

WILL RIGHTS OF WAY ACROSS INDIAN LAND DRIVE UP THE COST OF ENERGY?

BY JAMES C. POWERS

You can help prevent it.

Indian tribes are demanding grossly excessive compensation for renewal of existing rights of way. Unless the law is changed, utilities and pipeline companies will have no choice but to pay these demands.

As published in the March/April 2006 issue of Right of Way Magazine



If you have a pipeline that crosses Indian lands, or if you may want to install a pipeline across Indian land, there is likely to be a nasty surprise in store for you. You cannot acquire a right of way, or even renew an existing right of way, across Indian tribal land without the tribe's consent, and that consent does not come cheap. The sky is the limit on what tribes are demanding, not just for new rights of way, but also for extensions of long-existing rights of way for gas and oil pipelines, electric lines, and other utilities that serve vital energy needs of millions of people. Typical demands are for the same amount it would cost to build a new pipeline all the way around the tribal land.

Report to Congress Due August 2006

The recently passed energy legislation includes a provision (Section 1813 of the Energy Policy Act of 2005) requiring the Secretaries of Energy and the Interior to consult with tribes, businesses and others regarding this problem and to report to Congress on their findings and recommendations by August 2006. This is your chance to participate in the process and make sure that the report to Congress adequately describes the exorbitant prices Indian tribes have been demanding and proposes reasonable solutions. Tribes deserve fair and adequate compensation for rights of way, but they should not be allowed to hold up energy companies, and ultimately the public, for everything they can get. Section 1813 describes the inquiry process.

One-Year Window to Affect Change

Your company may have rights of way that will not expire for years, and you may have thought: "Let's not get involved with this problem now; let others deal with it and see what the situation is when we have to deal with it." The problem with this approach is that Congress has provided only a one-year window of opportunity to seek legislative help.

Legislation is the only sure way to end the current practice that allows tribes to demand whatever they want for rights of way with no recourse for utilities and pipeline companies except to pay or forego supplying oil, gas, electricity and other products the public needs. That window will close in August 2006. It has taken years to get even as far as a study.

If persons interested in a fair procedure to determine compensation for renewing or obtaining rights of way over Indian lands do not act now, it is very doubtful that they will have another chance. Participating in study sessions and contributing to the report of the Secretaries will be far cheaper, and more effective, than trying to bring about a change through lobbying or litigation at some later date.

Excessive Compensation Demands

There have been rights of way across Indian lands since cross-country railroads and telegraph lines were first constructed in the 19th century. Until recently, acquisition and maintenance of such rights of way for transmission of oil, gas, electricity

SEC. 1813. INDIAN LAND RIGHTS OF WAY

and other utilities was accomplished without undue problems. Typically, tribes were happy to get the revenue from granting rights of way, and the charges were not exorbitant.

In recent years, however, as more Indian tribes began amassing huge profits from casino gambling, they have become much more assertive in demanding compensation for grants of rights of way and, most distressingly, for renewal of existing rights of way. Tribes are able to do this because of the unique leverage given them by federal legislation.

Indian land is owned by the United States and held in trust for tribes. Since the federal government owns tribal land, only the government can convey that land, or any interest in it. Tribal land cannot be condemned for public use, except by the federal government. A statute (25 U.S.C. §324) provides that rights of way across lands of tribes recognized under specified sections (which include most, but not all tribes) cannot be granted without the consent of the tribe. This provision was obviously intended to enhance tribal sovereignty and protect tribes against overreaching grants by the Bureau of Indian Affairs. But what was intended as a protection for tribes has been turned into a method for imposing unreasonable demands on energy companies, and ultimately the public.

Trial Consent Required for Renewals

It can be argued that there is a distinction between a grant of a new right of way and renewal of an existing right of way. The two are treated separately in the statutes. (Compare the grant language of 25 U.S.C. §§ 319, 321, and 323 with the language authorizing extension of pipeline rights of way at the end of Section 321, and see 25 CFR §169.19 which clearly distinguishes between new grants and renewals of existing rights of way.) However, the Department of the Interior has imposed a tribal consent requirement on renewals, which may exceed statutory authorization, at least as far as oil and gas pipeline rights of way are concerned. As might be expected, the tribes insist that tribal consent is required for renewals as well as for original grants of rights of way.

The problem of exorbitant demands is particularly acute with regard to renewal of existing oil and gas pipeline rights of way. Such pipeline rights of way have been in effect for years, often for decades. The pipelines located in them supply oil and gas that is vitally important to millions of people. But tribes are now demanding hundreds of millions of dollars to renew such existing rights of way, sometimes basing their demands on what it would cost to build a line around the reservation. A fair charge for use of a right of way is entirely appropriate, but amounts being demanded bear no relation to market value or to fair compensation.

Unless the law is changed, utilities and pipeline companies will have no choice but to pay these unjustified demands, and ultimately those charges will be passed on to customers in the form of higher energy costs.

(a) Study.

- (1) **In general.** The Secretary [of Energy] and the Secretary of the Interior (referred to in this section as the "Secretaries") shall jointly conduct a study of issues regarding energy rights of way on tribal land as defined in section 2601 of the Energy Policy Act of 1992 (as amended by section 503) (referred to in this section as "tribal land").
- (2) **Consultation.** In conducting the study under paragraph (1), the Secretaries shall consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers.

(b) Report.

Not later than one year after the date of enactment of this Act, the Secretaries shall submit to Congress a report on the findings of the study, including:

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

Interfering with Alternative Rights of Way

Another problem arises when tribes use their newfound gambling wealth to purchase additional land and have it conveyed to the federal government to become tribal land. A pipeline company considering building around a reservation as an alternative to paying an excessive demand may find the build around route blocked by such an expansion of tribal land.

If you want to take part in the process of evaluating these problems and proposing solutions, now is the time to do it. The study will begin with the DOE and DOI holding a two-day meeting on March 7-8, 2006 in Denver, CO, to hear presentations from tribal and industry leaders and to form working groups.

There will be other meetings, but the sooner you begin taking part, the more you will be able to accomplish. And time goes by fast. If you wait, by the time you do decide you would like to participate in the process, it may be too late. For updates and opportunities to participate in the study, visit <http://1813.anl.gov/>. 🗨️

About the Author

James C. Powers



James C. Powers is a Partner at Nossaman, Guthner, Knox & Elliott, LLP. He specializes in representing public agencies in condemnation matters and is one of California's leading experts in condemnation. He has served as lead trial counsel at dozens of trials. Jim has represented public and private entities ranging from public transportation agencies to water utilities in condemnation and eminent domain litigation. He has also handled a broad variety of complex civil litigation cases in both trial and appellate courts. Jim is a graduate of Oxford University, earning his master's in 1964, and a bachelor's in jurisprudence in 1958.