



May 15, 2006

**VIA email to IEED@bia.edu**

Office of Indian Energy and Economic Development

RE: Section 1813 Study on Energy Rights-of-Way Across Tribal Land

Under section 1813 of the Energy Policy Act of 2005 (hereinafter referred to as “section 1813”), Congress required the Secretaries of the Departments of the Interior and Energy to jointly conduct a study of energy rights-of-way on tribal land. As part of that study, on March 23, 2006, the Department of Energy (“DOE”) and the Department of Interior (“DOI”) requested that the Interstate Natural Gas Association of America (“INGAA”) survey its member companies regarding their experiences negotiating right-of-way agreements over tribal land. In response to the survey request, and pursuant to the Federal Register Notice dated May 5, 2006, INGAA submits the following comments.

INGAA is a national, non-profit trade association that represents the interstate natural gas pipeline industry operating in the United States, as well as comparable pipeline companies in Canada and Mexico. INGAA’s United States members account for virtually all of the natural gas transported and sold in interstate commerce. INGAA members have an interest in the subject matter, inasmuch as a number of its members, particularly those in the West, transport natural gas via rights-of-way across tribal land.

## SUMMARY

To ensure that necessary natural gas transportation infrastructure is constructed, that natural gas transportation costs to consumers remain fair and reasonable, and that tribes are paid reasonable compensation for rights-of-way across their land, there must be an objective, consistent, transparent, and uniform standard for valuing these rights-of-way. While negotiations between tribes and pipeline companies may result in agreements for the payment of fair and reasonable compensation, a legal process or mechanism must be in place that provides for an established metric for determining an appropriate right-of-way compensation fee and an ultimate decision-making process should negotiations break down between the pipeline and the tribe. An objective valuation metric will provide the tribes with a fair and just return and, at the same time, provide the interstate natural gas pipeline industry with the ability to deliver needed natural gas to consumers at reasonable costs.<sup>1</sup>

As noted, in response to a request from DOE/DOI, INGAA surveyed its member companies seeking information on their experiences in negotiating rights-of-way on tribal land. As detailed more fully below, the survey as well as informal discussions with members shows that: (1) pipelines are paying rights-of-way fees far in excess of the fair market value

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<sup>1</sup> DOE and DOI should be aware that the costs of the tribal rights-of-way for Federal Energy Regulatory Commission -certificated, interstate pipelines are costs that generally will be passed on to ratepayers. These costs are items that are included in a pipeline's cost of service which, in turn, is recoverable through a pipeline's rates. Thus, the rights-of-way costs will be one of the components of the "just and reasonable" maximum rate that Federal Energy Regulatory Commission will allow the pipeline to charge its consumers.

As a result of competition in some markets, some ratepayers may successfully negotiate discounts. In setting rates, however, the Federal Energy Regulatory Commission also permits a pipeline an allowance for such discounts and the dollars that would otherwise be uncollected because of discounts are generally charged to remaining customers who do not have discounts.

Under some circumstances, the pipeline may still be unable to recover all of these costs. This would ultimately result in detrimental impacts to consumers since the lowered achieved returns, due to the inability to recover costs, may not sufficiently compensate the pipeline for its risk of building the infrastructure. In the future, if returns are insufficient, the pipeline may choose not to build or expand its infrastructure.

of easements for comparable land; (2) negotiations for both initial and renewal rights-of-way are taking longer to negotiate than in years past; and (3) most pipelines were not satisfied with their rights-of-way negotiations.

## **COMMENTS**

As confirmed by its survey and in conversations with member companies (several of whom, as discussed, *infra*, would not participate in the survey due to concerns about the impact such participation could have on present or future negotiations with tribes), the interstate pipeline industry is experiencing increasing difficulty in negotiating both new and renewal rights-of-way with Native American tribes. Our members – primarily, but not exclusively, those located in the West – have said that negotiating both new and renewal rights-of-way is an increasing problem for all pipelines. It is certainly not an isolated problem for one energy company and one tribe. Furthermore, our members have seen the difficulties, complexities and uncertainties of negotiating both new and renewal of rights-of-ways over tribal land increase without the benefit of a neutral third-party decision-maker to resolve disputes. Because of this, many members expressed serious concerns not only about renegotiations for existing rights-of-way but about siting new rights-of-way on tribal land in the future. One possible outcome of this increasing trend is that necessary infrastructure is more costly both in environmental and economic terms due to having to “go around” tribal land. Another is that necessary infrastructure may not be built.

### **A. The 1998 INGAA Foundation Study**

To illustrate this point, in 1998, the INGAA Foundation, Inc., INGAA’s research arm, conducted a study of rights-of-way across Native American lands. The report was based on a survey of linear facilities – interstate gas pipelines, electric power transmission, highway

owners, telecommunications networks and water systems – crossing tribal lands. The information was aggregated to protect the identities of the respondents. As is the case with the current study, which will be discussed herein, while the Foundation offered the assurance of anonymity, many companies chose not to participate due to the concern that it would damage their relationship with the relevant tribe. The study was ultimately not published due to our members' concerns over the repercussions from the tribes of making the study public and the impact the study could have on future rights-of-way renegotiations. Recently, however, with the enactment of section 1813 and DOE/DOI's request for data on historic rights-of-way compensation, our members decided that it is important to make the study public. INGAA's members see a continuing and concerning trend towards increasing demands for rights-of-way payments and increasing demands to shorten rights-of-way terms. Accordingly, we are attaching the complete study to these comments and will reiterate, as we did in the April Denver scoping meeting, the study's conclusions.

Briefly, the 1998 study, prepared by the consulting firm Stone and Webster, collected Native American rights-of-way data across 15 states and identified approximately 2,500 miles of existing rights-of-way easements on Native American lands. U.S. data was collected from companies with assets in Arizona, California, Colorado, Idaho, Michigan, Minnesota, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Texas, Utah, Washington, and Wisconsin. Most mileage-based data came from interstate gas pipelines and electric transmission companies. Thirty-two Native American tribes were identified in the study but two Native American tribes represent a significant portion of the mileage involved in these transactions. The study observed that:

- A significant number of Native American easements for existing rights-of-way will expire in the next 20 years.
- Rights-of-way payments to Native American tribes on tribal lands are escalating in the 1990s at a rate far in excess of historical trends since the 1950s. These payments are far in excess of either independent or in-house appraisal values.
- Lump sum payments to Native American tribes for renewal of right-of-way easements that are not directly related to the size of the easement appear somewhat common. The payment size has escalated from \$2,500 in the 1970s to \$250,000 in the 1990s. These payments ranged from educational scholarships to signing bonuses.
- Data on annual payments to tribes for continuing right-of-way usage indicate that some recent (that being pre-1998) annual payments exceed \$1,700 per mile per year. (For a 20 year easement that would be \$34,000 per mile at which point the energy company would need to renegotiate the easement again).
- The average tribal lands right-of-way payment during the 1990s (which was \$76,109 per mile) is almost 70 times higher than average payments made during the 1980s (which was \$1,101 per mile).
- The lowest tribal lands average payments for more recent new projects in the 1990s are over 110 times more expensive than the 1980s average and 50% higher than for projects completed earlier in the 1990s.

#### **B. Recent INGAA Survey**

As noted, in March 2006, INGAA agreed to survey its member companies to respond to DOE/DOI's request for data on compensation practices for right-of-way across tribal land. As with the 1998 study, our members expressed reservations about providing data to

DOE/DOI: (1) the information is highly sensitive business information; (2) some of the information is subject to confidentiality agreements between the pipeline company and the tribe; (3) revealing information to DOE/DOI could result negatively on the pipeline's relationship with the tribe and the pipeline's ability to renegotiate their easements with that tribe; (4) there was inadequate time to collect the data before the May 15 filing deadline; and (5) disclosure of payments to a tribe (which are significantly in excess of fair market value) could be used by other tribes as a starting point for their negotiations.

As with the 1998 study, to address member concerns, INGAA agreed to aggregate its survey data so that individual companies and tribes would not be identified. INGAA asked its members for data related to both original acquisition of rights-of-way and renewals. We asked our members whether the compensation they paid for their rights-of-way was based on independent third party appraisals or a review of land values at the time the right-of-way was negotiated and if so, whether the agreed upon payment to the tribe matched or exceeded the appraisal or land valuation.

Six INGAA (interstate gas pipeline) companies and one products pipeline,<sup>2</sup> a non-INGAA member, responded to the survey. Several other members with significant rights-of-way across tribal lands chose not to respond due to their concern about current and/or future renegotiations with their tribes and the impact on their business relationship. Therefore, while the response rate captured many of the INGAA companies with rights-of-way over tribal land, INGAA believes its survey significantly understates the problem. The responding companies

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<sup>2</sup> Under the terms of the 1813 study, companies were able to submit information to EEI and INGAA and keep their identity confidential. INGAA was contacted by one products transport pipeline company that provided INGAA its data. This company is not an INGAA member but submitted its data through INGAA to be able to maintain the confidentiality of its data.

reported a total of 20 rights-of-way across tribal lands.<sup>3</sup> These rights-of-way were with 15 different tribes over 11 states. Reporting companies stated that some right-of-way negotiations were conducted with both the Bureau of Indian Affairs and the tribe (with active tribe involvement); other negotiations were conducted only with the tribe, and at least one right-of-way was conducted only with the Bureau of Indian Affairs. Further, all respondents providing data regarding the amount paid for the right-of-way compared to the value of the land at the time of negotiation reported that they had paid compensation well in excess of fair market land values.<sup>4</sup> In many instances, the pipeline made a contribution to the tribe in the form of scholarships, recreational funds, etc. in addition to the per rod payment. The average terms for both renewal and original rights-of-way were 20 years. However, initial negotiations generally began with the tribe asking for much shorter right-of-way terms. Few of the respondents were satisfied with the negotiations. Two respondents reported that right-of-way renegotiations took at least two years. Other respondents reported that negotiations took significantly longer (with one respondent stating that negotiations took 10 plus years).

### **C. Case Studies**

INGAA recognizes that DOE/DOI wish to rely on case studies as well as survey data. Accordingly, INGAA offers the following nine case studies (five from an interstate gas pipeline, El Paso Natural Gas, and four from a products pipeline that wishes to remain anonymous).

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<sup>3</sup> The INGAA survey did not report rights-of-way on allottee lands since DOE/DOI made clear that they were interested in information related to rights-of-way over tribal lands.

<sup>4</sup> Due to the short time frame to provide comments, not all respondents had the time to research original land values and/or appraisals for rights-of-way on tribal lands.

## 1. El Paso/Navajo

El Paso Natural Gas (EPNG) has had a long relationship with the Navajo Nation (Nation). The core of this relationship has been EPNG's natural gas pipelines, which extend nearly 900 miles through the Nation while delivering natural gas from the San Juan and Permian basins in New Mexico and Texas to the Phoenix and Southern California markets. The pipeline has been in operation for over 50 years and, with the help of six compressor stations located on the Nation, moves more than 2 billion cubic feet of natural gas per day. EPNG has invested substantial sums in the construction and maintenance of this pipeline network, which has provided significant economic benefits to the Nation over the years. These benefits include increased local employment, tax revenues, and expenditures on Navajo businesses and services, as well as substantial annual lease payments for pipeline rights-of-way (ROW).

When EPNG built the pipeline in 1952, it paid about \$2 per rod for ROW across Navajo tribal lands. Contrary to popular belief, this was not less than was paid to private landowners. The Navajo were paid approximately twice per rod what was paid to similarly situated private landowners. In the time since its building, EPNG has continued to pay more for rights of way on Navajo tribal land than comparable private land.

In 1991, for example, EPNG built expansions to the pipeline which affected both private landowners and the Nation. On average EPNG paid just over \$40 per rod to private landowners for a perpetual ROW easement to accommodate the expansion (inclusive of payments for damages). Yet EPNG paid the Nation about \$186 per rod for only a fifteen year easement for the same expansion. If EPNG were required to make the same payment every fifteen years to the Nation to renew this easement, they would end up paying \$358 per rod in net present value (NPV) terms.<sup>5</sup>

Yet even these calculations underestimate the cost of obtaining an easement from the Nation. This is true for two reasons: the Nation is demanding ever higher payments per rod for ROW renewals, and with each new renewal both sides expend resources negotiating the new rate. To see how the Nation's demands have increased over time, consider the per rod payment adjusted for inflation using the national consumer price index (CPI). Adjusting for inflation in this way,<sup>6</sup> the \$2 per rod paid in 1952 is equivalent to about \$15 in 2006, the \$54 per rod paid in 1985<sup>7</sup> is equivalent to \$100 in 2006, and the \$186 per rod paid in 1991 is worth almost \$275 in 2006. In the current negotiations, the Nation is demanding more than \$1000 per rod<sup>8</sup>.

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<sup>5</sup> This NPV calculation assumes a 5% real interest rate.

<sup>6</sup> See <http://data.bls.gov/cgi-bin/cpicalc.pl>.

<sup>7</sup> The 1986 payment is calculated as the present value of the signing amount plus an annual inflation-adjusted stream of payments for the twenty year life of the easement assuming a 5% real discount rate.

<sup>8</sup> Similar to the 1986 payment, this amount is calculated as the present value of the proposed signing amount plus an annual constant-value stream of payments for the twenty year life of the easement assuming a 5% real discount rate.

These calculations imply that from 1952 to the present, the Nation's compensation per rod demands have been increasing on average at more than 8% per year above the rate of inflation. The combined effect of this escalation in fees has been to drive ROW payments well above fair market value, the original standard for their valuation. In fact, a third party appraiser has valued the ROW that are the subject of the current negotiation at less than 1% of current Nation demands.

## **2. El Paso/Southern Ute**

El Paso has had leases dating back to the 1950s on the Southern Ute Tribe's land in Colorado. The business relationship between El Paso and the Southern Ute Tribe (Tribe) involves both mainline and gathering system facilities. In the 1950s through the mid 1990s, both mainline and gathering system easements were acquired in the name of EPNG.

EPNG has two mainline pipelines on the reservation (the 24-inch 1205 Line and the 20-inch 1218 Line), each approximately 6.5 miles in length. El Paso also had two gathering systems, Colorado Dry Gas and Blanco, on the reservation. In the mid 1990s El Paso set up the El Paso Field Services Company (EPFS) and assigned all of its gathering facilities to EPFS. Through the years El Paso and the Tribe renewed both the mainline and gathering facilities with either 10 or 20 year terms.

In the 1998 renewal of rights covering mainline and gathering facilities El Paso, EPFS and the Tribe engaged in protracted negotiations. At that time, the ROW for the pipelines were internally appraised at about \$318,000 and the ROW for the gathering systems were appraised at about \$77,000, which is comparable to what was being paid to private landowners at that time.

During negotiations, the Tribe requested that EPFS sell its Colorado Dry Gas gathering system (81 miles of pipeline and related facilities) to them. EPFS had received offers from outside companies in excess of \$16 million for this gathering system, assuming renewed ROW.

As part of the final agreement, EPFS sold its Colorado Dry Gas Gathering System to the Tribe for the discounted price of \$2 million (cash consideration). In exchange, the Tribe granted EPFS a 20 year easement for its Blanco Gathering System (7 miles of pipeline and related facilities) The Tribe also granted EPNG a 20 year easement for its interstate pipeline.

In sum, when the discount on the purchase of the Colorado Dry Gas Gathering system is included, the cost to EPFS and EPNG for extending its ROW on the Blanco system and the mainline, respectively, was approximately \$14 million. This \$14 million cost was incurred for ROW that had been internally appraised for less than \$400,000 in total.<sup>9</sup>

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<sup>9</sup> EPFS had received offers indicating that the Colorado Dry Gas Gathering System was worth no less than \$16 million with a renewed ROW. To obtain these gathering system assets from EPFS, the Southern Ute tribe paid EPFS \$ 2 million in cash and provided the above-discussed ROW renewals on another EPFS gathering system and on EPNG's mainline.

### **3. El Paso/Other Native American Tribes**

Like many pipeline and electric transmission companies in the southwest, EPNG has ROW across many tribal reservations and must periodically renegotiate terms on each of them. Renewal costs are escalating for many with tribes now demanding significant multiples of fair market value. A few additional examples will be present here.

#### **a. Laguna Tribe**

The EPNG 30-inch 1300 and 1301 Lines cross the Laguna Indian Reservation near Laguna, NM, approximately 80 miles west of Albuquerque. These lines, collectively referred to as the Plains to Gallup Crossover Line (Crossover Line), carry natural gas from the Permian Basin to the San Juan Basin, allowing EPNG to move gas from its southern pipeline system to its northern pipeline system at times of need. In addition to the Crossover Line, EPNG has a compressor station on a 58 acre tract of land on the Laguna Reservation (Laguna Compressor Station). In total the 56 miles of pipeline and compressor station located on the reservation occupy approximately 284 acres of land.

El Paso originally acquired a 20 year term easement for the Crossover Line and a lease for the Laguna Compressor Station site. These rights were renewed in the 1970s. In 1993 the easement was appraised at a value of \$300 per acre, yet the negotiated settlement for a 20 year extension to EPNG's ROW was about \$7,000 per acre. This is more than 20 times greater than the appraised fair market value of the land.

#### **b. Acoma Tribe**

The Crossover Line referred to above also crosses the Acoma Indian Reservation near Acoma, NM. The Acoma Indian Reservation is adjacent to and west of the Laguna Indian Reservation. The 23 miles of the Crossover Line on the Acoma reservation involve about 85 acres of right of way.

As with the easements on the Laguna reservation, the original easements on the Acoma reservation were renewed in the 1970s and again in 1993. In 1993 the easement was appraised at a value of \$300 per acre, yet the negotiated settlement for a 20 year extension to EPNG's ROW was about \$7,000 per acre. This settlement was over 20 times greater than the fair market value of the land.

#### **c. Gila River Indian Community**

EPNG and the Gila River Indian Community (GRIC) of Arizona began a business relationship in the 1930s. In those early years, El Paso was expanding its young southern pipeline system (1100 Lines) westward through New Mexico and Arizona all the way to the California border.

EPNG constructed a 10-inch pipeline (1007) in the 1930s off of its 1100 Lines to reach the Phoenix area. The construction of the 1007 Line involved crossing approximately

20 miles of the GRIC's lands, which border the southern side of Phoenix. EPNG initially acquired a 20 year term easement from the GRIC and obtained additional easements as its pipeline system was expanded to meet the growing demand of the Phoenix area. Currently EPNG has over 100 miles of pipeline that cross the GRIC.

In 1987, an easement was negotiated that would renew the ROW for all facilities with a common expiration date of December 31, 1994. An approved GRIC appraiser appraised the existing ROW at a total of \$130,000. Despite this appraisal, and a revised appraisal of \$260,000, the final agreement was reached at \$3.2 million. This settlement was almost 25 times, or three million dollars, greater than the original estimate of the fair market value of the easement.

When EPNG renewed its ROW in 1994, it paid \$3.588 million for a ten year renewal. An additional \$5.2 million was paid in 2004 for an additional ten year renewal, with additional payments made for administrative costs, a scholarship fund, and an education fund.

The case studies below document the experience of a products pipeline company that wishes to keep its identity confidential. To maintain anonymity, the name of the tribes it has dealt with will also be kept confidential. Examples of its experience with four different tribes will be sketched here. These experiences provide additional compelling evidence that right-of-way costs across tribal trust land have been escalating and are moving further from the fair market value standard of the original easements.

## **1. Tribe A**

In the early 1980s the company built a pipeline across Tribe A's trust lands. The initial ten year ROW agreement was for \$20 per rod, which was the appraised value at the time. The renewal negotiations a decade later, which included an expansion to the pipeline, dragged on for many years. The final agreement was for almost \$800 per rod, more than ten times the value of comparable easements at the time.

## **2. Tribe B**

In the early 1980s, the company negotiated a ten year ROW across Tribe B's trust lands. Despite a valuation of \$20 per rod, the company paid almost \$30 per rod. When the company renewed this ROW a decade later, the valuation was between \$30 and \$40 per rod. Nevertheless, the final negotiated agreement was for \$200 per rod, more than five times the estimated fair market value of the easement. A further renewal, which included an expansion to the pipeline, was for \$640 per rod. This \$640 per rod figure was more than eight and half

times the high end of the range of estimated fair market values. In recent negotiations the tribe is requesting approximately \$1600 per rod, an additional 250% increase in per rod ROW fees.

### **3. Tribe C**

The company built another pipeline in the early 1970s. This pipeline crossed the land of Tribe C. The original 50 year easement was negotiated for the same as payments made to private landowners, about \$4 per rod. Less than a decade later, the company needed to obtain an additional easement for an expansion of the original pipeline. Comparable easements at the time were valued at \$12 per rod. The company and Tribe C negotiated the new easement for \$16 per rod as well as a shortened term for the original easement. A further renewal in the mid 1990's was agreed to for \$230 per rod, more than seven times the cost of comparable easements at the time. In recent negotiations the tribe is requesting over \$750 per rod, more than 15 times the cost of comparable easements.

### **4. Tribe D**

The pipeline that the company built in the early 1970s also crosses the land of Tribe D. The original 50 year easement for a ROW on Tribe D's land was negotiated for roughly \$6 per rod, 50% more than Tribe C or comparable private landowners received. At the time of the expansion, Tribe D negotiated a rate of \$52 per rod plus a shortened term for the ROW agreement associated with the original expansion. This \$52 per rod figure is more than three times what Tribe C received and four times the value of comparable easements. For the mid-1990 renewal, Tribe D negotiated an amount similar to Tribe C, roughly \$220 per rod, still more than seven times the cost of comparable easements. Recently this tribe has also requested over \$750 per rod, or 15 times the cost of easements on comparable land.

INGAA will verify these case studies, as well as its survey data, with the independent auditing/ research company on contract with DOE/DOI or with the Argonne National Laboratory.

## **CONCLUSION**

As both the 1998 study and the current survey and case studies show, rights-of-way across tribal land are taking greater amounts of time to negotiate than before and are resulting in cash payments that far exceed fair market value. Interstate gas pipelines are concerned that siting on tribal land is extremely risky since there is not an objective valuation metric and

third party decision-maker should negotiations break down. INGAA intends to supplement its comments in response to the additional discussion items raised in the section 1813.

Respectfully submitted,

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Attachment



THE INGAA FOUNDATION, INC.

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# **Securing Easements from Native American Groups**

Prepared for The INGAA Foundation, Inc. by:

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# Securing Easements from Native American Groups

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## Executive Summary

This survey describes issues involved in securing land easements or right-of-way from Native American Groups. Natural gas pipelines and other transportation companies that place physical assets in the ground must obtain certain rights from landowners to cross their lands. These rights, or easements, typically involve negotiated payments for the company's right to access the land for new construction, upgrading facilities and maintenance. Native American Groups that have reservations constitute approximately 2.2% (52 million acres) of the total U.S. land area. This land area represents an area approximately the size of Minnesota.

As current right-of-way easements expire, companies should be able to negotiate terms and conditions with Native American Groups that are consistent with expectations from other private and public landowners. These negotiations should be expected to proceed without undue delay or added costs, as long as reasonable market values are being offered. However, actual negotiations vary widely from these expectations, particularly with respect to comparable terms and conditions.

This study relied on written and telephone surveys to obtain information from natural gas transmission, electric power transmission, highway owners, telecommunications networks and water systems about their historical and current right-of-way acquisition issues relative to Native American Group lands.

Native American right-of-way data was collected across 15 states and identified approximately 2,500 miles of existing right-of-way easements on Native American lands. U.S. data was collected from companies with assets in Arizona, California, Colorado, Idaho, Michigan, Minnesota, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Texas, Utah, Washington, and Wisconsin. Most mileage-based data came from natural gas and power transmission companies.

Thirty-two Native American groups were identified in the survey. The survey found a large number of Native American Groups are involved in right-of-way transactions, but two Native American Groups represent a significant portion of the mileage (and acres) involved in these transactions.<sup>1</sup>

Observations about the survey results include:

- A significant number of Native American easements for existing right-of-way will expire in the next 20 years.
- A significant portion of these Native American easements are located on tribal lands as opposed to allotted lands. Respondents indicated that negotiations are becoming more difficult when Native American tribal lands are involved, as opposed to Native American allotted lands.

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<sup>1</sup> To preserve confidentiality, this study does not identify specific companies or Native American Groups.

- Right-of-way payments on allotted lands have been increasing, but generally are supported by independent property appraisals.
- Right-of-way payments to Native American groups on tribal lands are escalating in the 1990's at a rate far in excess of historical trends seen since the 1950's. These payments are far in excess of either independent or in-house appraisal values.
- Lump sum payments to tribal Native American Groups for renewal of right-of-way easements that are not directly related to the size of the easement appear somewhat common. The payment size has escalated from \$2,500 in the 1970's to \$250,000 in the 1990's. The reasons for these payments ranged from educational scholarships to signing bonuses.
- Data on annual payments to Native American Groups for continuing right-of-way usage indicate that some recent annual payments exceed \$1,700 per mile per year.
- The average tribal lands right-of-way payments (\$76,109 per mile) during the 1990's is almost 70 times higher than average payments made during the 1980's (\$1,101 per mile).
- The lowest tribal lands average payments for more recent new projects in the 1990's are over 110 times more expensive than the 1980's average and 50% higher than for projects completed earlier in the 1990's.
- A number of industries have experienced right-of-way issues for renewal of terms, upgrading of facilities and new projects with Native American Groups that are not apparent in private and public land negotiations. Both verbal and other anecdotal evidence has been offered to support survey results.

It cannot be clearly determined from this survey the extent that right-of-way easements are located on Native American lands. If a right-of-way easement width of sixty feet were assumed, then the respondents to this survey utilize less than 0.01% of the Native American lands in the U.S. Likewise, it cannot be determined from this survey what portion of a respondent's assets cross Native American lands. In any case, it should not be assumed that because the survey respondents use only a fraction of the Native American lands, that the economic impact to the respondents is trivial. On the contrary, a significant shift in right-of-way acquisition and renewal costs can affect the economic viability of a project or cause necessary projects to be delayed or rendered uneconomic. When significantly more expensive alternatives are considered and the most efficient investment cannot be made, transporters of goods and services will choose to enter other business opportunities that offer lower barriers and greater economic return.

## **Introduction and Purpose**

Any product or commodity that is transported long distances requires an ability of the transporter to secure rights to cross land that is not owned by the carrier. Both public agencies and private companies must negotiate with landowners to secure right-of-way easements across landmasses and waterways. For some industries where the public need and convenience is demonstrated to an authorized state or federal agency, the right of eminent domain is provided to the carrier. The right of eminent domain gives the carrier the legal right to cross an approved route, with just compensation to landowners for damages and restoration of property. The properties involved in any right-of-way easements are carefully selected to avoid known environmentally sensitive areas when possible.

Project developers in the natural gas industry are using approaches in right-of-way acquisition to minimize the potential difficulties associated with entities not wanting projects in “their backyard” in non-Native American settings. These steps include:

- Numerous local public meetings are held along a proposed route with all known landowners, public officials and real estate brokers before a project applies for any approvals or permits. A presentation of the routing in a given area is presented and local concerns are invited.
- Some projects use local land agents and real estate brokers to determine fair market values.
- Option agreements are sometimes used that provide some up-front partial right-of-way payments to the landowner before construction commences.
- Local contractors, if available, are used to address any follow-up remediation issues when construction is completed. This step avoids the misconception that once a project is built that the owners disappear.

Native American lands represent special challenges for agencies and companies that must traverse these properties. The challenge is both legal and relationship oriented. In the course of history, a large number of Native American groups have been provided properties over which the particular group may claim sovereignty. Based on a review of history, the success of various federal agencies in addressing Native American Group concerns has varied widely. It is not surprising then that the potential for disputes and economically divergent views may arise from time to time.

The purpose of this study is to identify whether significant or unusual right-of-way acquisition or renewal issues exist with Native American Groups. If such issues are identified, many questions follow such as:

- Are the issues significant in terms of economic impacts?
- Do the same issues appear across industries involved in dealings with Native American groups?
- Are the issues identified different from historical trends?
- Are right-of-way issues more prevalent in some selected geographic areas?

### Scope of Work

Stone & Webster was approached by the INGAA Foundation in May, 1998 to conduct a survey of companies involved in securing land easements for either regional or national transportation of products or services. The scope of work included a survey of companies in industries that are likely to have assets that traverse Native American Group lands. The industries selected were natural gas transmission, electric power transmission, highways, telecommunications networks, and water supply systems.

Information on Native American Group lands by state can be obtained from numerous sources; Stone & Webster relied on map information available from Native American groups on the Internet.

Several important guidelines were established early in this project to maintain objectivity in the results. These guidelines included:

- Survey participants would not be specifically identified to the INGAA Foundation.
- Stone & Webster would present data from the survey in such a form that any single participant could not be identified in the responses.

The geographic reach of this study was North America, including Canada. The eight states that were primarily expected to contain significant Native American groups and land included: Arizona, California, Colorado, New Mexico, New York, Oklahoma, Utah and Washington. The survey form was designed so that other states containing lands controlled by Native American groups could be identified by state without limitation. In fact 15 states were reported in the survey.

The survey was designed in two parts. The first portion of the survey required a written response to five pages of questions designed to collect factual data. Response tables were included in the questions. The second portion was a telephone survey. Tables requesting financial information were also sent to participants.

## Conclusions

Survey responses strongly indicate that acquisition of new right-of-way corridors and renewal of existing easements across Native American lands are becoming increasingly expensive and this expense is not related to a rise in the appraisal value of easements. Costs have increased since the 1970s because easements are becoming more difficult to obtain. Acquisition/renewal costs are dramatically changing across Native American tribal lands (as opposed to allotted lands) in terms of direct costs, indirect payments, length of term, and time to execute agreements. These significant cost increases occur across at least three of the industries (natural gas, power and highways) that participated in the survey and are likely occurring in the other industries that chose not to respond as well.

Without differentiating between tribal and allotted Native American lands, Stone & Webster calculated the following results for Native American land costs:

- Average right-of-way payments made during the 1970's averaged \$647 per mile.
- Average right-of-way payments made during the 1980's averaged \$1,101 per mile.
- Average right-of-way payments made during the 1990's averaged \$76,109 per mile from 1990 through 1997.
- Examples of some limited, but exceptionally high costs exist historically (\$795,000 per mile for one project in 1987).
- The lowest average cost in the 1990's was \$1,607 per mile (1994).
- Several respondents' costs for projects in the early 1990's averaged approximately \$51,000 per mile.
- More recent 1990's projects show a cost from \$110,000 per mile to \$240,000 per mile.
- In virtually all data provided the right-of-way width ranged between 45 feet and 75 feet with an average of 60 feet.

These recent payments significantly exceed independent property appraisals by up to 10 times, especially on tribal lands. Other survey results indicate that renewal of existing easements will become a larger issue in the next six to sixteen years because of expiration of existing arrangements. The increased renewal payments appear to have been made in order to avoid litigation. For new and upgraded projects, increased payments are made to avoid construction delays and penalties.

Native American lands, particularly in the form of reservations, exist in at least 25 states. The responses included lands in more than half of these states. Not surprisingly, the responses suggest that easements for natural gas rights-of-way on Native American lands have required a larger number of agreements in certain states where the Native American lands represent a significant portion of the state’s total land area.

### Responses

Stone & Webster sent forty-three written surveys to specific individuals identified from our pre-call screening. From the surveys sent we received 17 official written responses. These responses came from primarily two industry groups, natural gas and power.

The response rate by industry is shown in Figure 1.

Figure 1

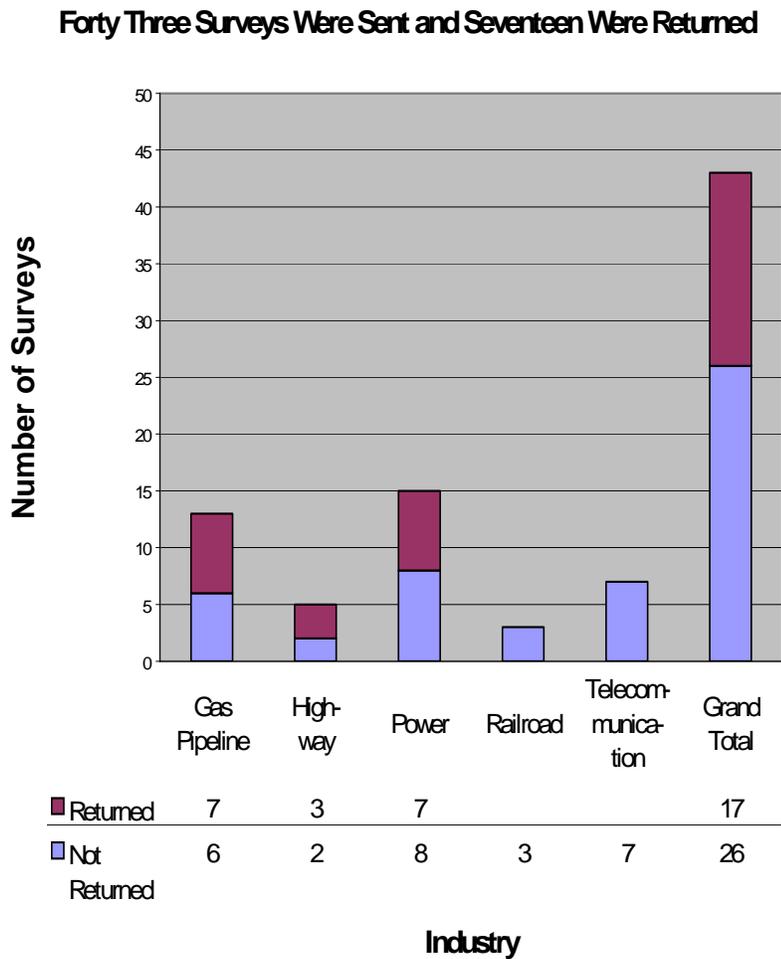
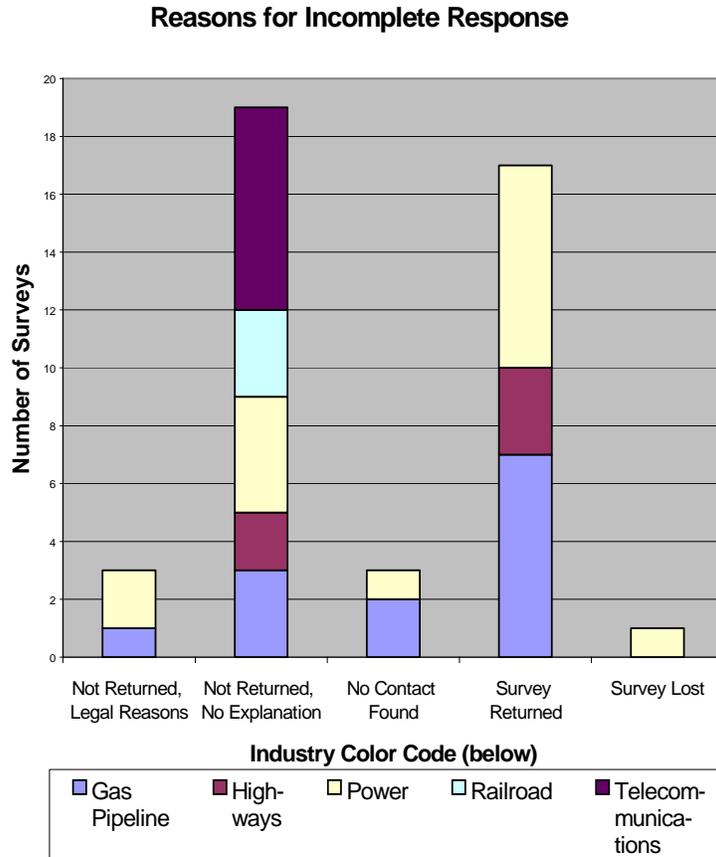


Figure 2 shows the response reasons by industry.

Figure 2



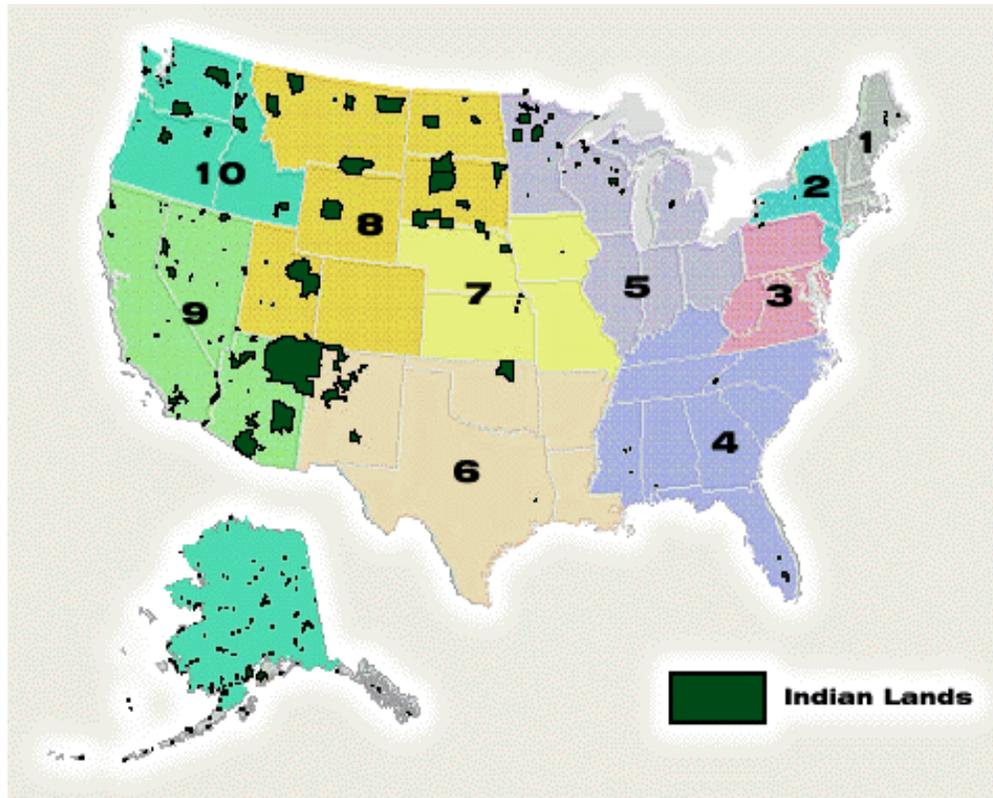
As can be seen from this chart, we received no responses from the rail or telecommunications industries. We did have conversations with appropriate personnel, which we will report under the Anecdotal Evidence section.

In addition to written surveys, Stone & Webster also conducted verbal surveys that focused on training, labor usage, regulatory, financial and legal issues on a cursory basis. There was one question in the verbal survey on financial data that required responses to two tables. These tables were sent to participants for later responses.

## Demographics

The size of lands occupied by Native American groups vary widely across Canadian provinces and the United States. The following map shows roughly the land areas that are controlled by Native American groups.

Figure 3: Map and List of Regional Tribal Program Managers/Coordinators



National Map of Federally Recognized Tribes in EPA Regions:

- Region 1 (ME, NH, VT, MA, RI, CT)
- Region 2 (NY, NJ, PR, VI)
- Region 3 (PA, DE, DC, MD, VA, WV)
- Region 4 (KY, TN, NC, SC, MS, AL, GA, FL)
- Region 5 (MN, WI, IL, MI, IN, OH)
- Region 6 (NM, TX, OK, AR, LA)
- Region 7 (NE, KS, IA, MO)
- Region 8 (MT, ND, WY, SD, UT, CO)
- Region 9 (CA, NV, AZ, HI)
- Region 10 (WA, OR, ID, AK)

## **Survey Description**

The written survey was designed to capture information about each respondent's assets in a particular order. This information included:

- Type of assets
- Diversity of assets (more than one industry)
- Extent of lands that cross Native American group holdings
- Data about renewal of existing rights-of-way
- Data about acquisition of new rights-of-way
- Data about new projects crossing existing rights-of-way
- Data about historical projects that involved Native American lands
- Relative value of assets involved with Native American groups

Stone & Webster commenced conversations with potential participants in late May 1998. Verbal surveys were conducted beginning in early September. The last written survey was received November 4, 1998. The last verbal survey table was received on December 4, 1998.

## **Findings**

Stone & Webster determined that a number of findings were significant from the survey results. In this section we will present our findings by the following general topic areas:

- Types of Respondent's Facilities
- Number of Agreements Involving Native American Groups
- Expiration of Agreements with Native American Groups
- Number of Agreements with Various Native American Groups
- New Projects Across Existing Right-of-Way
- New Projects Using New Right-of-Way Corridors

Following the general topic areas, we will present the findings as they relate to specific types of agreements. These types of agreements are as follows:

- New upgrade projects
- Historical projects
- Renewal of rights-of-way agreements

Finally, for the written survey we attempted to ascertain the book value of the assets relative to the respondent's total assets.

Each of these topic bullets is addressed in the sections that follow.

#### *Types of Respondent's Facilities*

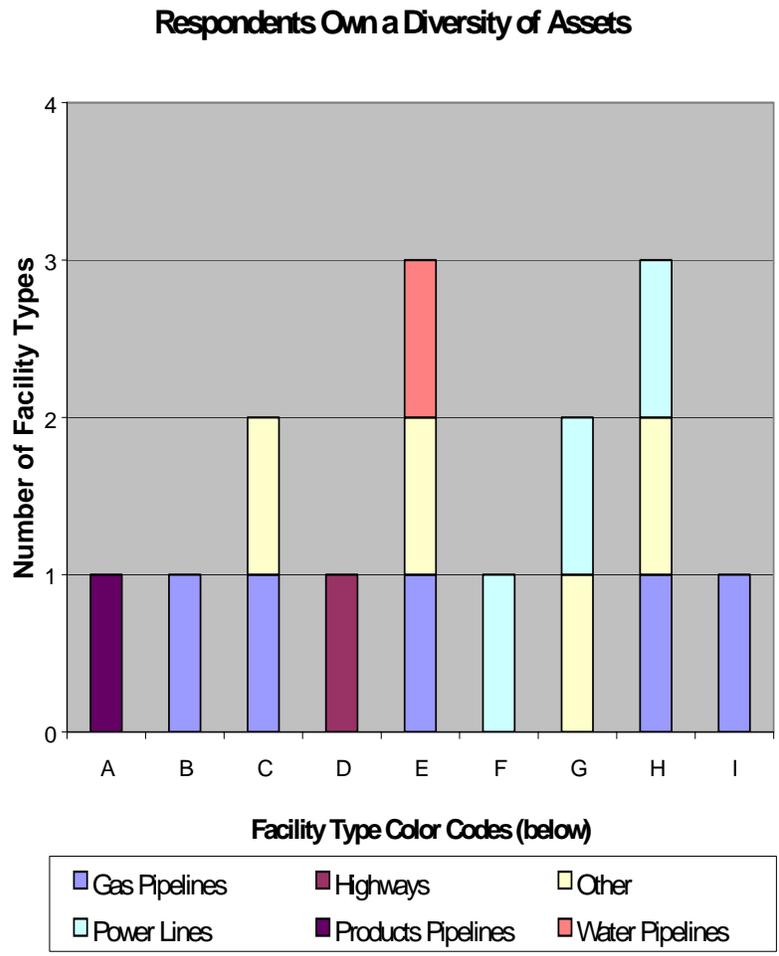
Stone & Webster received eight responses out of seventeen to the section requesting the type of facilities owned by the respondent. The facility type options provided in the survey were:

- Products pipelines
- Water pipelines
- Gas pipelines
- Highways
- Power lines
- Other facilities that may be above, on or below ground (such as conduits or cable)

The eight responses showed significant diversity in assets owned. Of the eight respondents, three own multiple types of assets. The most predominant mix of assets was gas pipelines and power lines. For those respondents having one type of asset, gas pipelines were the most predominant.

This information is provided in the Figure 4.

Figure 4

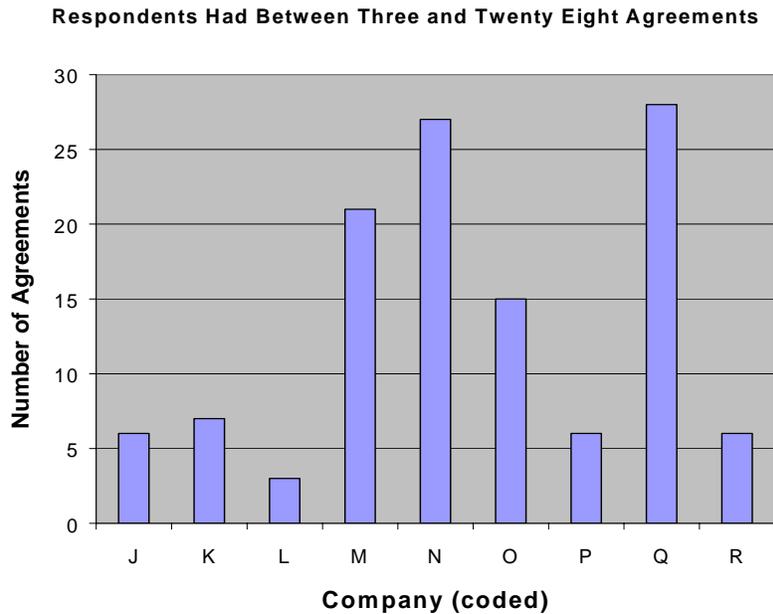


### *Number of Agreements Involving Native American Groups*

The number of agreements (for which expiration information was provided) with Native American Groups ranged from three to 28 with an average of 14.2 agreements per respondent company.

This information is provided in the Figure 5.

Figure 5



### *Expiration of Agreements with Native American Groups*

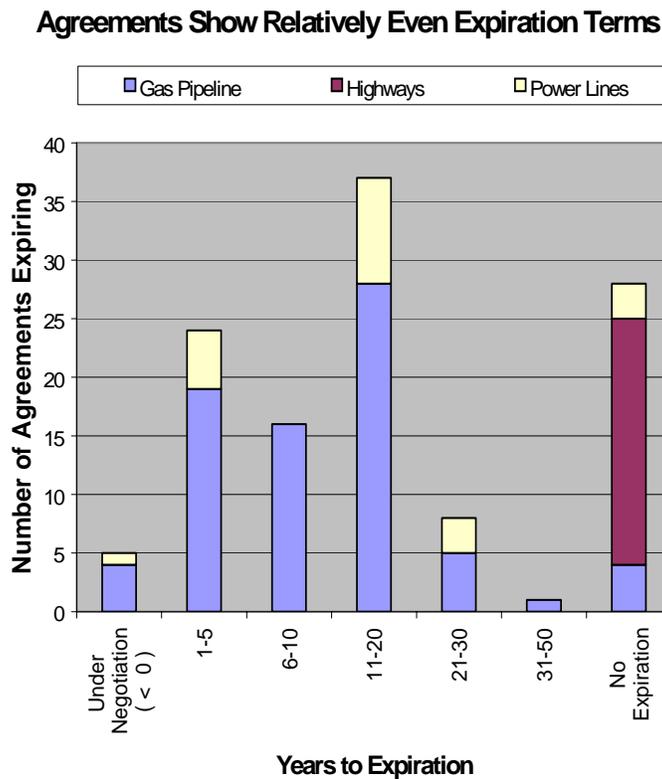
The respondents to our survey indicated the expiration of existing agreements from the point in time of this survey. Three industries (natural gas, power and highways) provided responses to this question. The results of the survey appear to show that the largest group of existing agreements expire between 11 and 20 years from now. However, because the survey question used unequal time periods, the actual results show relatively even distribution of expiring agreements, when considering similar time increments. Stone & Webster also observed that one respondent had a significant portion of its existing agreements constituting a significant portion of all of the agreements expiring in less than 10 years. This one response, if removed from the data set collected, would strongly support a contention that more agreements expire in the longer term.

The next largest group had agreements with no expiration dates. The industry with by far the most agreements with no expiration dates was the highway industry. This result should come as no surprise, as state highway departments require easements in perpetuity to develop highway corridors. State highway departments may have more governmental clout than private companies in determining the length of agreements.

It should be noted that a few respondents showed significant agreements with expiration dates of less than one year (including less than zero, which is interpreted to mean agreements in current negotiations). This result either suggests that the right-of way renewals will become more pronounced around the time period 2010 to 2020, or that companies with short term agreements up for renewal did not participate in the survey.

Figure 6 shows the survey results on this topic. On Figure 6 please note that the eleven to twenty year period is a 10-year interval, compared to five-year intervals to the left. While Figure 6 shows that agreements appear to expire somewhat evenly over the next twenty years, the sizes of the easements covered by each agreement are not evenly distributed. Figure 13 illustrates how the easement distances covered by these agreements compare with expiration dates.

Figure 6



*Number of Agreements with Various Native American Groups*

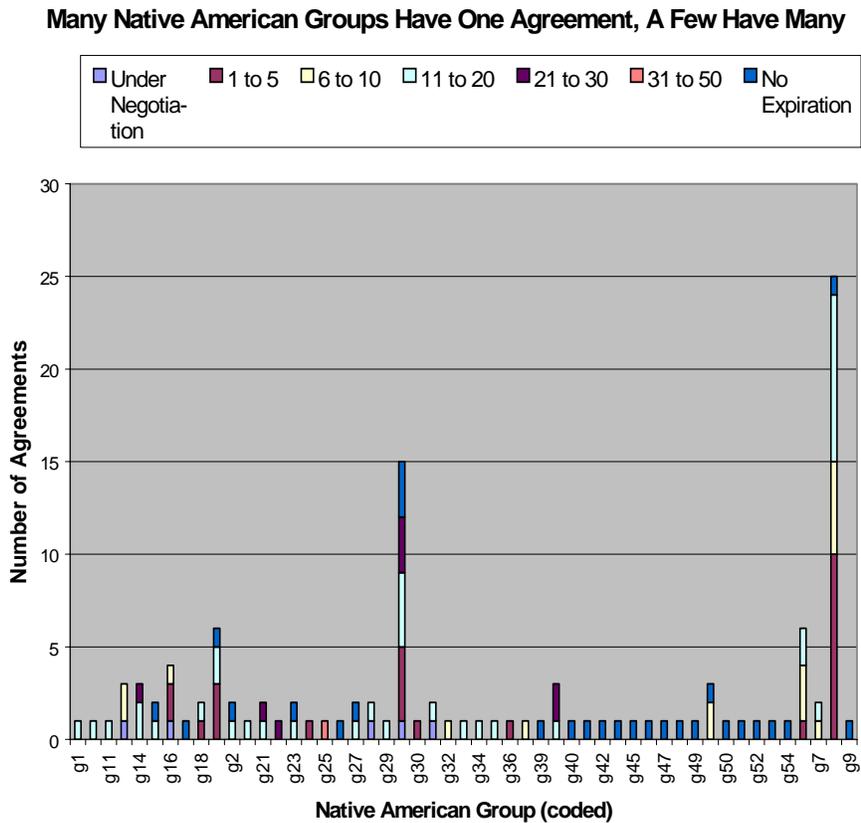
In the survey, we requested that the name of the Native American Group be identified. This information was requested so that we could examine the diversity of Native American groups across different respondents and industries. The response was very interesting. Fifty-one different Native American groups were identified in the survey responses. These Native American groups were geographically dispersed.

An interesting (and not totally surprising result) is that most respondents have only one existing agreement with a particular Native American group. Thirty-two of the fifty-one (or 62%) separate Native American groups identified in the survey have only one right-of-way agreement with a respondent. Only four Native American groups had more than five agreements with any respondent, with only two Native American groups having in excess of ten agreements.

Further review showed that the expiration dates of these various Native American right-of-way agreements is entirely mixed, with no apparent distinguishable patterns.

Figure 7 shows the Native American groups and the number of agreements with each.

Figure 7



### *New Projects Across Existing Right-Of-Way*

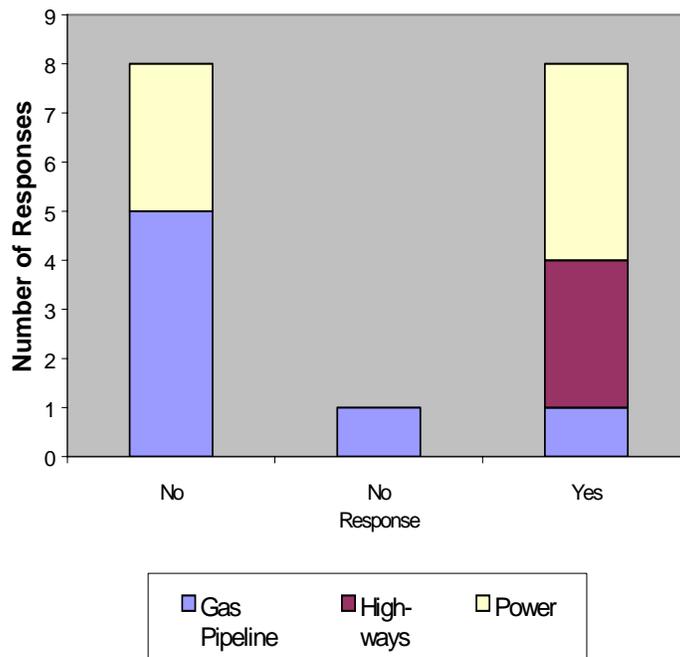
In developing this survey in conjunction with the INGAA Foundation, one of the more important elements of the survey involves what impact new projects may have upon Native American lands. Both the Native American Groups and the entities crossing these lands could see this new activity both as an opportunity to expand systems to meet growing demand for what is being transported (power, liquids, natural gas or vehicles via highway), or for Native American groups, additional sources of revenue. Both groups could view this new activity as a threat. Companies may view the threat in terms of financial burdens and Native American groups could view it as an irreversible loss of some rights in tribal lands.

Stone & Webster collected responses concerning new projects that utilize the existing or immediately adjacent right-of-way as well as projects requiring new right-of-way corridors. The survey responses were equally divided between those planning new projects across Native American lands, and those that were not. The industries with the most new projects planned were highways and power transmission systems. Only one respondent chose not to answer this question.

Figure 8 shows these results.

Figure 8

#### **About Half Have No New Projects Across Existing ROW**



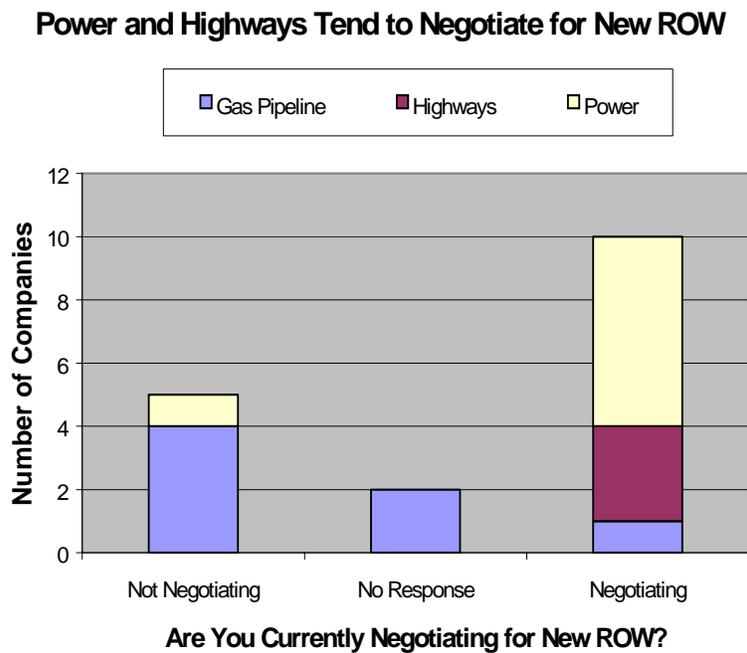
Our survey showed that more than half of these respondents are currently in negotiations concerning these existing right-of-ways. Stone & Webster cannot determine whether this is a statistically significant portion of all new projects without further information beyond the scope of this study.

### *New Projects Using New Right-of-Way Corridors*

Similar to the analysis above, Stone & Webster collected responses pertaining to the need for new right-of-way corridors for new projects. Ten of the seventeen respondents indicated that they are currently acquiring (or attempting to acquire) right-of-way on Native American lands that are different from existing right-of-way.

Figure 9 shows these responses. Again, power and highways are the most notable industries currently negotiating for new ROW.

Figure 9



Stone & Webster also requested the respondents who are acquiring new right-of-way to identify what Native American groups were involved, and how many agreements were under negotiation. Only three of ten respondents provided responses that would identify the Native American groups involved. All three respondents were in the natural gas industry. Reasons for not providing responses or examples (of Native American groups involved in negotiations) were also collected. Examples may include coded information known only to the respondent without identifying the specific group. We received numerous combinations of data and examples, but very few complete responses containing both components.

Stone & Webster also analyzed responses to questions about the starting point in negotiations and whether there were any common threads concerning the length of term of the new agreements. Without presenting the specific results, Stone & Webster observed that the length of term most frequently sought by Native American groups in opening negotiations was five years less than offered. From the data collected, there does not appear to be a common expiration date or term being sought.

### *Historical Projects*

To ascertain whether Native American group interactions have changed over time, the written survey requested information concerning right-of-way activities within the last ten years. A number of respondents chose not to provide data for these questions generally because that data was not easily accessible. Computerized records and query capabilities have not made appreciable inroads to the right-of-way records of any of the respondents to our survey. For those who did respond, it was obviously a tedious task.

Native American lands in the United States are divided into two groups, allotted and tribal. A brief review of American history reveals that territorial expansions mainly during the late 1800's caused significant displacements of Native American groups, particularly through legislative acts designed to relocate tribes. Some 370 treaties were negotiated with Native American groups, mainly between 1850 and 1867 that established tribal lands. A large number of reservations were formed during the period that still appear to retain some aspects of their own sovereignty.

Beginning in 1887, Native American groups were divided up piecemeal using an allotment policy that subjected landowners to federal revenue laws, unilateral laws of Congress and presidential rulings. Reservations were broken up and allotted to the heads of Native American families in 160 acre pieces.

Today there are approximately 300 federal reservations totaling approximately 52 million acres located mainly in western states. The U. S. Native American reservation land area represents 2.2% of the total U.S. land area, approximately the size of the state of Minnesota. The largest reservation is held by the Navajo tribe, with approximately 14 million acres, or 27% of the Native American tribal lands. These tribal lands are sometimes also referred to as trust lands.

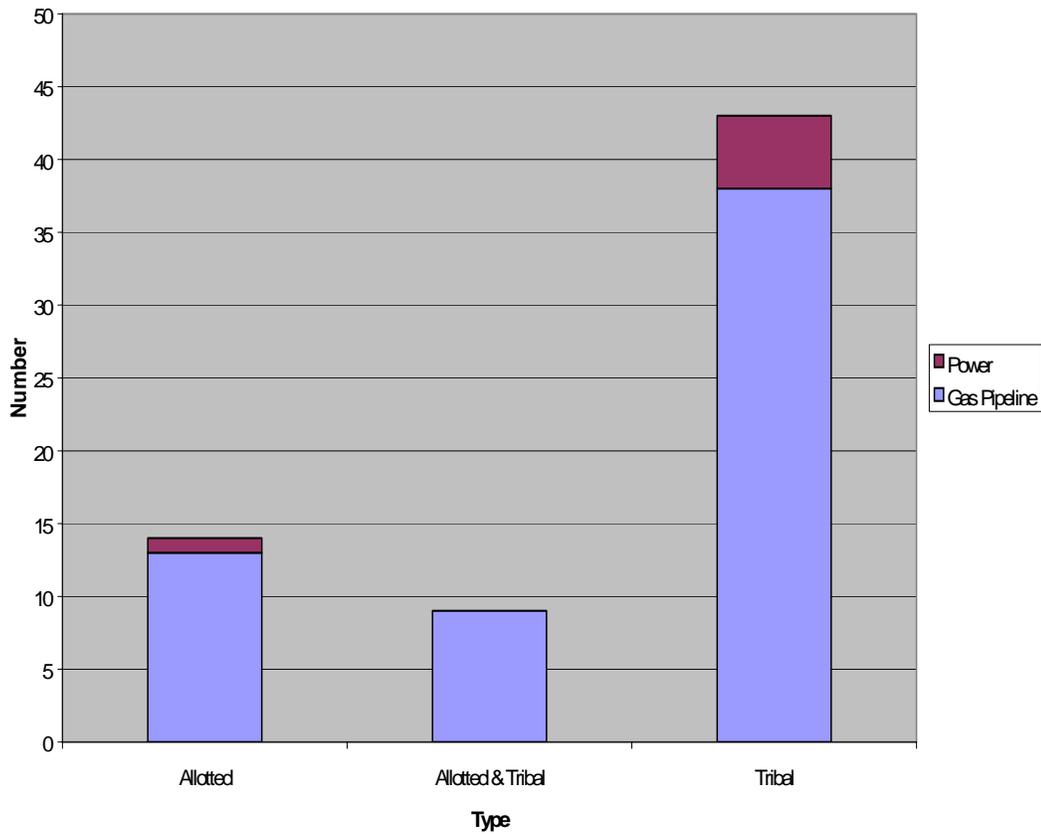
From the respondent's answers, we offer the following observations:

- Most responses concerning the kinds of lands involved in historical right-of-way acquisition were provided by the natural gas industry, with some response from the electric power industry.
- Much more than half of the right-of-way agreements involved tribal lands as opposed to allotted, or allotted and tribal combinations.

These results are shown in Figure 10.

Figure 10

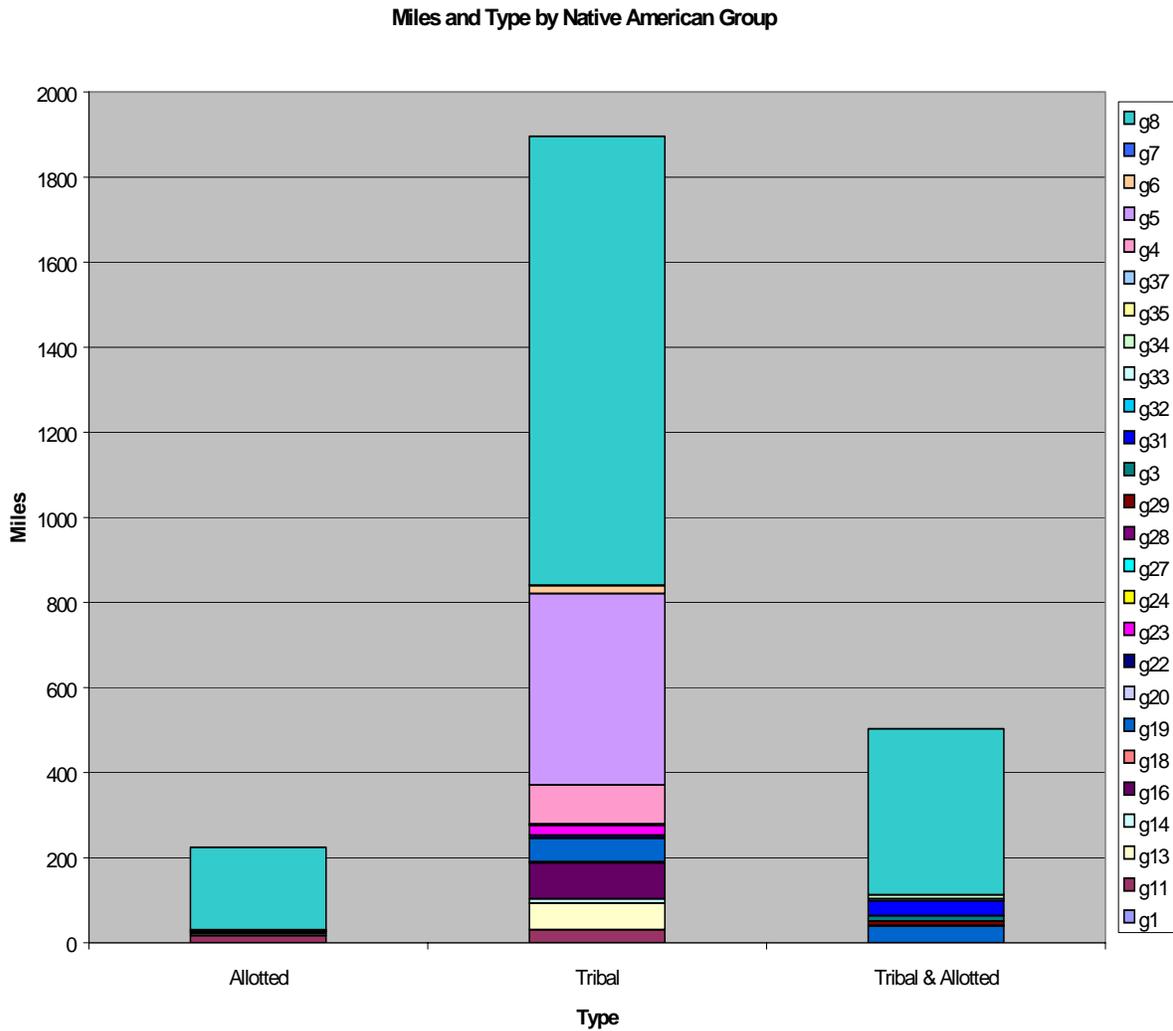
### Type of Agreements by Industry



- Data on over 2,500 miles for right-of way across Native American lands was provided.
- Most of the responses were from the natural gas industry. The responses from the natural gas industry represent approximately 1% of the total miles of natural gas pipelines in the U.S.
- Over 26 Native American groups were identified (in the written survey).
- Two of the Native American groups represent a substantial portion of the total miles involved in right-of-way acquisition.

These results are shown in Figure 11.

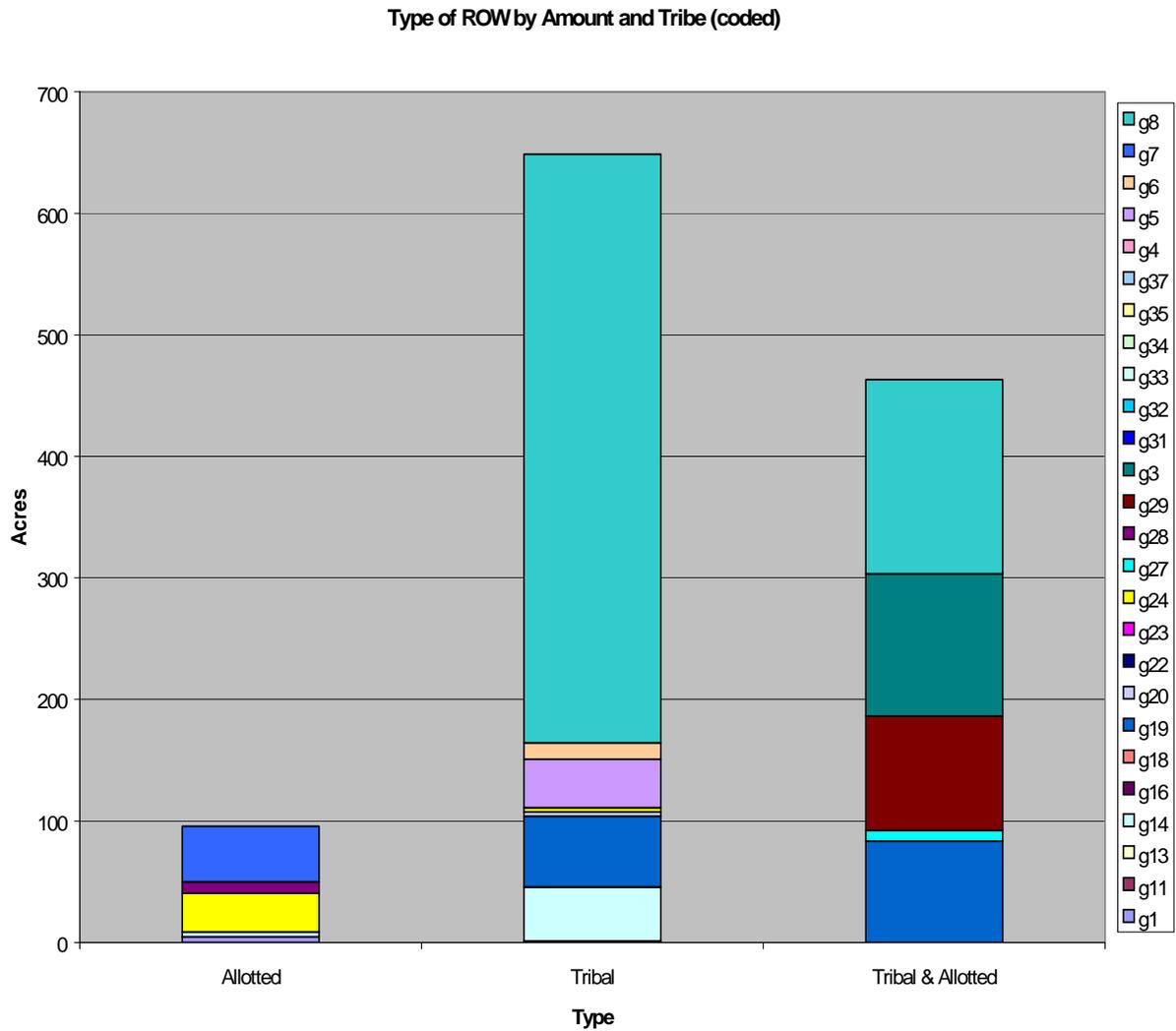
Figure 11



- Using total acres acquired, as opposed to total mileage, provides similar results in terms of the tribal versus allotted lands splits.

These results are shown in Figure 12.

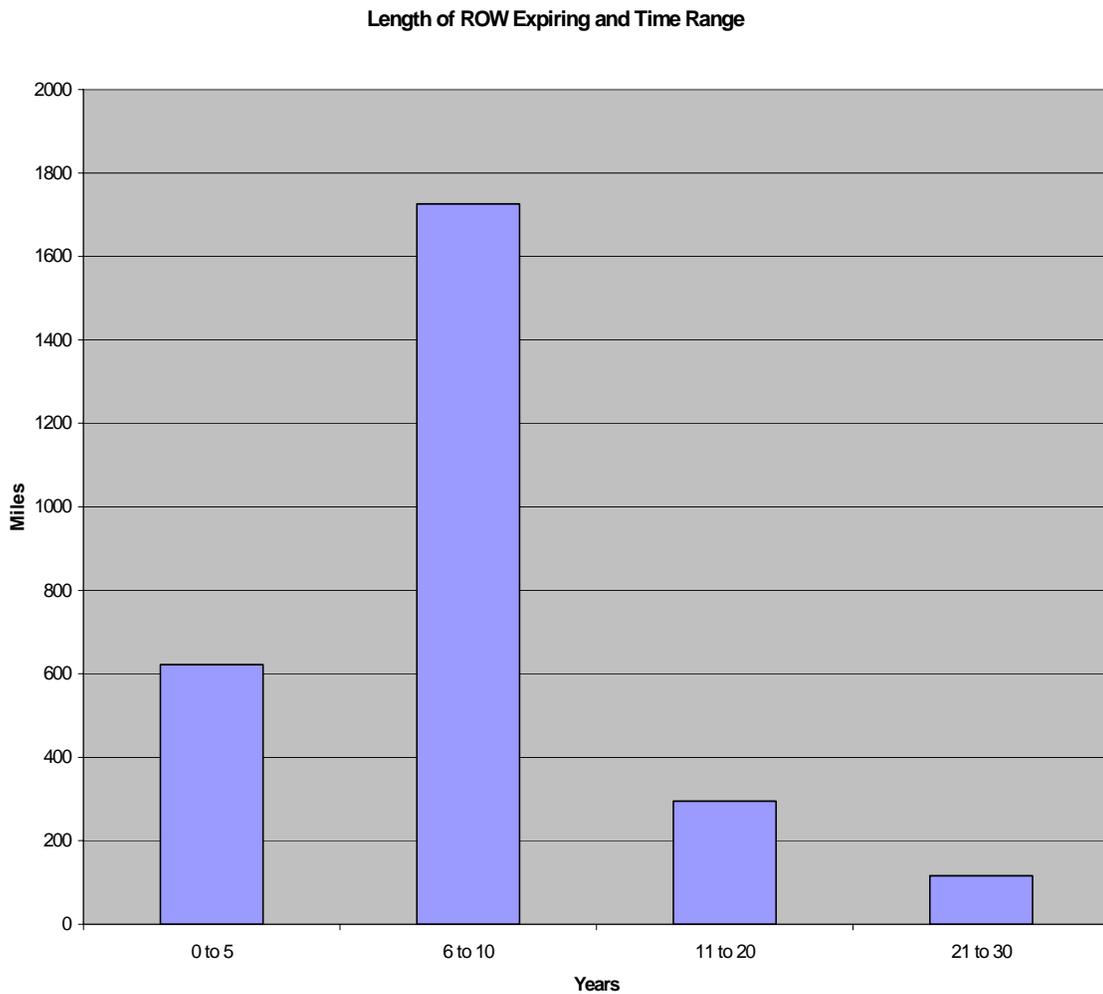
Figure 12



- Length of term until agreement expiration for right-of-way shows that over 2,300 miles will expire in the next ten years. This information when combined with the data shown in Figure 6 would suggest that some agreements that cover large lengths of right-of-way expire within next 10 years. In other words, the relatively even distribution of expiring agreements is not a good indicator of the length of right-of-way covered by each agreement.

These results, which show miles of easements expiring within the next 10 years, are shown in Figure 13.

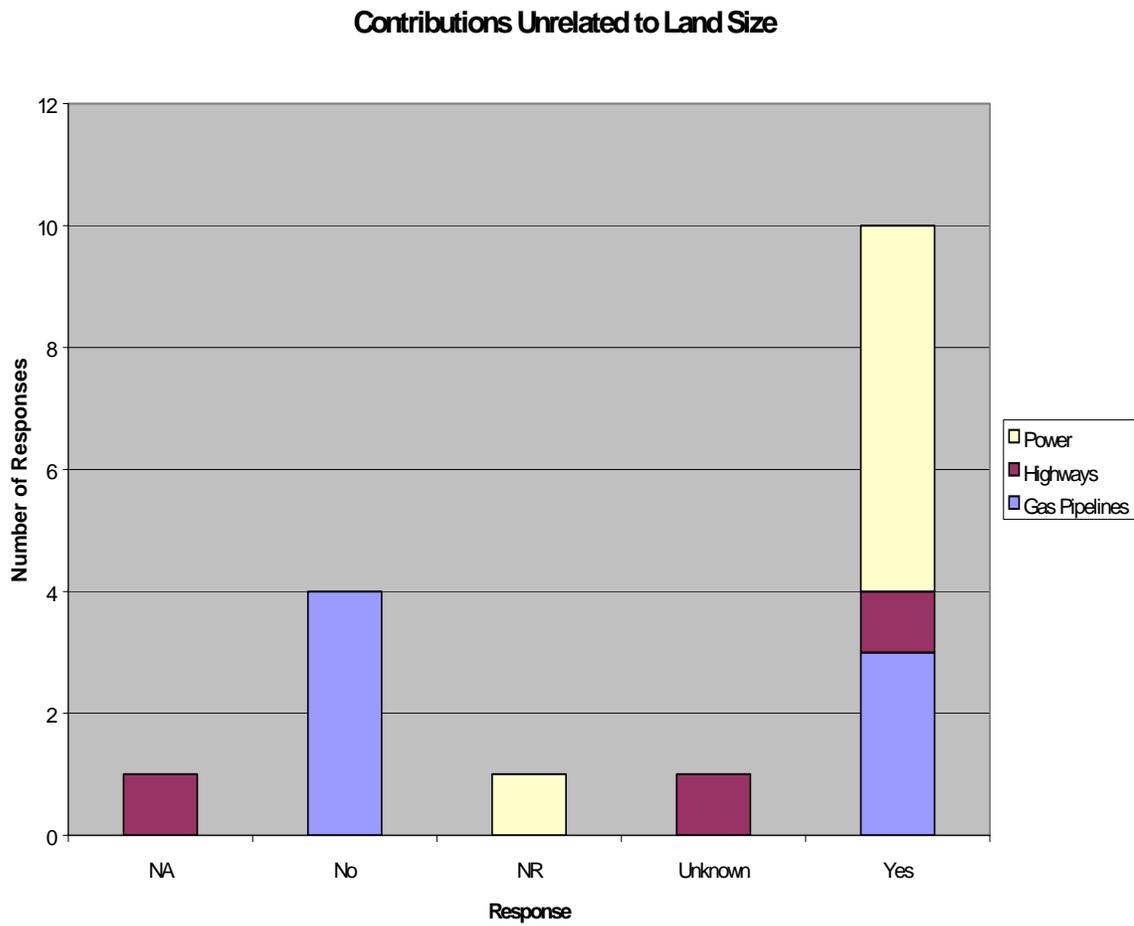
Figure 13



- A number of respondents indicated that contributions not directly related to land size (length, width or site size) have been made to Native American groups. These contributions may be in the form of scholarships, training, funding to particular institutions and signing bonuses related to a company's acquisition efforts.

These results are shown in Figure 14.

Figure 14



### *Additional Insights*

In order to gather additional information about the relationships between companies and Native American groups, we conducted follow-up conversations with those respondents who indicated a willingness to participate. The response rate, while lower than the written survey, provided some of the most meaningful results as will be shown later in the report.

The telephone survey covered topics such as legal issues, labor, taxes and litigation as well as quantitative information about right-of-way cost trends.

In the first section of the telephone survey, questions were asked about whether the companies had different experiences in dealing with Native American lands than for all other land acquisition for projects. In some industries, a right of eminent domain is secured through the approval of a certificate proceeding before a federal agency. In other industries, the right of eminent domain is not an option. Three of the six respondents had agreed to terms that they would not ordinarily have agreed to if they had the power of eminent domain. Three respondents said they did not agree to terms any different than for any other right-of-way acquisition. These same respondents did not provide any detailed land acquisition information. It is possible that their experience varied depending on which Native American groups were involved. Three respondents had been involved in litigation or contested administrative actions. Five respondents would support an initiative to improve the process of obtaining land rights.

The following sections of the verbal survey reveal the responses to specific topic areas.

#### Legal:

Six companies responded to the Legal section. The six respondents had not been sued, nor had they sued anyone in tribal court. In the written form that accompanied the telephone survey, one respondent did indicate that a court settlement was reached in the distant past.

#### Renewal:

Granting of a renewal was withheld or delayed in fourteen reported instances. One company reported that a tribe let an easement expire, in order to make claims of trespass during negotiations for renewal, and meanwhile, the tribe charged the company daily penalties for the expired easement. The company reported that the tribe seemed to negotiate for “a penny less than it would cost to go around.” In another case a tribe did not disperse to landowners monies that a company had paid to the tribe as it was obligated to do, causing a government agency to treat the situation as if the company had not paid. Another company reported instances of tribes withholding their consent to renew until the company paid over twenty times appraised value for an easement.

### Labor:

Six companies responded to the Labor section, with four answering with yes to at least one question in the section. Only one company gave information on number of Native Americans employed. Companies reported a total of five projects that employed Native American groups, but all reported paying competitive labor rates. Four of the instances were as a result of negotiated land rights agreements. Companies reported two instances of training Native Americans, but never as part of an agreement.

### Relocation:

Respondents tend not to relocate existing facilities but clearly try to avoid locating new facilities on Native American lands. Companies reported only one instance of relocation, but seven instances of avoiding locating facilities on Native American lands. One company wanted to use an existing easement that was not up for renewal for a different purpose, but abandoned the idea when the Native American group wanted to renegotiate the easement because of the change in purpose. Several companies reported that they avoid locating facilities on Native American lands, and usually seek an alternative.

### Taxes:

Only two companies reported tax information. They reported paying property and possessory interest taxes.

### New Land Rights:

Only one instance of a Native American group withholding a new land right was reported, and the withholding had no substantial impact on the company.

### Quantitative Data:

Stone & Webster collected data to quantify right-of-way acquisition costs. The first table requested information about acquisition costs directly related to some measure of land size, typically distance. The second table requested information concerning payments made that were unrelated to land size. Such payments may include scholarships, donations to charitable causes for the Native American group, signing bonuses and other specific items. These payments may also be indirect or in-kind payments such as providing vehicles or training.

In some cases the data submitted included annual payments without explanation of reason.

To be fair, the concern in these questions relates to whether Native American negotiations require more compensation than other privately or publicly held lands. The second hypothetical question is: "Should Native American groups receive more compensation than any other land owner? If Native American groups do expect and receive greater compensation, how much is reasonable? The survey results provide some definitive answers to the last of these questions.

Stone & Webster calculated average payments made per mile (ignoring right-of-way width differences) for various time periods and for some recent projects.

The results of data received were more expansive than the original target states. Some states not anticipated in the survey responses demonstrated some of the most profound results.

In addition to these trends, Stone & Webster examined the appraisal methods used to evaluate these same properties. We saw that some companies used independent appraisers to conduct their assessments, while other companies use their own in-house personnel to conduct appraisals. More than half of the right-of-way projects reported unknown appraisal values. We reviewed the data to see if there was a more representative blend of appraisals and payments. Our conclusions are that the appraisal data represents a valid, albeit small sample size.

To support this conclusion, Stone & Webster also examined cost trends in historical appraisal values per acre or rod for the data submitted. Where information was presented in rods we converted to an acre basis for comparison of like units. We found evidence of historical appraisals that ranged from approximately \$825 per acre to \$990 per acre in the early 1980's from various company's independent appraisals for land in similar states for terms of 20 to 25 years on allotted and tribal lands. We also calculated independent appraisal values from 1990's data presented for similar states that showed values ranging from approximately \$440 per acre to \$890 per acre for 20 year terms for allotted lands.

Stone & Webster concludes that the appraisal values used appear to be reasonable for the sample size. We have some concern that more recent values were somewhat less than appraisal values in the early 1980's, however, the small sample size of known appraisal values may explain this anomaly.

Perhaps the most profound findings are the differences in right-of-way costs between tribal and allotted lands. Stone & Webster observed extremely high payments above appraised values on tribal lands, particularly in the 1990's. Our observations are summarized as follows:

- For similar lands in the same states with identical expiration dates, payments to tribes exceeded by up to ten times the appraised values.
- In one case Stone & Webster observed a large tribal payment which exceeded by almost 20 times the independent appraised value.
- In addition to what appears to be excessive payments on tribal lands, some companies are also making increasing amounts of annual payments for existing right-of-way.

Stone & Webster believes that the disparity between tribal and allotted right-of-way payments may lie in part with the parties and the legal status of the land involved in the negotiations. For allotted lands, the companies' appraisal values, whether independent or in-house appear to be acceptable to the Bureau of Indian Affairs (BIA). For tribal lands, it appears that appraisal values have little meaning to the tribal negotiators. Further information from our survey suggests that some respondents face significant renewal date issues in the period from 2000 to 2017. Some of the tribal lands crossed are extensive, while others appear to be piecemeal.

## *Anecdotal Evidence*

### Participation

Stone & Webster learned through many conversations that a large number of potential respondents would not participate in this survey, because of their concerns about skewing future relations with Native American groups.

### Comments

In addition to the verbal anecdotes offered in the telephone survey, some interesting comments were offered by non-participants to the survey. The comments also offered insights into negotiations between Native American groups. For example in one instance different Native American groups share their right-of-way cost results with other Native American groups. The comments revealed that one Native American group would use the results of a negotiation with a separate Native American group to secure a better payment even when state agencies were involved, such as for highways.

Other comments involved instances where negotiated documents were modified after being agreed upon, resulting in less favorable conditions.

Other comments from both participants and non-participants included concerns over the increasing amount of annual payments being made for existing right-of-ways, substantially in excess of national cost index increases.