Draft Rpt., exec. Summary at viii (Dec. 21, 2006).

237. *Id.* at 19.

238. *Id.* at ix, 30. The Departments based this conclusion on two proclamations of President George W. Bush. *Id.* at 17 (citing Presidential Proclamation 7500, 66 Fed. Reg. 57,641 (Nov. 12, 2001), and Presidential Proclamation 7956, 70 Fed. Reg. 67,635 (Nov. 7, 2005)).

239. *Id.* at 12.

240. Draft Rpt., *supra* n. 236, at 7–9; 10–11.

the Departments “found no evidence that negotiation between parties for obtaining an energy [right-of-way] on tribal land contributed to an emergency situation.”²⁴¹

The Departments reviewed several economic studies submitted both by the tribes and by industry representatives and concluded that tribal right-of-way consideration does “not appear to be large enough to have a significant effect on overall energy transportation costs and the total cost of delivered energy paid by consumers.”²⁴² It found “no evidence to date that any of the difficulties associated with [right-of-way] negotiations have led to adverse impacts on the reliability or security of energy supplies to consumers.”²⁴³ The Departments specifically rejected the arguments of some in the industry who urged that tribal consent should not be required for a renewal after the term of the right-of-way had expired:

[T]hese contracts were entered into with the full knowledge that they were for a fixed term and that the company would have to enter into a renewal negotiation at some time in the future. . . . [T]ribal sovereignty is a known and familiar part of the business landscape in parts of the U.S. and should be recognized in any prudent business practice—especially over the last 25 years. Companies can not expect that terms of contracts would remain static over time or the same for contract renewals.²⁴⁴

These findings lead to only one rational recommendation: no legislation is needed or desirable. As the Departments state,

[n]egotiations between Indian tribes and energy companies for the grant, expansion, or renewal of energy rights-of-way across tribal lands have had no demonstrable effect on energy costs for consumers, energy reliability, or energy supplies to date. Therefore, broad changes to the current federal policy of self-determination and self-governance for tribes—or the existing right of consent—are not warranted at this time.²⁴⁵

However, the final report has not been submitted to Congress as of the date of this writing, and industry-friendly officials in the Department of the Interior²⁴⁶ may suggest in the final report “options” or other legislative action to address the problem that has been determined not to exist.

The NCAI, the Council of Energy Resources Tribes, the Intertribal Council of Arizona, the Affiliated Tribes of Northwest Indians, and other tribal coalitions will be crucial to the final outcome of the Section 1813 effort. It will be equally as important for individual Indian nations to gain the active support of its industry partners, state and

241. *Id.* at 9.

242. *Id.* at 35.

243. *Id.* at 36.

244. *Id.* at 42; *see id.* at 46 (“In most cases, initial rights-of-way agreements are term contracts and no guarantee or indication of renewal was given by the tribes or the federal government. Therefore, any renewals represent, in essence, new contracts.”).

245. *Id.* at 45.

246. *See e.g. Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005), (“[O]ur ‘modern’ Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.”), *vacated*, *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006); Noelle Straub, *Waste, Fraud, Abuse at Interior*, <http://www.casperstartribune.net/articles/2006/09/15/news/wyoming/fd0826102d9f9fc6872571e90081061d.txt> (Sept. 15, 2006) (quoting Tom Davis (Virginia), Chairman of the House Government Reform Committee, decrying the “culture of waste, fraud and abuse” at the Department of the Interior).

local political leaders, and representatives and senators in Congress, in anticipation of subsequent battles. The Council of Energy Resources Tribes and NCAI have offered to be the primary coordinators of the tribal effort. The legal and factual positions of the Indian nations on this matter are strong on the merits. Indeed, the Section 1813 study should be an appropriate vehicle for recommendations to Congress to solidify tribal interests in rights-of-way by providing a legislative fix for the *Strate* dictum, and its progeny, and to provide real relief for energy consumers and tribes alike as mandated in the 1992 Energy Policy Act, that is, to “develop proposals to address the dual taxation by Indian tribes and States of the extraction of mineral resources on Indian reservations.”²⁴⁷

Congress may have passed Section 1813 under the misconception that there is a problem with Indian energy rights-of-way that impacts consumers or national energy security. To the contrary, the Indian nations are ameliorating energy problems with their industry partners, thereby contributing to national energy security. Tribal representatives have been able to show that the amounts paid by energy consumers attributable to Indian energy rights-of-way are wholly insignificant. The true causes of the rise in energy bills include global supply and demand, consolidation of oil companies, abuse of marketing power by cartels, Enron-style market manipulation, extraordinary profit-taking, and executive compensation. It is up to the Indian nations and their industry partners to make sure that the facts are documented and persuasively delivered to Congress, and that bedrock, treaty-based principles and the policy of respect for tribal self-determination are honored.

247. 25 U.S.C. § 3505(k)(1).

