

STANDARDS FOR DETERMINING FAIR AND APPROPRIATE COMPENSATION

The second prong of Section 1813(b) says that the Secretaries of Energy and Interior shall submit to Congress a report on the findings of the study, including –

(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;

Status Quo on Tribal Lands:

Currently, there are no set standards or procedures on tribal lands. Consent is now given for new projects, expansions and renewals only if a bargain can be reached between parties based on “the highest negotiated value.”

Congress Could Consider Following Statutes:

1. Remove tribal consent authority and establish status quo on non-tribal lands, which is “Just compensation” under the Fifth Amendment of the U.S. Constitution as it has always existed for American citizens not on tribal lands. “Just compensation” means Fair Market Value (FMV), a term of perpetuity and an immediate right of entry on to the land.

2. Maintain tribal consent authority and establish standard of “Fair Market Value” for a term of years.

3. Maintain tribal consent authority and establish standard of “Fair Market Value Plus” in perpetuity.

- PLUS could mean an objective sovereignty multiplier such as 3, 5 or 10 times FMV
- PLUS could mean subjective financial enhancements for geography, cultural sites, etc.

4. Maintain tribal consent authority and establish standard of “Fair Market Value Plus” for a term of years.

5. Consent, once given, is given for the life of the energy infrastructure project, until abandonment.

The establishment of a standard benefits all parties. A standard benefits Tribes being underpaid. A standard benefits companies overpaying.

NEW PROJECT GRANTS, RENEWALS & EXPANSIONS

- Congress also wanted the departments of Energy and Interior to think about types of energy infrastructure.
- Congress identified three types of infrastructure in Section 1813(b):
 - grants (new projects)
 - expansions (to existing projects)
 - renewals (of existing projects)
- Greatest area of concern is renewals
 - Currently there is not a level playing field during negotiations because the life of any project is greater than the ROWs term of years
 - Sunk costs create an opportunity for unreasonable compensation requests

- Lesser area of concern are new projects
 - No sunk cost has occurred
 - Industry player can walk away from an unreasonable request unless geography prevents a build around
 - Tribe may want new revenues
- Expansions fall somewhere in between new projects and renewals of existing projects
 - Lots of options on how to handle

PROCEDURES FOR DETERMINING FAIR AND APPROPRIATE COMPENSATION

1. Federal Court System (already in place to resolve disputes)
 - Court of Claims
 - District Court
 - Circuit Court of Appeals
 - U.S. Supreme Court
2. Federal Energy Regulatory Commission (already grants certificates for building or abandoning energy delivery systems)
3. Special Commission for ROWs
 - Retired or Senior Judges
 - Energy Industry and Indian Officials
4. Binding Arbitration