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4. ENERGY POLICY: Storm clouds gather over tribal lands rights-of-way for energy

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A little-noticed provision of the Energy Policy Act of 2005 has uncovered contentious issues about the renewal of rights-of-way across tribal lands for energy facilities. Section 1813(a) of EAct directs the departments of Energy and Interior to provide an historic assessment of the rights-of-way valuation issues and to offer recommendations for Congress for methods of resolving problems and providing compensation for land use.

A **draft report** on the matter issued in August found that while thousands of existing rights-of-way agreement renewals have been negotiated, there exist many "complex and contentious" examples of cases where renewals have been stymied or led to much higher payments. These cases involve natural gas and oil pipelines, high voltage electricity transmission, coal-slurry pipelines and roads associated with delivering fuels or accessing facilities.

While energy companies argue for a standardized approach to negotiations that bases payments on "fair market values" for land use, many tribes say that traditional valuation approaches cannot fully capture the value of lands that cannot be bought or sold. And they reject using the same formulas employed for rights-of-way payments by federal lands managers. According to the Confederated Tribes of the Warm Springs Reservation of Oregon, "The federal government may choose not to get fair value for its own lands, but that standard should not apply to tribal lands."

Tribal sovereignty and local self-determination rise to the top of tribal concerns. "The right to determine who will be on our lands and under what conditions they may remain is of paramount importance," wrote William Johnson, general counsel for the Ute Mountain Ute Tribe.

Many tribes urged the government not to make any changes to the current system, which allows for individual negotiations. Besides a "no change" scenario, the draft report offered a range of possible recommendations to Congress, including authorizing the federal government to determine what fair value should be, requiring binding valuations, or even having lawmakers authorize condemnation of tribal lands in instances where energy access is deemed crucial to national energy reliability.

The report, nonetheless, downplayed such a possibility, finding no existing instances of adverse effects on reliability. The report also suggested that the problem may be "self-limiting" in that transportation costs, including easements, are a relatively small portion of overall energy costs, and that while rights-of-way renewals may be a major issue for certain tribes and energy companies, it is "less consequential for the nation."

The agencies have stated they do not intend to take a position on possible approaches.

Utilities see a looming problem

The Edison Electric Institute, representing the nation's investor-owned electric utilities, however, argued that the issue is one of national concern because only Congress or the executive branch can resolve the problem. EEI said that its members expect to see more than 271 rights-of-way agreements expire in the next 15 years. One utility, Public Service Co. of New Mexico, has 95 agreements that will expire during the time frame.

The Fair Access to Energy Coalition, sponsored largely by gas pipelines, said that the current negotiation policy

"will likely increase existing energy infrastructure costs needlessly and by over \$700 million annually" as tribes and companies begin renewal talks. Coalition executive director Nancy Ives also criticized the draft report for being "superficial and irrationally exuberant" in its finding that problems may be limited. She urged the agencies to use their "trustee responsibility" to derive a more transparent valuation system. "Failure to implement a right-of-way acquisition and renewal process that is consistent, transparent, objective and reasonable will mean that any tribe can demand exorbitant, unreasonable, economically stagnating, and self-defeating right-of-way consent fees," Ives wrote.

Sempra Energy, the parent of San Diego Gas & Electric and Southern California Gas Co. utilities, wrote that its customers will bear the higher costs of facilities that cross tribal lands. "Tribes are increasing their land holdings at strategic project locations, enabling them to block construction of new energy facilities serving our customers," the company wrote.

The report notes that rights-of-way agreements completed in the past five years often led to payments at many times higher than the fair market value. Under one calculation, "the fair market value was paid in two cases, was between 2 and 4 times in five cases, and was between 11 and 25 times in five cases," the report said. In five other cases, "compensation was between 65 and 1,625 times the fair market value."

Energy companies say they also face more difficult negotiations and shorter contract terms for renewals -- from 50 years under original agreements to 20 to 25 years for newer renewals. This, said EEI Vice President David Owens, raises "the likely outcome that every 20 years or so companies will have to financially rebuild a portion of the interconnecting grid intended to serve the nation for decades to come."

EEI claims that it is not only rising costs that concern its members but "an unpredictable process that produces outcomes that clash with historic, contemporary and constitutional notions of just compensation."

Margie Schaff, an energy analyst for the Affiliated Tribes of Northwest Indians, suggested that the apparent conflict over access rights stems from a change in the historic balance of power between companies and tribes. "When these facilities were built, the companies dealt with [the Bureau of Indian Affairs] and got a standard federal rate," she said. "Now the tribes are saying, 'We are energy companies, too. These lands are outside the scope of federal lands, and we have the right to work at arms-length with the companies.'"

Another change results of economic activity on tribal lands, Schaff said. "These are not just vacant lands, they've been used for economic development purposes. Tribes have taken a much more active view of their role in managing properties," she said. "Energy companies are very concerned about renewals because they are not in a very good negotiating position."

As federal agencies review comments received to the draft report, they face two very different potential outcomes, with energy firms arguing for a change to the status quo, and tribes saying, "Don't fix what isn't broken," Schaff concluded.

The final version of the report, which is being compiled by the Office of Indian Energy and Economic Development, is expected to be made public in early December.

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