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ASSESSING RIGHTS-OF-WAY ON TRIBAL LANDS

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1. Introduction

Statutes have long been in place to protect the rights of Tribes to control the terms of leases, easements, and rights-of-way on Tribal lands. However, these legal rights have not always guaranteed that Tribes receive fair market value for that access. Modern experience shows that Tribes would be unwise to rely on the compensation offered by a company or recommended by the U.S. Department of Interior as trustee. Rather the Tribes should see them as a starting point for establishing fair compensation based on Tribal values. Each right-of-way (ROW) is unique and requires a Tribal team to gather the information needed to negotiate for the optimum value of the right-of-way.

This paper examines rights-of-way across Tribal lands, to provide Tribes with background information and resources that will allow them to determine whether their current ROW and easement agreements are structured in a manner advantageous to the Tribe. Right-of-way is not a new concept in Indian country, although the range of technical and legal options for assessing rights-of-way has evolved and expanded.

A Tribe may find that by gathering information available to them, they can revisit agreements with non-Tribal entities as they come up for renewal – or in some cases even if they are not up for renewal. Knowledge of right-of-way conditions and legal definitions provides a Tribe with leverage when it chooses to negotiate new lease terms with energy companies, telecommunications firms, and transportation authorities. Defining valuation calculation methods for rights-of-way on Indian lands was a major area of work for the Council of Energy Resource Tribes (CERT) in its infancy, and now thirty years later, the need to revisit Tribal right-of-way options once again resurfaces.

1.1 Objectives

- To provide Tribes with information and resources to assess whether they are receiving fair value for rights-of-way over and across their lands.
- To describe common rights-of-way valuation methodologies.
- To present four case studies of Tribes who have taken recent action regarding their rights-of-way, and convey the pertinent lessons learned by these Tribes.

1.2 Layout of the Report

Section 2 of this report provides a brief background on the legal and regulatory history of right-of-way issues on Indian lands. This is followed by a review of common valuation methods, application of those methods, and negotiating strategies in Section 3. Section 4 contains case studies developed through interviews with knowledgeable Tribal representatives, and Section 5 summarizes key findings of the research. A final section suggests steps for initiating a right-of-way assessment.

2. Tribal Lands and Rights-of-Way

2.1 Background

Why should a Tribe care about assessing rights-of-way? In addition to aiding the Tribe in negotiating a fair financial return for the use of land resources, a Tribe may determine in the process that market valuation methods have not reflected Tribal defined values. In this case, a Tribe may want to use alternative or a combination of methodologies in looking forward. The following questions are a few of those that arise when the issue of rights-of-way comes up among Tribal leaders:

- How do we gather and analyze the information needed to properly value right-of-way agreements?
- What constitutes fair compensation a Tribe may command from an energy company for providing access over and across Indian country?
- What are the existing and potential challenges for Tribes in negotiating a new ROW agreement or renegotiating an existing agreement?
- Can CERT help us in the appraisal and negotiation process?

Armed with knowledge of right-of-way laws, tools for assuring physical compliance, and valuation techniques, Tribes can better negotiate what they want from energy companies in exchange for allowing access through and over Indian lands. Regrettably, Indian law is not clear and concise when it comes to natural resource developers and Tribes; cases such as the Crow Tribe's failed attempt to tax utility properties on Tribal trust lands¹, and Elouise Cobell² asking the federal government to account for Tribal monies exemplify this lack of clarity. [note: recent Congressional action seeking a settlement of this case resulted in Tribal attorneys indicating to the government that they would settle for \$27.5 billion – still likely much less than the government actually owes according to the Cobell plaintiffs.³] These cases are examples of the need for eloquence in defining Tribal jurisdiction and federal responsibility to oversee and protect Tribal interests for land use in Indian country. Felix Frankfurter, who served as a Supreme Court Justice from 1939 to

¹ In *Big Horn County Electric Cooperative v. Adams (Big Horn)*, the Crow Tribe enacted a 3% ad valorem tax on all utilities which required them to treat the tax as an embedded cost and not pass the tax directly onto ratepayers. The Ninth Circuit Court of Appeals held in 1998 that easements for power lines are equivalent to fee simple lands, thus the Tribe did not have the power to impose an ad valorem tax.

² Elouise Cobell is the lead plaintiff in a class action lawsuit filed in 1996 by approximately 500,000 American Indians against the U.S. government. The suit charges the Department of Interior with mishandling royalties for oil drilling, mining, and timber sales on Indian lands for over 100 years, and is seeking a full accounting of funds held in their individual government trust accounts.

³ Associated Press story, July 14, 2005.

1962, said, “Indian law in general is notorious for its idiosyncrasies and unpredictability.”⁴

Federal regulations have been stable for the past 75 years while valuation methods have evolved, not just in valuation of Tribal lands but throughout the world. Tribes have become more sophisticated in using both the code of federal regulation and modern valuation methods to obtain more fair compensation for the loss of the use of their lands and for the value that their approval bestows on a company desiring to cross their lands. This trend may continue in the future with Tribal willingness to work for itself within the existing framework in order to obtain just compensation for access to lands and resources. Knowledge is power, as exercising Tribal sovereignty in this legal arena demonstrates. Negotiated terms are not limited by market valuation of land use; compensation for a right-of-way can be in monetary terms, access to reliable electricity, or a number of Tribal defined terms.

Market theory, today’s prevailing ideology, would say that the fair compensation is what is agreed upon between a willing seller and a willing buyer in an open market. The company has chosen the Tribal lands route for its right-of-way as optimal for the company’s interests. Therefore, the value for the right-of-way is best established by negotiations between a Tribe and a company if the Tribe is as informed as is the company.

There are 55.7 million acres of Tribal trust land in 32 states.⁵ Easements across thousands of miles of Tribal trust lands provide rights-of-way for highways, railroads, electric transmission lines, communication facilities, and oil and gas pipelines.⁶ Rights-of-way through Indian country are essential in the national infrastructure that keeps towns and cities across the United States physically connected, and supplied with fuel, power, and telecommunications services. And in light of the role that natural gas and electricity play in sustaining national prosperity and security, these Tribal rights-of-way are of great value to not only the Tribe and the company but to American society as well. Legal issues in regard to rights-of-way across Tribal trust lands are unique compared to those for allotted trust land, fee patent, and public domain lands for reasons that are established federal policy and law. It is vital for both ROW holders and Tribes to understand the legal status of easements across Indian lands so all entities can negotiate terms that reflect statutory rights of the Tribes and the important values of these easements. While CERT recognizes the importance of all types of land use agreements that take place on allotted and fee lands, this paper will limit its focus on right-of-way located on Tribal trust lands. Rights-of-way on allotted lands require special considerations and a separate review; allottee negotiations have been problematic, notably with inherited rights. This document

⁴ Quoting Felix Frankfurter in Bennett & Hart, foreword to F. Cohen, *Handbook of Federal Indian Law* (1942).

⁵ The Bureau of Indian Affairs (BIA) administers 45.6 million acres of Tribally-owned land, 10 million acres of individually-owned land, and 309,189 acres of federally-owned land held in trust status. BIA serves 1.5 million American Indians and Alaska Natives, members of 562 federally recognized Tribes in 32 contiguous states and Alaska. See www.doiu.nbc.gov/orientation/bia2.cfm.

⁶ See Todd Miller, “Easements on Tribal Sovereignty”, *American Indian Law Review* 2001-2002.

will present options and strategies for American Indian Tribes needing to assess rights-of-way in the near future.

This report will present current information to assist Tribes seeking to identify and evaluate right-of-way agreements, or to renew expiring ones. We will consider the most pertinent issues Tribes are likely to confront. First of all, how does a Tribe verify the terms of a current lease on their land, including defined use and when the lease will expire? How does a Tribe know whether an energy company is in compliance? What issues will a Tribe face when and if it has competing interests with a company holding a right-of-way and seeking renewal? Does a Tribe hold veto power or does the Secretary of the Interior have the authority to force use of Indian lands against Tribal wishes? What constitutes a fair demand that a Tribe may make of an energy company in exchange for a right-of-way through and across Tribal land? This report will address these questions through a review of pertinent Indian laws, a sample of existing law cases, and actual case studies conducted with selected Tribes. Keep in mind that Section 16 of the Indian Reorganization Act (IRA) empowers a Tribe that chooses to organize under the Act “to prevent the sale, disposition, lease, or encumbrance of Tribal lands, interest in lands, or other Tribal assets without the consent of the Tribe”.⁷

2.2 Regulatory History

Prior to 1948, the Secretary of the Interior had the authority under various acts to grant different types of rights-of-way across Indian lands.⁸ After 1948, Congress passed a general right-of-way statute, *Indian Right-of-way Act*, to simplify and bring uniformity to the administration of rights-of-way over Indian lands held in trust by the United States.⁹ The transition from the old to new system did not repeal existing legislation, for the purpose of avoiding potential confusion. All rights-of-way are granted as easements, or permits for stated periods and are based on specific legal authority. Easement is defined as the permission for a throughway for a specific purpose as agreed by owner and party granted the right.¹⁰ Some rights-of-way obtained under the Act of 1948 may not have duration term limitation while others are not to exceed 50 years.¹¹ As these earlier ROW agreements expire, new agreements in Indian country are not likely to be in perpetuity and will be limited to shorter duration terms. Additionally, the Indian Reorganization Act of 1934 specifically guaranteed that Tribes that adopted Tribal constitutions under its provisions would enjoy land base control.

⁷ See “Tribal Sovereignty and Congressional Dominion: Rights-of-Way for Gas Pipelines on Indian Reservations” *Stanford Law Review*, November 1985.

⁸ For example, the Act of March 2, 1899 empowered the Secretary to grant rights-of-way for railways and telephone and telegraph lines; the Act of March 3, 1901 empowered the Secretary to authorize rights-of-way for the purpose of establishing public highways through Indian reservations; and the Act of March 11, 1909 gave the Secretary the authority to grant rights-of-way for the construction, operation, and maintenance of oil and gas pipelines.

⁹ See Indian and Reservation Lands in *American Indian Law Deskbook*.

¹⁰ See glossary of terms at end of report for the Bureau of Land Management’s definition of easement.

¹¹ See Theodore H. Frison, “Acquisition of Access Rights and Rights-of-way on Fee, Public Domain, and Indian Lands” *Rocky Mountain Mineral Law Institute*, 10:217-259 (1965).

How may a right-of-way be obtained? According to U.S. Code Title 25, the Secretary of the Interior is empowered to grant rights-of-way for all purposes over any lands held by the United States and set aside for the benefit and use of American Indians.¹² A right-of-way on Indian land generally requires consent from the Secretary of the Interior and Indian land owners. Written consent from the Tribe is required prior to the Secretary granting a right-of-way over and across Tribal land and no right-of-way may be granted over individually owned Indian land without first obtaining written consent from the owner. Under Section 324 of 25 United States Code, the Secretary may grant rights-of-way over individually owned lands without the consent of the individual Indian owner when: 1) the land is owned by more than one person, and the majority of owners give consent; 2) the whereabouts of the owner is unknown but majority of known owners give consent; 4) the heirs have not been determined; 5) the owners are too numerous. In these situations, the Secretary must also determine that granting the rights-of-way will not cause substantial injury to person or land.¹³

In exchange for the privilege of access and encumbrance across Indian land, the applicant for a right-of-way must pay the Secretary compensation, an amount determined by the Secretary, for the benefit of the Tribe or allottee. Section 325 of U.S. Code 25 states that: “No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.” Note that the Tribal Energy Resource Agreement (TERA) provisions in the newly signed Energy Policy Act 2005, as will be discussed later in this section, may change how a Tribe negotiates compensation for a right-of-way.

Application of law does not always reflect the intention behind the written words. Demonstration of this inconsistency in law and practice occurred on Navajo land in the checkerboard area of New Mexico, where many Navajo families have little recourse for the unfair valuation of their lands for rights-of-way obtained. Here valuations for pipeline

¹² 25 C.F.R. 169 addresses particular ROW issues. 169.3 requires consent by the Tribe or individuals; 169.4 deals with application for permission to survey; 169.5 specifies that application for Right-of-Way is accompanied by a “stipulation” agreeing to many ROW terms and conditions; 169.6 requires map of locations; 169.7-11 address specifics of surveys and maps; 169.12-14 detail payment of consideration and damages; 169.15 deals with BIA action on application; 169.16 addresses construction completion affidavit; 169.17 specifies that a change in location requires new process; 169.18 deals with term of easements; 169.19 addresses renewals; 169.23-28 list particular rules for railroads, pipelines, telecommunications, power lines, and highways.

¹³ Regulations implementing 25 U.S.C. § 324 are found in 25 C.F.R. Section 169.3(c). Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interest therein consent to the grant; (3) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; (5) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

rights-of-way have been determined on a per rod basis (a rod is 16.6 feet) for a specified term. While some private and Tribal land owners were receiving \$140-\$575 per rod, allottees were receiving anywhere from \$25 to \$40 per rod.¹⁴ When Deborah Lewis, an appraiser for the Office of the Special Trustee for Native Americans, investigated the disparity, she discovered that Anson Baker, chief appraiser for the Navajo Regional Office, had erased all electronic documents to support his evaluations. Other information points to individual official's interests and ties to energy companies put in question the federal government's ability to oversee the ROW process. Allegations that the federal government has systematically put the interests of energy companies ahead of individual Indian beneficiaries have been stated by Alan Balaran, special master overseeing the Cobell v. Norton suit, and Ms. Lewis, as a result of their investigations into the Navajo case.

New measures within the Energy Policy Act 2005 signed by President Bush on August 8 may both address and exacerbate some of the problems inherent in the current management of Tribal lands. Section 2604 authorizes Tribes and the Secretary of the Interior to enter into Tribal Energy Resource Agreements (TERA) under which the Secretary may delegate to the Tribes the authority to approve leases, agreements, rights-of-way and other business deals for energy development on Tribal land. Rights-of-way under a TERA may not exceed 30 years and the pipeline or facility for transmission or distribution must be located on Tribal lands. Secretarial approval for rights-of-way is not required if a TERA has been approved. Furthermore, the renewals of leases, agreements, and rights-of-way will be at the discretion of the Tribe. The Secretary must approve or disapprove a proposed TERA within 270 days of receipt or within 60 days of receipt for an amended TERA. For a more complete analysis of Section 2604, see separate report "Summary of Provisions" at www.CertRedEarth.com.

Negatively, Title XVIII of H.R. 6, the Act's "study title", under section 1813, requires the Secretary of Energy and the Secretary of the Interior to conduct a joint study on energy rights-of-way on Indian land. In preparing this study, the Secretaries must consult with Tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers. The report is due to Congress one year after the date of enactment of the Act; it must include an analysis of historic rates of compensation for Indian energy rights-of-way, recommendations for standards and procedures for determining fair and appropriate compensation for rights-of-way (new, expanded and renewals), an assessment of the Tribal self-determination and sovereignty interests implicated by rights-of-way, and an analysis of "national energy transportation policies" related to Indian rights-of-way. This call for a study implies that "powerful" Tribes are taking advantage of disempowered energy companies and directly questions Tribal sovereignty and Tribal right to self govern, notably when energy companies cannot successfully negotiate with Tribes for a desired right-of-way agreement.

¹⁴See SmartMoney.com "Fraud in New Mexico" by Scott Patterson, 3 December 2004.

3. Getting Fair Value for Rights-of-way and Leases

3.1 Right-of-way Valuation Methods

When Ahmed Kooros, Ph.D., first led CERT in 1978 to reform right-of-way calculations on Tribal lands, the “*opportunity cost method of valuation*” he developed had less to do with the value of the land as it appeared than the value it rendered in the application as a right-of-way. Indian land was not useless desert land as claimed by energy companies but had intrinsic value as the optimum thoroughway to transport energy resources and products. Exemplary cases that reflect the logic and success of Dr. Kooros’s calculation methods include pipeline negotiations for the Navajo Nation and Arco (1980), and the Pueblo of Laguna and Transwestern (1982). Dr. Kooros has participated in over 100 successful ROW negotiations using these modern valuation methods. The position Dr. Kooros and CERT continue to promote is that Tribes must be the principal negotiating party with an energy company; valuation methods are only suggested ways of reaching toward fair values that reflect Tribal values.

To take a step back and a broader view of valuation methodologies, there are a variety of methods used to determine economic value of rights-of-way; some methods are more commonly applied on Tribal lands than others. In some cases, this was due to the laws that bound the Bureau of Indian Affairs (BIA) to employ specific methodologies when they were the negotiating body on a particular ROW for a Tribe. Other methods often used off-reservation that assign market-based value to rights-of-way and easements may be considered by Tribes, if the legal framework for using those methods is appropriate. This section discusses some of the commonly used valuation methods, and briefly summarizes the pros and cons of each approach.

The value of a given tract of land may be different for a Tribe than it is for a company seeking a right-of-way across it. The Tribe may value the land so highly that it chooses not to lease access at all, but if the Tribe does grant right-of-way access, how much payment should be received in compensation? One way of determining fair compensation is to estimate the “market value” of the land, which ideally would be determined by a competitive open market. In the appraisal field, there are three fundamental approaches to determining property value:¹⁵

- **Income Approach**, which determines value according to the stream of net income that the user receives from the property.
- **Comparison Approach**, in which a review of similar property transactions are used to estimate fair market value.

¹⁵ International Right-of-way Association, *Principles of Right-of-way*, “Valuation and the Appraisal Process” (Chapter 9), 1999.

- **Cost Approach**, which is based on the assumption that a property is worth what it would cost a buyer to purchase a substitute site and modify it to provide the same utility as the property in question.

Understanding and applying these valuation approaches is an important aspect of valuing Tribal rights-of-way, as discussed later in this section and in the case studies. In truth, however, competitive markets may not exist for transactions involving rights-of-way corridors, which often have only one logical buyer and one logical seller.¹⁶ Furthermore, the traditional approaches to valuing real property (i.e., the Income Approach, Comparison Approach, and Cost Approach) must be adapted to the valuation of utility and transportation corridors through Tribal lands due to the unique nature of these properties, including their shape (long and narrow) and the uses for which they are appropriate (communications, utilities, and transportation, but generally not housing or commercial/industrial buildings). An additional problem with this methodology is that it can only approximate value when there is an open, active market. The practical fact is that there is not a market for Tribal lands as Tribes do not put their lands up for sale.

Table 1 summarizes some of the pros and cons to using the market valuation approaches described above, as well as an alternate approach based on the value of land bordering the right-of-way.

Table 1. Right-of-Way Valuation Approaches

Approach	Description <i>Value based on...</i>	Pros	Cons
Income	Income derived from use of the ROW	<ul style="list-style-type: none"> ✓ Reflects the value gained from the entity paying for use of the ROW 	<ul style="list-style-type: none"> ✓ Definition of “income” (versus “profit”) may be subjective ✓ If actual income is low, ROW may be undervalued
Comparison	ROW agreements of similar tracts of land	<ul style="list-style-type: none"> ✓ Value based on market value ✓ Uses “real” values 	<ul style="list-style-type: none"> ✓ Sales of ROW corridors are not common ✓ ROW corridors tend to be unique and are not easily comparable
Cost	Total cost of locating, appraising, negotiating for, and grading/ preparing the ROW corridor	<ul style="list-style-type: none"> ✓ Reflects the actual costs to the ROW user of choosing an alternative corridor 	<ul style="list-style-type: none"> ✓ Cost may not be known, except to the ROW user ✓ In urban areas, tends to overestimate value of corridors
Across-the-Fence value plus “Enhancement”	Value of land adjacent to the corridor, plus subjective multiplier	<ul style="list-style-type: none"> ✓ Based on value of land in the area of the corridor ✓ Reflects added value offered by the corridor 	<ul style="list-style-type: none"> ✓ Difficult to determine appropriate acreage of ROW against which to apply a per-acre land value ✓ Enhancement factor is subjective

¹⁶ Seymour, Charles F., “The Continuing Evolution of Corridor Appraising (Back to the Basics),” *Right-of-way Magazine*, International Right-of-way Association, May/June 2002, pp 12-20.

The limitations of these methods become apparent when they are applied to hypothetical scenarios. If a user of the Tribal ROW is a telecom provider generating tremendous profits, for example, then the valuation using the **Income Approach** may be out of line with other, similar properties nearby. Alternatively, if a municipal utility is operating as a not-for-profit service to a nearby city, or if a state is widening a highway, then there is no income upon which to base an Income Approach valuation.

The **Comparison Approach** may be similarly inadequate because corridors are often sufficiently unique as to make comparisons on a dollars-per-acre or dollars-per-linear-mile basis almost meaningless. Comparison of existing ROW fee agreements may generate useful reference points, but the fee values may not be directly applicable to a given Tribe situation due to differences in usage (e.g., sewer or highway), land values (e.g., urban or rural), benefits to the user (e.g., cable TV or gas pipeline), and alternatives to going through the reservation. Furthermore, historical agreements concerning Tribal lands may underestimate the value of these rights-of-way.

The **Cost Approach** – which incorporates the total cost of locating and appraising land for a corridor, negotiating for the contiguous parcels, acquiring the land, grading the corridor, and other relevant costs – can be used for corridor valuation. However, this method often leads to valuations as much as five or six times the value of the adjacent land, which is significantly more than the usual selling price of corridors.¹⁷ In terms of ROW rental fees, the increase in the cost of circumventing the reservation may serve as a useful upper bound. A Tribe may have significantly more leverage during renewal of existing ROW agreements since the infrastructure typically is already in place and the marginal cost of relocating is likely to be quite high.

An alternative to the above methods evolved at least as far back as 1978, when the *Appraisal Journal* published an article by John Dolman and Charles Seymour that advocated the use of adjacent land values, known as “**across the fence,**” or ATF, values. The article’s authors, both veterans of the real estate appraisal field, also suggested that ATF values be augmented by an “enhancement factor” that accounted for the value of the corridors’ continuity, which is of course essential for utility lines.¹⁸ Essentially, this enhancement factor is the ratio of a corridor sales price to its ATF value. As an upper limit, the enhancement factor can be viewed as a means of accounting for the additional costs that would be incurred to construct or otherwise configure a contiguous corridor from scratch, similar to the Cost Approach described above.

These approaches discussed above represent formal means of appraising the value of rights-of-way and may be used in the context of easements or damage litigation. In practice, Tribes will not be selling ROW corridors, but rather negotiating for lease of the

¹⁷ Zulaica, Richard J., “Valuing a Corridor Within a Corridor,” *Right-of-way*, March/April 2000, pp. 6-9. Adapted from remarks presented at IRWA’s 45 Annual International Education Seminar held in Albuquerque, N.M. in June of 1999.

¹⁸ Dolman, John P. and Charles F. Seymour, “Valuation of Transportation/Communication Corridors,” *The Appraisal Journal*, October 1978, pp. 509-522. Recognizing that the corridor value adjustment could be negative (i.e., an adjustment factor of less than 1.0), the enhancement factor is now often called a “corridor factor.”

corridors to one or more users with different interests, alternatives, and potential for profit. Aspects of each of the above methods may be relevant to Tribes wishing to maximize the economic value of their reservation lands.

3.2 Applying ROW Valuation Methods to Tribal Lands

Rights-of-way across Tribal lands have value, but measuring their market values can be difficult since there is not a perfectly competitive market where supply and demand result in a market price. Furthermore, there is no single “correct” value for any given right-of-way. A Tribe may consider various valuation methods and their unique situation to determine the best negotiation route to take. The value will depend on many factors, including the following:

- **User of the ROW** – The type of entity using the ROW will affect what the Tribe may get paid for it. A government entity may have funding constraints or have to give fair compensation for a taking of property. A private company may be freer to pay what it deems the ROW is worth.
- **Product or service offered via the ROW** – Local telephone service may generate relatively little profit for the user, whereas natural gas pipelines are likely to generate significant revenue that give the user a greater incentive to negotiate an agreement.
- **Alternatives to user** – Is there an easy alternative to using the Tribal ROW, such as a short detour to go around the reservation? If not, the Tribe may be able to use this as negotiating leverage to get a better deal.
- **New versus existing ROW** – For a new ROW with no infrastructure in place, the user will have to pay for and develop the infrastructure regardless of where/from whom the user chooses to lease the ROW. On the other hand, if the ROW is for a renewal, then the user already has infrastructure invested in the Tribal land and it would incur abandonment and new construction costs to move elsewhere. *This prior investment may make the Tribal ROW more valuable than if the negotiation were for a new ROW.*
- **Location/topography** – What is the value of land through which the ROW runs? Is it a mountainous or otherwise costly area to develop? These and similar factors could affect how much a user is willing to pay for use of the ROW.
- **Duration of ROW lease** – Generally, users look for longer leases to give them assurance that they can use the ROW at a known price long into the future. They may be willing to pay more for a longer term (e.g., 20 years instead of 10).
- **Current economic situation** – How strong is the economy? How much is the commodity selling for that the user is transporting across the right-of-way? If natural gas is in high demand and selling at historically high prices, the value may be greater than during times of plentiful supply.

Given the uncertainty in value—and the multiple approaches to right-of-way valuation discussed in Section 3.1 above, some Tribes try to bracket the value by using several approaches.

Land Values

A good place to begin the valuation process is with the value of the land in the area of the right-of-way. The land value can be estimated by determining the area (in square feet or acres) taken up by the right-of-way, including any area “encumbered” by the ROW. Encumbrance refers to land area that is physically vacant but that cannot be developed or used so long as the ROW is being used. For example, high-voltage transmission lines or highways need a minimum of 15 feet as a buffer on either side for safety. This land area, multiplied by prevailing land values, gives an estimate of the value of the ROW itself.

This calculation may serve as lower bound to the value that a Tribe can expect to recover from leasing the right-of-way since it does not include recovery of damages (e.g., removal of existing buildings, environmental harm, or obstruction of views) or the added value provided by a contiguous corridor. In fact, much of a corridor’s value lies in its ability to connect points on either side of the reservation. It matters little to the user of the ROW whether the corridor is 20 feet wide or 50 feet wide, but this makes a big difference in the calculated area of the ROW. This, in turn, greatly affects the estimated value of the ROW if a Tribe uses adjacent land values as the basis for its valuation. One prominent ROW appraiser argues that price per acre is a “meaningless” measure of value. “If a corridor is wide enough to perform its connecting function, its width and area are of little importance.”¹⁹ For this reason, Tribes should only use land values as a starting point for valuing rights-of-way.

Comparable Right-of-Way Leases

Although there is no real “market” for rights-of-way, Tribes can better understand the value of corridors across their lands by knowing what other land owners have received for leasing rights-of-way. The most useful information for comparison will be for leases of rights-of-way under circumstances similar to those under which the Tribe is operating. If possible, the “comparable” agreement should be from the same general region as the reservation and should be for the same use of the ROW. All of the other issues discussed at the beginning of this section (e.g., user of the ROW, product or service offered, alternatives) will also affect how useful the lease comparison is as a means of valuing a specific ROW.

Unfortunately, information is not always easy to obtain or interpret. Property owners may not divulge terms of their agreements, and apples-to-apples comparisons are not always possible. For example, a pipeline owner may pay more per rod for crossing a small farm versus a large ranch, and neither price may be exactly appropriate for comparison with

¹⁹ Seymour, 2002.

the reservation. Were the two agreements reached at or close to the same time? Is the farm in a narrow valley around which it would be expensive to develop a ROW corridor? Was the ranch owner in financial distress at the time of negotiations? It may not be possible to make an exact adjustment to the value of these transactions to account for unique circumstances, but even qualitative information can help to put these other leases into perspective.

If time and resources are not a limitation, the more a Tribe can learn about similar transactions, the better it will be able to estimate the value that a prospective lessee will place on a ROW across the reservation. In one recent case, a Tribe's own research had bracketed the value of a right-of-way at between \$10 and \$35 per rod (a rod is 16.6 feet of pipeline). The Tribe also learned of a similar, nearby agreement worth \$25 per rod, which helped in understanding how much leverage the Tribe might have in negotiating for a lease agreement at the upper end of the estimated range.

Value to the User of the ROW

No matter what the land is worth, and regardless of what neighbors may have received for use of their property, a ROW through a reservation is worth only as much as someone is willing to pay for it. In cases where there is only a single entity interested in the ROW, it becomes particularly important for the Tribe to understand the value to the prospective lessee. This value is based largely on how much revenue (if any) is generated from using the ROW and how much it would cost to develop and use a different ROW corridor off the reservation.

The revenues generated by the user of the ROW may not be easy to utilize, or in some case, to even determine. Highways, other than toll roads, do not generate revenue and thus revenue is not a good measure of the value to the lessee. Telephone wires and electric distribution lines may provide fixed revenue for the owners, but typically these lines serve residents of the reservation, and some Tribes are wary of assessing costs that will get passed on to members of the Tribe. Contracts for transportation of natural gas pipelines and electric power lines are likely to earn revenues for their owners according to proprietary contracts and because of the volatility of those respective markets, the revenues are likely to fluctuate higher and higher over time. However, enough public information is often available (e.g., from the Energy Information Administration and FERC) to help inform the valuation process—if a Tribe has the necessary expertise to obtain and analyze the data. This may require hiring an expert on wholesale marketing of natural gas or an appraiser who specializes in pipelines.

3.3 Negotiating a ROW Agreement

The process of valuing a right-of-way is a critical step for Tribes in order to receive fair compensation for use of their lands. However, negotiation of the right-of-way use agreement is essential for locking in that value and ensuring that changing economics or other factors do not diminish the financial benefits to the Tribe. The topic of contract negotiations is broad and complex and the specifics are beyond the scope of this study. In

general, when negotiating new ROW agreements, avoid documents that are vague, containing confusing, or illegible language, or are missing critical information. Contract essentials need to include, but not limited to, the following valid real property information: relevant parties, type of interest that is transferred, description of land rights sufficient to find lands, compensation, and the beginning and end dates. Note that contracts without these essential terms can be invalidated by a court. It is essential for a Tribe to seek counsel from a knowledgeable attorney for all legal matters.

In the context of negotiating agreements for use of Tribal rights-of-way, however, there are several useful points worth mentioning briefly.

- **Research and knowledge.** Successfully negotiating for fair compensation and terms requires knowledge of property valuation and the industry in which the lessee operates. Tribes will benefit by doing their own research to become familiar with local land values and the value of comparable agreements and to understand the lessee's industry, profit margins, and alternatives to use of the Tribe's land. This may require retaining the relevant outside expertise to supplement the Tribe's internal knowledge.
- **Negotiating leverage.** Regardless of what the "fair" value of the right-of-way may be, the negotiated value will depend largely on the relative positions and interests of the two parties. Understanding how much leverage a Tribe has with a potential user of the right-of-way may help in maximizing the compensation ultimately negotiated. If it can be learned that the lessee has a lucrative agreement to deliver its product or service in a relatively short timeframe, for example, then the lessee may be particularly amenable to negotiating a quick agreement on terms favorable to the Tribe. It is important to note that pushing too hard for the "ideal" agreement for the Tribe could cause the potential lessee to choose an alternative. In deciding how diligently to pursue favorable price and terms, Tribes should consider how willing they are to give up the potential revenue should the deal fall through.
- **Duration of contract term.** There are advantages and disadvantages associated with the relative length of the contract term. The optimal term length may be a function of the Tribe's interests and the value placed on a short versus long term by the lessee. If a Tribe is most interested in the stability of a long-term agreement (which ensures revenues and avoids the need for renegotiation in the near future), then a term of 15 to 20 years or more may be appropriate, depending on the use of the right-of-way. A longer term may also be in the interests of the lessee and therefore would constitute a point of negotiating leverage for the Tribe. Shorter contract terms allow the Tribe more flexibility in converting the land to alternate uses or negotiating more lucrative deals as circumstances change over time.
- **Fixed versus indexed payments.** Even if a fair value can be agreed upon in principle, how that value is transferred from the lessee to the Tribe is still a matter for negotiation. A lump sum or fixed stream of payments provides Tribes with a known value for the agreement, but this payment structure does not necessarily reflect the true value of the right-of-way, which may change over time. For example, as natural gas

prices have risen over the past decade, the value in transporting natural gas through pipelines (some of which cross Tribal rights-of-way) has also risen. By indexing payments to the commodity price and/or volume of the commodity being transported via the right-of-way, Tribes can share in the increased value of their land. Indexing payments requires a more detailed agreement and a greater knowledge of the relevant industry. Among other things, negotiating a “floor price” is recommended to ensure a minimum level of income regardless of the commodity price or how much the right-of-way is used.

There are many aspects of negotiations and contracts that can affect the ultimate compensation received for use of Tribal rights-of-way. For example, by front-loading payments in the early years of a lease agreement, Tribes can minimize the lost revenues from a lessee that goes bankrupt or that stops using the right-of-way under a contract where payments are indexed to throughput of the commodity. Payment structure, exit provisions, and limitations on use of the right-of-way are just a few of the many contract terms that can affect the value realized by the Tribe from use of rights-of-way. Tribes should be certain to have the necessary legal expertise to ensure that the ultimate compensation is consistent with expectations.

4. Case Studies

Many rights-of-way granted to energy companies on Tribal lands are soon expiring or have already expired. With nearly 56 million acres of Tribal lands spanning 32 states, there are a number of Tribes considering renewal terms for their rights-of-way and reevaluating the compensation in return for access across and over their lands. Their varying experiences and the results provide insights from which other Tribes can learn. A brief literature review uncovered a number of precedent-setting legal cases and relevant statutes, but in order to gain a better understanding of the most current information on Tribal experiences in regard to rights-of-way, interviews with Tribal representatives who have been intimately involved with Tribal ROW cases were conducted. A sample of Tribes that represent the diversity in ROW experiences was asked to participate in this study. There are certainly many other Tribes that have recent ROW experience that could provide valuable lessons learned. The case studies included here are not intended to be a comprehensive compendium of Tribal experience, but rather to stimulate thought regarding how the lessons might apply to other Tribes – and to initiate a dialogue between Tribes to share experiences. CERT will be convening a number of forums designed to enhance and deepen this dialogue.

4.1 Case Study Selection and Process

In selecting the Tribes to be interviewed for this study, the intent was to represent the diverse Tribal regions and varying Tribal approaches to right-of-way management. The geographical areas targeted for this effort include the Northwest, Southwest, and Southern California.

Tribes Covered in Case Studies

- Blackfeet Nation
- Fort Mojave Indian Tribe
- Jicarilla Apache Nation
- Yakama Nation

Once the case studies were selected, a general interview guide was developed to solicit information from Tribal representatives on the ROW issues facing their Tribe, and how they are handling them. [See Appendix B for interview guide.] A letter was sent from CERT's executive director to Tribal representatives requesting participation in the case study process. This letter was followed by email and phone contact to arrange a telephone interview, and then an outline of the topics to be discussed during the interview was forwarded to the interviewee to allow them to prepare for the interview.

Interviews were conducted over the telephone, and typically lasted about one hour. In some cases, follow-up discussions were required to clarify specific points. The interview notes were then provided to the interviewee in order to confirm accuracy of the information, and to assure that no confidential information would be released.

Case studies are summarized in the following section, and follow the general format below:

Background – Description of the rights-of-way granted across the reservation and any special circumstances or pending actions.

Discussion – Explanation of how the Tribe has valued its rights-of-way or addressed right-of-way issues.

Findings - Brief summary of the Tribe's rights-of-way, and *lessons learned* that may be pertinent to other Tribes' situation.

4.2 Case Study: The Blackfeet Nation

Background

The Blackfeet Nation's reservation lands cover about 1.5 million acres in northwestern Montana. The Tribe has extended rights-of-way for many uses, including a natural gas pipeline, electric transmission lines, and several oil pipelines. Several of the right-of-way agreements expire in the next several years, but it is the oil pipelines that have drawn the most attention from the Tribe. The three pipelines are located along the same right-of-way, but are governed by separate agreements, which expire between 2007 and 2011. Hoping to secure in advance long-term rights to the land, the company owning the pipelines first approached the Tribe in 2001 to renew the right-of-way lease. Not until early 2005 did the Tribe began serious negotiations.

Discussion: ROW Agreements and Valuation

The company owning the oil pipelines offered the Tribe an annual fee for use of the rights-of-way beyond the terms of the existing agreements. The Tribe then discounted the proposed stream of payment to determine a present-value for the offer against which they could compare their own estimation of the value of the right-of-way. Estimating right-of-way values is not an exact endeavor, as many factors influence value, including geography, current economic conditions, the product being transported across the right-of-way, and the alternatives available to the lessee. Consequently, the Tribe attempted to bracket the value by using several different methods of valuation and incorporating a number of factors. These considerations include the following:

- ◆ **Value of the land used for the right-of-way**, including any reduction in the value of nearby properties resulting from the lessee's use of the land. Existing rights-of-way may not have the same damage issues that could arise if new land has to be prepared for use (e.g., digging trenches to install pipelines).
- ◆ **The type of product going through the right-of-way and the value of that product.** The relative values of gas, oil, electricity, and telecommunication services will affect how much a lessee is willing to pay. Furthermore, current and projected economic conditions could affect these relative values.
- ◆ **The importance of the right-of-way to the lessee.** If the lessee does not have any easy or cheap alternatives to using the reservation right-of-way, the value may be higher than if alternatives exist. For example, if a nearby pipeline has been constructed in the years since the original right-of-way agreement was reached, the lessee may have a relatively inexpensive option to tap into this line rather than renewing the lease with the Tribe.
- ◆ **Comparable right-of-way agreements reached for similar uses in the region.** The Tribe seeks to learn as much as possible about how much companies have paid recently for use of rights-of-way on other properties. In one case, the Tribe bracketed the value of a right-of-way at between \$10 and \$35 per rod (a rod is 16.5 feet of pipeline). This estimation was supported by knowledge of a similar, nearby agreement worth \$25 per rod.

Valuing rights-of-way requires knowledge both of property valuation and of the industry in which the lessee operates. The Tribe consults with land men and appraisers who deal with the industry in question. They also gather data via the internet and telephone from the U.S. Energy Information Administration, which collects detailed cost and operating data from federally regulated industries including interstate gas pipeline and electric transmission operators. Among the information used by the Tribe are location-specific gas purchase prices, which can provide an indication of the relative value of gas transmission in the region. Information is not always easy to obtain or interpret. Property owners may not divulge terms of their agreements, and apples-to-apples comparisons are not always possible. A pipeline owner may pay more per rod for crossing a small farm

versus a large ranch, and neither may be exactly appropriate for comparison with the reservation.

The Tribe enters negotiations as prepared as possible and generally only after the Tribal Council has had the opportunity to understand the fair value of the right-of-way. The time to convince the Tribal Council of the merits of an agreement is prior entering negotiations, not after initial negotiations are complete.

Findings

In valuing rights-of-way through the reservation and negotiating fair compensation, the Tribe makes sure to educate themselves as much as possible about the market value of the service they are providing. The land value is only a starting point.

The current negotiations for renewal of the oil pipeline rights-of way began in early 2005 and the Blackfeet Nation hopes to complete them by the middle to end of the year. Six months is generally regarded as a reasonable amount of time to complete an agreement for existing rights-of-way. New right-of-way agreements where there are few obvious comparable agreements may take longer.

Some of the key points summarizing the Tribe's experience in right-of-way valuation and negotiation include the following:

- ◆ There is “value in doing your homework” with regard to land value, the industry in which the lessee operates, and the lessee's alternatives to using the Tribal right-of-way. It is essential to have someone knowledgeable on your team—whether from within or outside of the Tribe—to justify strong positions taken during negotiations.
- ◆ It is easier to “shoot high to start” and negotiate down in price. In choosing a starting point, Tribes should consider how much leverage they may have with the lessee.
- ◆ While many agreements provide for an annual payment, it is often best to get more upfront in case the company using the right-of-way leaves the business or goes bankrupt prior to the expiration of the contract term.
- ◆ Lessees will generally try to get longer contract terms in order to have more certainty in their future business environment. Tribes may wish to keep terms shorter unless they believe that the value of their right-of-way is likely to diminish over time. Granting longer terms (e.g., 15 to 20 years) can be a point of leverage in negotiations.

4.3 Case Study: Fort Mojave Indian Tribe

Background

The Fort Mojave Indian Tribe owns and operates three separate utilities: gas/electric, water/sewer, and internet/telephone/cable. All of the enterprises have right-of-way concerns that are managed on a day-to-day basis by the individual enterprises. The Tribe has taken the position that Tribal ownership of these entities is key to the stabilization of Tribal sovereignty. For the purpose of this case study the focus is on the Tribal enterprise

that provides energy services to the reservation. The Tribe believes the same ROW policies and procedures apply to the other entities.

The Tribe, through Aha Macav Power Service (AMPS), owns and operates its own electric and gas utility. All of the electric transmission and distribution facilities on the reservation that provide service to the reservation are managed by this Tribally chartered entity (except for four residential homes that will continue to be served by the city of Needles until later this year). Due to the checkerboard pattern of the reservation, a few dispersed poles owned and operated by adjacent utilities are allowed on the reservation. AMPS is not directly managed by the Tribal Council but rather it is managed by an independent board of directors comprised of Tribal and non-Tribal members. However, since it has been chartered by the Tribe to serve the reservation (similar to a municipality), the utility typically does not enter into signed agreements for rights-of-way or easements. Instead the Tribe has an informal process where the need and location of rights-of-way are discussed with the manager of Tribal lands prior to any construction taking place. The manager of Tribal lands then makes a timely decision if a more formal process is required for any particular right-of-way.

AMPS entrance into the gas utility business is relatively new (2004). AMPS has a seven mile long transmission/distribution pipeline that serves one major customer. Plans are underway to expand gas delivery service, and the same right-of-way procedure utilized for the electric business will be employed. The remainder of gas transmission/distribution facilities on the reservation are still owned and operated by non-Tribal entities. It is AMPS' goal to negotiate the purchase of most of the gas distribution facilities over the next two to three years.

In terms of outsiders using the ROW on the reservation, the agreements can be divided into three broad categories:

- ◆ Local utility lines, such as telephone, cable, and the electric coop
- ◆ Natural gas pipelines
- ◆ State highway

It is important to note that the reservation is comprised of a checkerboard pattern of land, with private and public land interspersed throughout.

Discussion: ROW Process and Outcomes

As a general rule, the Tribe allows/requires ROW users to “build, operate, and maintain” the rights-of-way being used, but it does not give any claim to the land for other uses. Some of the details surrounding the various types of ROW uses are described below.

Local utility lines

Most of the local lines run along county roads serve as the dividing line between Tribal and private lands. Because of the checkerboard nature of the reservation land, lines from both AMPS and the local utilities must cross intersections or small parcels of land that may not be owned by the owner of the lines. The Tribe has agreed with these local

carriers to grant access to limited rights-of-way without monetary compensation, in exchange for receiving the same treatment. For the reservation, it is not worth the effort and hassle of charging for the ROW and also having to pay for its own use of ROW that is not on the reservation.

Natural gas pipelines

Two natural gas pipelines run through the reservation per a ROW agreement negotiated more than two decades ago, largely by the BIA. The Tribe received initial compensation for this 60-foot ROW, but no ongoing payments. The Tribe has been pleased with the cooperation of the gas company in terms of minimizing impact and consulting with the Tribe prior to maintenance and improvements along the ROW.

When the current agreement expires, the Tribe intends to negotiate the renewal in order to ensure fair compensation. The intention is to recoup at a minimum the loss of income and land value, but the Tribe recognizes that the ROW is likely worth even more than that to the gas pipeline company. The balancing act will be to ensure that the Tribe does not insist on a price so high that the company chooses an alternative, thereby denying income for the Tribe.

State highway

In the late 1990s, the State of Arizona sought to widen an existing highway running through the reservation from two lanes to four lanes. The Tribe hired an appraiser to identify appropriate land values, and the Tribe negotiated directly with State representatives on a modified ROW agreement. The Tribe now receives fees from the State for use of the ROW and is pleased with the agreement.

Findings

The Fort Mojave Indian reservation may be in a unique situation in that its checkerboard pattern of land ownership makes for few contiguous strips of land through which other entities would seek rights-of-way. Based on the highway ROW negotiations late last decade, the Tribe appears to have taken on greater initiative than in the past, when BIA was largely involved in a long-term agreement for the gas pipelines. However, it is not clear when that agreement expires or whether it contains any beneficial provisions that are not currently being enforced by the Tribe. (Anecdotal evidence suggested that this was the case at other Tribes, and according to the interview conducted for this case study, the Tribe has not been monitoring the agreement terms and expirations.)

ROW fees represent a steady source of additional income and prudence dictates that a Tribe collects fees for use of reservation lands. But the Tribe, with a very diverse business portfolio, does not rely on ROW fees for economic health and is wary of demanding too much. All things equal, users of the ROW will pay only as much as it costs them to develop an alternative route. Maintaining good relations is essential to ensuring that the Tribe receives at least some compensation as opposed to pushing away a

potential ROW user and foregoing revenue. In this regard, sound negotiation techniques can be critical to obtaining a desirable outcome.

4.4 Case Study: Jicarilla Apache Nation

Background

The Jicarilla Apache Nation has agreements with a variety of companies for use of right-of-way corridors across the reservation. These include agreements with two gas pipeline companies, two electric cooperatives (one of which serves the Tribe), and a local telephone company. The pipelines represent the greatest revenue source, but the Tribe aggressively maximizes the value of its right-of-way regardless of the lessees.

For several expired agreements, the Tribe is leasing the land under the old contract terms while the Tribe evaluates alternatives, including possible joint ventures to own part of the assets and reap the potential economic benefits enjoyed by the companies using the rights-of-way. At present, the Tribe is in the process of negotiating agreements with both a pipeline company and the telephone company.

Discussion: ROW Agreements and Valuation

The Jicarilla Apache Nation does not have a specific formula for valuing rights-of-way, but it considers a variety of valuation techniques and factors that inform its negotiations. Some of these considerations include:

- ◆ The amount of land consumed, the property value of land in the area, and any damages or loss of value caused by creation of the corridor.
- ◆ Volume of the commodity being transported across the right-of-way. The greater the throughput, the greater the benefit to the user. This could raise the inherent “value” of the right-of-way.
- ◆ Historical payments for use of the right-of-way. The Tribe looks not only at how much money was received, but also at what the business/economic environment was at the time the lease was negotiated relative to the present. For example, assume that the compensation was based on throughput of natural gas across the reservation. If natural gas prices are doubled today what they were when the contract was signed, then the Tribe might expect double the compensation for the same volume of gas.
- ◆ Comparison with other similar agreements. This is not something that can easily be done by someone outside of the field in which the right-of-way user is operating. The Jicarilla Apache Nation will typically hire a consultant (e.g., someone who specializes in the wholesale marketing of natural gas) to help value the right-of-way resource and to serve as an advisor in negotiations.

The agreements with the pipeline companies offer some interesting insights into the issues facing the Tribe when valuing rights-of-way and negotiating agreements. The agreements represent two unique compensation structures. One entails a set of fixed payments negotiated at the time of the initial agreement; the other is based on the amount of natural gas that flows through the pipeline. Interestingly, although these agreements

are each more than 10 years old and business conditions have been rapidly changing in the natural gas industry, the two agreements have provided similar value to the Tribe.

In order to ensure that the Tribe receives fair value for the right-of-way long into the future, the Tribe seeks terms of agreement that are driven by the market, rather than by a one-time snapshot of the potential value of the land. This generally means linking compensation to both throughput and commodity price. One of the drawbacks to a “throughput-only” deal is that the lessee has a disincentive to increase volume—and therefore Tribal revenues—since this will also raise its costs. By tying compensation to price—preferably with a floor, but no ceiling—the Tribe hopes to share in the gains potentially reaped by the pipeline companies from transporting a more valuable commodity. Since the Jicarilla Apache Nation also have leasing agreements with natural gas producers on reservation lands, the Tribe is wary of making transportation too expensive for the economic well-being of the gas producers. And for local services like telephone or cable, the relatively lower profit margins of the companies may not allow for as much negotiating leverage. In addition, these local companies tend to serve the reservation, and higher right-of-way costs are likely to be passed on to the members of the Tribe.

Findings

The Jicarilla Apache Nation has taken advantage of the fact that the Nation is located in a desirable area for transporting natural gas. In renegotiating right-of-way agreements, the Tribe is doing the necessary research and hiring the necessary help to understand what fair market value may be. Unlike some past agreements with fixed prices that do not adjust for changing market conditions and commodity values, the Tribe aims to index payments to the amount and price of the commodity going across the right-of-way.

Although there is no set formula for how much of a lessee’s right-of-way-related revenue the Tribe can share, the Tribe has found that about 20% is often a reasonable value that can be achieved in negotiations. This value will not be written into an agreement, but can be derived based on knowledge of the industry—i.e., gas transportation, electricity, telecom services—in which the lessee operates. Going into negotiations with knowledge is important, since it could backfire politically to push too hard for economic concessions.

The “right” value for rights-of-ways depends on a lot of factors, including the lessee’s business and its alternatives to using the Tribal right-of-way. But in the Jicarilla Apache Nation’s case, the Tribe is also evaluating its own alternatives—including entering the very businesses in which the lessees operate—through joint ventures or other business arrangements. This may provide for greater negotiating leverage and ensure greater right-of-way revenues.

4.5 Case Study: Yakama Nation

Introduction

The ROW work currently being conducted was initiated as a Geographic Information System (GIS) project for the Yakama Nation. The GIS Coordinator for the Tribe initiated a process to investigate the physical locations of several improvements on existing rights-of-way on Tribal land. The goal of the initial project was to identify all property for the Tribe, and determine the current legal status of all parcels.

Discussion:

In order to identify the legal status of each parcel, the GIS team employed interns to review the Title Status Reports (TSR) for each Tribal parcel to determine if a ROW was actually issued for a given parcel. The TSR includes information on whether a ROW was issued, the issue date, and the statute the TSR was issued under, and whether specific conditions apply. After reviewing this information, the team searched records for the specific conditions. These records were located in 3 sets of archives:

- County Courthouse
- State Archives
- National Archives

The team used GIS techniques and location devices to determine actual locations of utilities and other improvements that had been ‘piggybacked’ onto the county road ROW. Once determining that there were trespass conditions on the existing ROW, the Tribe negotiated for the imposition of the 3% franchise fee on those utilities that had been granted an illegal easement. This fee applies to the gross revenues associated with *all* sales on the reservation (Tribal customers or not). This agreement allows the companies (telephone, water, etc.) to keep their improvements where they are while the Tribe prepares to *fix* the ROW agreements. The Tribe currently brings in about \$1million/year through this agreement.

Transmission lines and pipelines that pass through the reservation, but do not actually serve the reservation are handled differently.

Barriers and Opportunities

It can be difficult to find the initial funding to initiate a ROW project. At the same time, the quick payback from finding trespass situations and recognizing their value can provide funding for future efforts to fully uncover the extent of the ROW irregularities. In addition, data collection and analysis efforts may provide negotiating leverage on other issues with local authorities

Findings

Review of records indicated that a number of county roads on Yakama trust land were not properly located within the ROW. In addition, a number of documentation ‘abnormalities’ were discovered in the *conditions* and other documents reviewed. In one case, the road was not on the ROW, and the County had issued easements to other entities to use the ROW, without the permission of the Tribe – basically treating the land as if

they owned it (or at least the ROW). This appears to be due to the fact that if the land had gone into FEE LAND, then the county would have been given jurisdiction. At the time (1937), they fully expected the land to become fee land, and thus this may not have been entirely unreasonable. Since the land actually became TRUST LAND, state law – rather than county law – applies. State law requires compensation to landowners for granting of additional easements on a ROW, and it further requires public notice.

The BIA had a role in the initial granting of ROW for the Tribe, and used a valuation method that looked at adjacent land values (by the acre) and valued the ROW by the acre. The BIA is bound by a specific CFR that requires them to use this valuation method. [note: a Tribe can negotiate rights-of-way themselves, but must first notify BIA of this intent]. BIA *could* place a ‘title defect’ on the parcels impacted, but this would make everyone’s titles defective, and the Tribe determined that this was not the most effective thing to do. Each parcel must be addressed separately. If the ROW were to be re-issued, it would be under the 1949 Act, not the 1901 Act under which the original ROW was developed. The rights-of-way will be renegotiated as agreements with Trust land.

During a negotiation for a new ROW, a range of compensation types may be requested. Basically, this has allowed the Tribe leverage on other County regulation issues that impact Tribal members.

The Yakama Nation is currently preparing their case to have the rights-of-way re-negotiated. In the meantime, they continue to collect franchise fees for those in trespass.

Cost to conduct a ROW review

The Tribal ROW work has been going on for about five years. The project started by investigating four sections with the money the Tribe had available up front. This grew to a township, then another township, and so on. After the imposition of the 3% franchise fee on those utilities in trespass (see above), the Tribe has been generating \$1million/yr revenue from these fees; a portion of this money is used to fund the ongoing work to ‘fix’ the rights-of-way in question.

5. Summary of Findings

Key findings from literature reviews, discussions with ROW experts, and Tribal case studies indicate a number of barriers and opportunities on how Tribes may benefit from ROW research and negotiation. The following summary is intended to assist Tribes as they begin to assess existing and future right-of-way agreements; it is not an exhaustive list of considerations but outlines key issues to consider.

Summary of Valuation Methods

Income: Income derived from use of the ROW

Comparison: ROW agreements of similar tracts of land

Cost: Total cost of locating, appraising, negotiating for, and grading/
preparing the ROW corridor

Enhanced Across-the-Fence: Value of land adjacent to the corridor, plus
subjective multiplier

Barriers to Valuing Rights-of-Way on Tribal lands

Tribes have had difficulty getting necessary information to inform ROW valuation and negotiation. Key challenges Tribes have traditionally faced include:

- Locating existing agreements. Current records are often difficult to locate or prove to be incomplete.
- Determining which utilities may already be in the ground and which ones are in violation of current agreements
- Accessing information on fair value
- Hiring in-house expertise
- Financing research on existing agreements, legal considerations, and locating physical assets

Lessons Learned

- Enforce existing agreements – if there is a trespass now, use it as a negotiating opportunity
- Educate yourselves on fair value in the region for similar agreements
- Consider a variety of valuation techniques to maximize return for ROW

- Hire the right expertise, or train Tribal staff so that they have the expertise in the following areas:
 - Legal
 - GIS
 - Landman
- Get Council approval prior to negotiating
- Dig deep for information regarding current and predecessor agreements. If the information is hard to find, there may be a reason for that. Get into the archives; valuable information may be available by digging through various archives.
- Do your homework
- Enter negotiations prepared with documentation
 - Know what leverage you really have

Opportunities for Tribes

- Unmet conditions of existing agreements can create opportunities to:
 - Recoup unpaid compensation
 - Use as leverage when developing ROW or lease renewal terms
- Information on trespasses to existing agreement can also provide the impetus for new business ventures, such as:
 - Joint venture instead of ROW lease
 - Buy assets over time

6. How to Get Started

If you have read the information in this report, and are thinking to yourself ‘where do I start?’, you may begin by discussing the issues among Tribal leaders to assure that there is sufficient interest to pursue a ROW assessment. In addition:

- Review the *lessons learned* in the previous section. You may contact CERT for specific Tribal information and to access individuals interviewed for case studies.
- Call CERT for technical assistance and additional resources applicable to your specific situation. CERT services include participatory strategic planning with Tribal leaders and planners to arrive at objectives then connecting the Tribe with the appropriate partner. In addition, CERT plays a prominent role in advocating policies that would provide Tribes with the greatest options and control over Tribal Trust land. Tribal experiences and concerns should be expressed to CERT so that it truly represents Tribal views.

- Find out what easements are currently granted across the Tribe’s land. Once again, sources for uncovering this information include Tribal records, state and national archives, and state, county and church records. Keep in mind the search may expand and evolve to other more obscure or uncommon depository of information specific to your Tribe.
- Contact the organizations under “Resources” for additional information.

6.1 Additional Resources

Several additional organizations may be able to provide assistance to Tribes in identifying and mapping right-of-way corridors across the reservation, valuing the rights-of-way, and negotiating agreements. These organizations offer publications, tools, and directories of professionals. A few of the organizations that may be able to assist Tribes are as follows:

International Right of Way Association (IRWA)

IRWA is a source of information, education, and professional services regarding rights-of-way. Operating in the United States and Canada, the organization claims membership of more than 10,000 right-of-way professionals, with membership open to “any person who is principally engaged in the acquisition, management, or disposition, of real property or interests therein, in connection with public, quasi-public, or private activities.”

IRWA’s publication *Principles of Right of Way* is an introduction to the basic elements of rights-of-way. It was originally published “to provide an overview of the theory and methods of the acquisition of real property for public use,” but it contains specific topics that may be of interests to Tribes in better understanding property valuation and related disciplines, including:

- ◆ Appraisal and valuation
- ◆ Real estate fundamentals
- ◆ Contracts
- ◆ Interpreting engineering drawings
- ◆ Negotiations

IRWA offers educational courses, including courses for students with little or no experience in the right-of-way field. Descriptions of courses in “Basic Right of Way Disciplines,” “Communications/Negotiations,” “Appraisal,” and other topics can be found at www.irwaonline.org by clicking on the “Education” link.

The IRWA website also provides a membership directory, searchable by state and by subject area that Tribes can use to identify local right-of-way professionals. The free online directory can be accessed at www.irwaonline.org by clicking on the “Resources” link.

*International Right of Way Association**19750 South Vermont Avenue**Torrance, CA 90502-1144**(310) 538-0233**Contact for Principles of Right of Way publication: Bonnie Gray, extension 134**www.irwaonline.org****American Association of Professional Landmen (AAPL)***

AAPL represents professional landmen, who traditionally deal with acquisition of mineral rights, including verification of title and negotiation of business agreements. While most landmen do not specialize in rights-of-way, they may be able to assist Tribes in valuing rights-of-way used for oil and gas pipelines. AAPL describes landmen as follows:

Landmen constitute the business side of the oil and gas and mineral exploration and production team. Company landmen negotiate deals and trades with other companies and individuals, draft contracts (and administer their compliance), acquire leases and ensure compliance with governmental regulations.

Independent field landmen serve clients on a contract basis and are generally the industry's contact with the public as they research courthouse records to determine ownership and prepare necessary reports, locate mineral/land owners and negotiate oil and gas leases and various other agreements with them, obtain necessary curative documents and conduct surface inspections before drilling.

Independent land consultants serve clients on a contract basis and much effort is directed to due diligence examinations required in the purchase and sale of companies and properties.

AAPL sells a directory of landmen and may be able to answer questions to help Tribes identify landmen who can best address their needs.

*American Association of Professional Landmen**4100 Fossil Creek Blvd**Fort Worth, TX 76137**817.847.7700**www.landman.org*

7. APPENDIX A: GLOSSARY OF TERMS

Fee Simple (Land): It is the most complete ownership interest one can have in real property. In common law legal terminology, one does not "own" the real estate; one has an estate in the land conferring certain rights. The fee simple estate is also called "estate in fee simple" or "fee-simple title." Land held in fee simple can be conveyed to whomever its owner pleases; it can be mortgaged or put up as security as well. No rent or similar obligations are due from the owner of property in fee simple.

Easement: An interest in land entitling the owner or holder thereof, as a matter of right and not merely by way of a permissive license that can be revoked at any time, to enter upon land in the possession of another person (usually an owner or tenant) for a particular purpose in the form of a prescribed use to be made of the land. The land against which the easement or privilege exists is called the "servient" tenement and the estate to which it is annexed is the "dominant" tenement. Source: BLM Manual Section H-2100-1, Chapter III, Release 2-290, dated January 31, 2002.

GIS (Geographic Information Systems): Geography is information about the earth's surface and the objects found on it, as well as a framework for organizing knowledge. GIS is a technology that manages, analyzes, and disseminates geographic knowledge.

Ingress: The right to enter over a parcel of land not owned by you but not to occupy the land. It is a means for entering one's own property without trespassing on another person's property, as applied to an easement. **Egress** is a means for departing from one's own property without trespassing on another person's property, as applied to an easement

Lease: These are authorizations to possess and use public lands for fixed periods of time. Land uses which may be authorized by lease are those involving substantial construction, development, or land improvement and the investment of large amounts of capital which is to be amortized over time. A lease conveys a possessory interest and is revocable only in accordance with its terms and the provisions of 43 CFR 2920.9-3. There are no limitations on the amount of land that may be included in a lease; however, the area should be limited to the size justified. Source: BLM Manual Section 2920, Release 2-147, dated May 27, 1982.

In general, non-Indians are allowed to lease Tribal and allotted property for a period ranging between 25 and 99 years. The governing Tribal documents and federal and Tribal leasing statutes must be consulted to determine the limits on leasing. In addition, while Indian land itself cannot be encumbered (to attach a claim, lien, charge), leasehold interests can be encumbered, assigned and used as collateral for financing the transaction. Encumbering the leasehold interests, however, still requires the BIA's approval and the consent of the Tribe.

Petition for Writ of Certiorari: (informally called "Cert Petition.") A document which a losing party files with the Supreme Court asking the Supreme Court to review the decision of a lower court. It includes a list of the parties, a statement of the facts of the case, the legal questions presented for review, and arguments as to why the Court should grant the writ. **A Writ of Certiorari** is a decision by the Supreme Court to hear an appeal from a lower court. **Cert. Denied** is the abbreviation used in legal citations to indicate that the Supreme Court denied a Petition for Writ of Certiorari in the case being cited.

Right-of-Way: 1. A legal right of passage over another person's land. 2. The public or Federal land authorized to be used or occupied pursuant to a right-of-way grant. 3. A document authorizing the use of public or Federal lands for the construction, operation, maintenance, and termination of a project. Source: BLM Manual Section 2800. Release 2-224, May 15, 1985.

Trust land: Land the title to which is held in trust by the United States for an individual Indian or a tribe. The federal government holds legal title but the beneficial interest remains with the individual Indian or tribe.

8. APPENDIX B: INTERVIEW GUIDE

Right-of-way Interview Guide for Tribal Case Study

Tribe:

Key contact person:

Phone/Email:

Interviewed by:

Date:

Please note that the information we gather during this interview will be used for the purposes of developing a case study of ROW assessment, valuation, and negotiation approaches that will inform other Tribes as to practices may help them in securing appropriate value from their ROW resources. Any information that you provide that you indicate is confidential will be treated as such, and you will have the opportunity to review our write-up of the interview for accuracy before we put the information into the paper CERT is preparing.

The following is a summary of the information to be gathered during the interview.

1. Please provide a brief introduction to your Tribe's experience regarding ROW
 - a. Scope, negotiation process, and current status.
 - b. What energy company/utility does the Tribe currently have ROW agreements with?
 - c. What type of utilities utilize rights-of-way across Tribal land? [are there pipelines, transmission lines, etc.?)
 - d. Are there Lease agreements or other documents available in Tribal records, or aware of specific terms?
2. Background information
 - a. Please describe the events, decisions, and actions that led the Tribe to consider/pursue ROW negotiations.
 - b. Is there a strategic planning process underway considering other uses for the land?

3. Process

- a. What actions did the Tribe take to assess the ROW situation and records?
- b. How are you preparing for ROW negotiations? [i.e. – are you reviewing legal records, or hiring experts to assess current agreements & compliance? Are you reviewing valuation methods used elsewhere?]
- c. What valuation method are you using? Were there other methods considered and not used?
- d. What costs were incurred during this effort? How did you finance this effort?
- e. How long did the process take – or what is your timeline for completing the activities?
- f. What next steps are planned?

4. Project Impacts

- a. Did the ROW assessment and resulting negotiation produce the desired result for the Tribe?
- b. Are Tribal members and surrounding community satisfied or dissatisfied with the project, and why?
- c. How has the result impacted the Tribe, economically, socially or in terms of land use activities?

5. Barriers and Opportunities

- a. What obstacles had to be overcome or avoided regarding ROW assessment or negotiations?
- b. How did the Tribe overcome them?
- c. What events or actions helped the project to move ahead?
- d. Who are the key people or institutions that helped the negotiation be successful?

6. Lessons Learned

- a. What lessons were learned from this project?
- b. How would other Tribes benefit from pursuing ROW assessment and negotiations or taking similar strategies?

Thank you very much for your time.

9. APPENDIX C: BIBLIOGRAPHY

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