

September 29, 2005

Honorable Sue Ellen Wooldridge
Solicitor
United States Department of the Interior
1849 C Street N.W., Room 6352
Washington, D.C. 20240

***Re: Renewal of El Paso Natural Gas Company's Rights-of-Way for Interstate
Pipelines Crossing Lands of the Navajo Nation***

Dear Solicitor Wooldridge:

El Paso Natural Gas Company ("El Paso") is an interstate transporter of natural gas certificated by the Federal Energy Regulatory Commission ("FERC"). In June of 1950, the Federal Power Commission ("FPC"), FERC's predecessor, issued El Paso a certificate of public convenience and necessity for the construction of a natural gas pipeline across portions of Texas, New Mexico, and Arizona, including lands owned by the United States and held in trust for the Navajo Nation ("Nation") ("Navajo Lands"). Thereafter, the United States Department of the Interior ("Interior"), Bureau of Indian Affairs ("BIA"), granted El Paso rights-of-way for its pipeline system crossing Navajo Lands.

El Paso constructed its original pipeline system across Navajo Lands in 1951. Since that time, El Paso has invested millions of dollars in maintaining and expanding its pipeline infrastructure to provide an adequate, stable supply of natural gas to millions of end-users in New Mexico, Arizona, Nevada, and California. At present, El Paso's interstate pipeline system traverses nearly 900 linear miles of Navajo Lands and is maintained pursuant to certificates of public convenience and necessity issued by FERC.¹ El Paso's rights-of-way were last renewed by the BIA in 1985 and are set to expire on October 17, 2005. Today, El Paso is submitting an application ("Application") to renew its rights-of-way crossing Navajo Lands with the Secretary of the Interior.

El Paso has been engaged in lengthy negotiations with the Nation in an effort to renew the parties' 1985 right-of-way contract on fair and reasonable terms. To date, the Nation has demanded that El Paso remit several hundred times fair market value as

¹ Sections of pipeline also traverse parcels of land allotted by the United States to individual Indian allottees. Because El Paso expects to acquire the necessary rights-of-way across these allotted lands through negotiation, such allotted lands are not addressed in this letter and accompanying memorandum.

remuneration for the Nation's consent to the renewal.² This equates to a \$22 million payment annually over a twenty (20) year period. The Nation has rejected El Paso's most recent offer worth in excess of \$200 million dollars over a twenty (20) year period, which is still many times larger than fair market value of comparable private lands in the area. The parties are therefore approximately one quarter of a billion dollars apart on a twenty (20) year renewal. With the October 17 expiration of its rights-of-way, this impasse threatens to disrupt El Paso's pipeline operations and service to millions of consumers in Arizona, New Mexico, Nevada, and California who depend on these very rights-of-way for their energy needs. However, the Nation's unreasonable conditions for consent do not bar Interior's immediate approval of the Application and of El Paso's rights-of-way for the following reasons:

- First, under the Nation's 1868 Treaty with the United States, the Nation expressly agreed to permit construction of works of utility or necessity upon Navajo Lands subject to the payment of damages. Congress has not abrogated the Treaty, and Secretary Norton may not act in a manner or impose a regulation that abrogates the Treaty's provisions.
- Second, the BIA's implementing regulation requiring tribal consent to rights-of-way crossing Indian land cannot be lawfully applied to tribes, including the Nation, that have chosen not to reorganize under the Indian Reorganization Act ("IRA"). Having declined to reorganize itself under the IRA, the Nation is barred from invoking the consent provisions that are available solely to IRA tribes. Even if the consent requirement imposed by the regulation were applicable to non-IRA tribes, which it is not, this consent has already been secured by virtue of the Nation's 1868 Treaty.
- Third, renewal of El Paso's rights-of-way is necessary to avoid a conflict with FERC's jurisdiction over El Paso under the Natural Gas Act ("NGA"). Neither Secretary Norton nor the Nation can effectively veto the decision of FERC to certificate El Paso's pipeline for public convenience and necessity. Indeed, the Secretary has an obligation to consider El Paso's fifty-four (54) year history of natural gas transportation over these rights-of-way and to ensure that her actions do not interfere with the continuous supply of this gas at reasonable rates over rights-of-way maintained on reasonable terms.
- Finally, the Nation's imposition of unreasonable terms for its consent to renewal of the rights-of-way at issue here is tantamount to an unlawful exercise of regulatory authority over non-Indians and is well beyond the scope of its tribal jurisdiction as defined by federal law. As such, the Nation's terms of consent are invalid and cannot prevent Secretary Norton from granting the rights-of-way sought in El Paso's renewal Application.

El Paso intends to continue good faith negotiations with the Navajo Nation. The enclosed memorandum of points and authorities ("memorandum," enclosed as

² The Nation's demand translates to about \$50,000 per acre for an easement. In contrast, the fair market value of a perpetual easement on comparable off-reservation land is generally between \$100 and \$500 an acre.

Attachment 1) details El Paso's position as summarized above. The memorandum further requests that the Assistant Secretary for Indian Affairs decide El Paso's renewal Application and any appeal thereof directly, to avoid the need for a lengthy and costly appeal to the Interior Board of Indian Appeals and thus avert a disruption to the secure flow of natural gas while such an inevitable appeal is pending.

El Paso looks forward to working with Interior to timely process its Application and renewal of the rights-of-way. Please do not hesitate to contact me if you or your colleagues have questions.

Sincerely,

HOLLAND & HART LLP

Thomas L. Sansonetti

Enclosure

**EL PASO NATURAL GAS COMPANY'S
MEMORANDUM OF POINTS AND AUTHORITIES
REGARDING
RENEWAL OF RIGHTS-OF-WAY ACROSS NAVAJO LANDS**

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INTRODUCTION

Since 1950, El Paso Natural Gas Company (“El Paso”) has built, operated, and maintained an extensive network of pipelines that transport natural gas to millions of Americans in the southwestern United States, including the Navajo Nation (“Nation”). Nearly 900 miles of pipeline traverse lands owned by the United States and held in trust for the Nation (“Navajo Lands”). The Federal Energy Regulatory Commission (“FERC”) has determined that El Paso’s interstate pipeline system crossing Navajo Lands is in the public interest, and it has issued certificates of public convenience and necessity under which El Paso operates. In the past, the Department of the Interior (“Interior”), Bureau of Indian Affairs (“BIA”), as trustee for the Nation, has granted and renewed rights-of-way to El Paso for its pipelines that cross Navajo Lands. In return, El Paso has paid to the Nation substantially more than the fair market value of those rights-of-way.

On October 17, 2005, the current rights-of-way will expire. El Paso seeks a twenty-year renewal of those rights-of-way and has been engaged in lengthy negotiations with the Nation, dating back to early 2004. The parties have been unable to agree on the value of the rights-of-way renewal.

For a number of reasons detailed in this memorandum, Interior can and should renew the rights-of-way before October 17, 2005. Renewal will secure the flow of natural gas to millions of consumers in Arizona, New Mexico, Nevada, and California who depend on these rights-of-way for their critical energy needs. Moreover, renewal is in the best interest of the Indians, many of whom (including

the Nation) rely on El Paso's rights-of-way for the delivery of vital natural gas and earn royalties from the natural gas produced from tribal lands and transported through El Paso's pipelines. Before and after renewal, El Paso will continue to negotiate in good faith with the Nation to determine a fair value for the rights-of-way.

DISCUSSION

I. UNDER THE NATION'S 1868 TREATY WITH THE UNITED STATES, THE NATION EXPRESSLY AGREED NOT TO OPPOSE FEDERALLY-CERTIFICATED WORKS OF UTILITY OR NECESSITY CROSSING NAVAJO LANDS.

A. The Nation has already consented to El Paso's pipeline rights-of-way pursuant to the clear and unambiguous terms of the Treaty.

In 1868, the Nation's chiefs and headmen exercised their authority on behalf of the Nation and entered into a treaty with the United States (the "Treaty"). *See* Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Ratified July 25, 1868 and Proclaimed August 12, 1868, 15 Stat. 667. Under the Treaty, the Nation "expressly agree[d]" that:

They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.¹

¹ El Paso recognizes that Interior practice under similar provisions requires the non-Indian applicant to pay such damages. To the extent a Commission is appointed pursuant to Treaty Article IX, clause 6th to determine appropriate damages for the rights-of-way, El Paso stands ready to participate and pay such damages as may be assessed.

Treaty Preamble & Article IX, clause 6th (emphasis added).² Pursuant to Article II, the Treaty further created a non-exclusive reservation “for the use and occupation of the Navajo tribe,” providing that:

no persons except those herein so authorized to do, . . . or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

(Emphasis added). The Treaty between the Nation and the United States is “the ‘supreme Law of the Land. . . .’” *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968).³ As such, the “courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress.” *United States v. Minnesota*, 270 U.S. 181, 201 (1926).

Under the Treaty, the Nation relinquished its power to oppose, then and in the “future,” works of utility or necessity upon Navajo Lands ordered or permitted by the laws of the United States. *See* Treaty Article IX, clause 6th. Moreover, the Nation acquired its lands subject to the right of the Government to order or permit construction and operation of works of utility or necessity thereon. *See* Treaty Article II. Thus, the Nation’s right to occupy and use its lands has, since its inception, been subject to and burdened by the right of persons, including El Paso, “to pass over, settle upon, or reside in [Navajo Lands]” as authorized by the United States and “ordered or permitted” by

² This consent to federally-permitted works of utility extends to the lands added to the 1868 Reservation by the Executive Orders of January 6, 1880 and April 24, 1886.

³ By the Act of March 3, 1871, ch. 120 § 1, 16 Stat. 566, codified at 25 U.S.C. § 71, Congress ended treaty making with Indian tribes. However, the statute expressly recognizes that the 1871 Act did not impair or alter obligations and commitments in extant treaties.

FERC. See Treaty Articles II and IX; *cf. Del Rio Drilling Programs, Inc. v. United States*, 35 Fed. Cl. 186, 194 (1996) (the estate the tribe received was “burdened from birth by a right-of-way”); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1361 (Fed. Cir. 1998) (the Government retained an easement when it conveyed the lands to the tribe).

Significantly, canons of construction applicable to Indian matters cannot alter the plain language of a treaty.

While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government’s obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean.

Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179 (1947) (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1942); see also *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) (the rule by which legal ambiguities are resolved to the benefit of Indians “is not a license to disregard clear expressions of tribal and congressional consent”).

The Nation’s consent in the Treaty to “construction” of works of utility or necessity is not an ambiguous provision and clearly encompasses the continued operation of such works once constructed. Were the Treaty interpreted to provide for the construction of works of utility or necessity but to exclude their operation once completed, such an interpretation would render the “construction” provision utterly meaningless. Neither the plain language of the Treaty nor the canons of treaty

interpretation permit such a result. *See United States v. Andrews*, 179 U.S. 96, 99 (1900) (the Chisom Trail was a work of utility or necessity within the nearly identical article of the treaty with the Kiowa and Comanche Tribes of Indians, Concluded October 21, 1867, and Proclaimed August 25, 1868, 15 Stat. 581, 585, which “the Government would naturally seek to provide and obtain permission to lay out or to keep in use for the convenience of its citizens. . . .”).

In short, the Nation has already consented to El Paso’s pipeline rights-of-way pursuant to the clear and unambiguous language of the Treaty. The Treaty is the supreme and controlling law with regard to works of utility or necessity crossing Navajo Lands. Having forsaken and failed to preserve any right it may have had to oppose construction and operation of federally-ordered works of utility or necessity across Navajo Lands, the Nation does not now possess the power, whether by purporting to withhold its consent or otherwise, to prevent the Secretary of the Interior (“Secretary”) from renewing the rights-of-way as certificated by FERC. *See Del-Rio Drilling Programs, Inc. v. United States*, 37 Fed. Cl. 157, 161 (1997) (Interior “erred as a matter of law” in giving the tribe a veto over access across its reservation).

B. Congress has not abrogated the Treaty through subsequent legislation.

Only “Congress may abrogate rights reserved to Indian tribes in treaties.” *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Nevertheless, there is a strong presumption against subsequent legislative abrogation of Indian treaty provisions. *See United States v. Winans*, 198 U.S.

371 (1905); *see also* *Washington v. Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) (“[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights....”). To abrogate treaty rights, Congress must “clearly and unequivocally express its intent to do so.” *Williams v. Clark*, 742 F.2d 549, 553 (1984) (quoting *Idaho v. Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983)). Here, Congress has not abrogated the Treaty through any subsequent legislative enactments. No where in any statute has Congress “clearly and unequivocally express[ed] its intent” to abandon the rights and obligations of the Nation as set forth in the Treaty. *See id.*

The 1948 Rights-of-Way for All Purposes Act, 62 Stat. 17, codified at 25 U.S.C. §§ 323-328 (the “1948 Act”), and in particular, 25 U.S.C. § 324, leaves the 1868 Treaty undisturbed and in full force. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 836 (D. Minn. 1994), ultimately *aff’d*, 526 U.S. 172 (1999). Any requirement of tribal consent imposed by the 1948 Act is clearly and plainly limited to “certain tribes” that elected to reorganize under the Indian Reorganization Act (“IRA”).⁴ The Nation is not among those “certain tribes.” Section 324 reads:

⁴ The Indian Reorganization Act, June 18, 1934, 48 Stat. 984, is codified as amended at 25 U.S.C. § 461, *et seq.* As originally enacted, the IRA exempted from its coverage Indian tribes located in Oklahoma and the then Alaska Territory. In 1936, the provisions of the IRA were extended to the reorganized tribes of the Alaska Territory. Act of May 1, 1936, 49 Stat. 1250, codified at 25 U.S.C. § 473a. Extension of the IRA to Oklahoma was accomplished by the Oklahoma Indian Welfare Act, 49 Stat. 1967, codified as amended at 25 U.S.C. §§ 501-509 (“OIWA”). Because the Nation is neither an Alaska nor an OIWA tribe, all references herein are restricted to “IRA” and “non-IRA” tribes.

Sec. 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands *belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984) [the IRA]*, . . . , shall be made without the consent of the proper tribal officials. . . .

(Emphasis added).

It is undisputed that the Nation is not an IRA tribe. Therefore, 25 U.S.C. § 324’s application only to tribes organized under the IRA is significant. The IRA vested tribes electing to reorganize with certain powers in addition to those rights which may have been granted or reserved to them in prior treaties. The tribes that chose not to reorganize under the IRA were therefore confined to the original rights and obligations articulated in the original treaties. *See* 25 U.S.C. § 478b. Having declined to become an IRA tribe, the Nation did not gain the additional power of consent granted pursuant to 25 U.S.C. § 324 and must rely solely upon the terms of its Treaty with the United States. *See Navajo Resources, Inc. v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 10 IBIA 72, 89 I.D. 412, 414 (1982) (the meaning of the conditions in the 1938 Indian Mineral Leasing Act bestowing rights upon IRA tribes but not upon the Nation are “absolute”). Thus, the 1948 Act is neither an abrogation of, nor an authorization for the Secretary to abrogate, Treaty Articles II and IX.

C. The Secretary cannot act in a manner or impose a regulation that effectively abrogates the Treaty’s provisions.

Unlike Congress, the executive branch does not have authority to abrogate a treaty provision. *See Mille Lacs Band of Chippewa Indians*, 861 F. Supp. at 823-24 (“The

Constitution does not provide the President with the power to remove Indian tribes or to abrogate rights guaranteed under treaties”) (citations omitted). Therefore, neither the Secretary nor the BIA has the authority to act in a manner or impose a regulation that effectively abrogates the terms of the Nation’s Treaty with the United States.

Notwithstanding this limitation, Interior first promulgated 25 C.F.R. § 169.3 in 1971, requiring the “prior written consent of the tribe” before granting a right-of-way over and across *any* tribal Indian land. As written, this regulation applies equally to both IRA and non-IRA tribes, including the Nation. The regulation’s requirement that the consent of the Nation, a non-IRA tribe, be obtained prior to renewal of El Paso’s pipeline rights-of-way is an impermissible attempt by an executive department to abrogate the Treaty provisions by revesting the Nation with the right to oppose works of public utility or necessity – a power it expressly surrendered under the Treaty and that was never restored by Congress. *See Mille Lacs Band of Chippewa Indians*, 861 F. Supp. at 823-24. The Secretary, as an appointee of the President, does not possess the authority to abrogate the Treaty, by BIA regulation or otherwise. *Id.*

II. THE BIA’S IMPLEMENTING REGULATION REQUIRING TRIBAL CONSENT TO RIGHTS-OF-WAY CROSSING INDIAN LAND CANNOT BE LAWFULLY APPLIED TO NON-IRA TRIBES, INCLUDING THE NATION.

A. 25 C.F.R. § 169.3 cannot be lawfully applied to require the consent of the Nation before El Paso’s rights-of-way are granted.

As articulated above, the 1948 Act expressly limited its requirement of tribal consent to tribes that had elected to reorganize under the IRA. *See* 25 U.S.C. § 478

(providing that IRA “shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application”).⁵ For those Indian tribes declining to reorganize under the IRA, 25 U.S.C. § 478b provides that:

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of sections . . . 476 to 478 . . . of this title shall be deemed to have been continuously effective as to such reservation, notwithstanding passage of said sections. Nothing in said sections shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said sections.

(Emphasis added). The Nation’s June 1935 election failed to garner the vote for IRA status. The Nation is therefore precluded by the IRA itself from claiming any of the benefits of being an IRA tribe. The Secretary and the BIA are equally forbidden by that statute from extending such status to the Nation via regulatory or administrative fiat.

The present form of 25 C.F.R. § 169.3, requiring the “prior written consent of the tribe” before granting a right-of-way over and across *any* tribal Indian land,⁶ has appeared

⁵ Indeed, while the House Committee on Government Operations recommended that 25 U.S.C. § 324 be amended to pertain to any and all Indian tribes and thereby eliminate the plain and absolute distinction between IRA and non-IRA tribes, this recommendation was never adopted by Congress. *See* H.R. Rep. No. 91-78 at 19. “Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, . . . absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.” *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (citation and internal quotation omitted). More specifically, where a statute “names the parties who come within its provisions, other unnamed parties are excluded.” *See Foxgord v. Hischmoeller*, 820 F.2d 1030, 1035 (9th Cir. 1987).

⁶ 25 C.F.R. § 169.19 provides for renewals of rights-of-way, “with the consent required by § 169.3” Neither the Treaty, the 1948 Act, nor the Act’s implementing regulations contain limitations on the length of term for which a right-of-way may be granted. *See* 25 C.F.R. § 169.18 (specifying that “rights-of-way granted under the [1948 Act], for. . . oil, gas, and public utility water

in the regulations of the BIA since 1971.⁷ Nevertheless, the regulation's requirement for obtaining the consent to rights-of-way from non-IRA tribes substantially exceeds and is not "in line"⁸ with the tribal consent provision of the 1948 Act. As the Secretary explained in 1968, the 1948 Act "make[s] clear that *tribal consent is required only in the case of tribes organized under the [IRA]. . . . It has always been understood . . . that the Secretary has the authority, regardless of regulations, to grant . . . [rights-of-way] on his own initiative in the case of tribes not organized under the above acts.*" H.R. Rep. No. 91-78 at 40-41 (emphasis added).⁹

pipelines (including pumping stations and appurtenant facilities), . . . and for service roads and trails essential to any of the aforesaid use purposes, may be without limitation as to term of years"). Similarly, neither the 1948 Act, the BIA's regulations, nor the Treaty limit the number of renewals which the Secretary may issue. See 25 U.S.C. § 169.19 (permitting the Secretary to "extend the grant for a like term of years").

⁷ See 36 Fed. Reg. 8520, Proposed Rule Making (May 7, 1971) and 36 Fed. Reg. 14183, Final Rule (July 31, 1971), revising 25 C.F.R. § 161.3 to require the "prior written consent of the tribe." Prior to that revision and since 1951, 25 C.F.R. § 256.3, required the "prior written consent of the tribal council" In either case, and although not pertinent to the Nation as a non-IRA tribe, the Treaty contains the Nation's prior written consent and was entered by its "duly authorized" chiefs and headmen.

⁸ January 27, 1968 Letter from Secretary Stewart L. Udall to Robert E. Jones, Chairman, Natural Resources and Power Subcommittee of the Committee on Government Operations, House of Representatives, attached to H.R. Rep. No. 91-78 at 40-41 (1969) (emphasis added).

⁹ The current BIA Manual casts further doubt on the Secretary's authority to require that the Application comply with 25 C.F.R. § 169.3. The current BIA Manual at 54 BIAM 2.3, Supp. 7, Rel. 1 (August 23, 1971), instructs in pertinent part that:

(a) The regulations require that the consent of the tribe be obtained prior to . . . granting a right-of-way over tribal land of tribes that are organized under the Indian Reorganization Act . . . ; and tribal land belonging to all other tribes which have a governing body recognized by the Secretary.

As to tribes which do not have a recognized governing body, the Secretary can, as a matter of law, grant a right-of-way; however, such cases would have to be handled as an exception to the regulations. . . .

(Emphasis added). The regulations in fact make no such distinction.

Accordingly, under the authority of 25 C.F.R. § 1.2, the Secretary may, and should, waive the consent requirement of 25 C.F.R. § 169.3 in this instance. 25 C.F.R. § 1.2 allows the Secretary to “waive or make exception to” her regulations “in all cases permitted by law and . . . in the best interest of the Indians.” *See, e.g.*, Solicitor’s Opinion M-32071, 58 I.D. 351, 354 (February 19, 1943) (finding that the construction of a helium plant on the Nation’s reservation was a direct pecuniary benefit to the Nation because it was paid a royalty from the helium processed in the plant). Similarly, El Paso’s pipelines transport natural gas produced from lands of the Nation, Jicarilla Apache, Southern Ute, and Ute Mountain Ute Tribes. El Paso’s pipelines deliver such natural gas into interstate commerce allowing the tribes and individual Indians to earn royalties therefrom. In addition, El Paso’s pipelines deliver natural gas to the Navajo Tribal Utility Authority, Navajo Agricultural Products Industry, Jicarilla Tribal Utility Authority, and other Indians. These deliveries of critical energy supplies are manifestly and immediately beneficial to the Nation and to other Indian tribes and individual Indians. Indeed, the Nation’s unbridled demands for exponential increases in “consent” payments by El Paso disserves the Nation’s interest and is massively self-defeating. Such demands send a powerful signal to the marketplace, to investors, to entrepreneurs, and to infrastructure stakeholders: “Don’t build or invest here.” Failure to waive the consent regulation will, thus, adversely affect short- and long-term Indian interests.

Unlike the provisions of 25 C.F.R. § 169.3, the distinction between IRA and non-IRA tribes codified in the 1948 Act is plain and absolute.¹⁰ The Secretary can only give meaning to Congress' express reference to IRA tribes in the 1948 Act and is without jurisdiction or authority to remove that distinction by regulation. Imposing the consent requirement of 25 C.F.R. § 169.3 on the Application, in light of the strict limitations of the 1948 Act's consent provision to IRA tribes, would be arbitrary and capricious and exceed the Secretary's statutory authority. *See* 5 U.S.C. § 706. Simply put, 25 C.F.R. § 169.3 cannot be lawfully applied to require the consent of the Nation before El Paso's rights-of-way are renewed.

In 1952, the Secretary faced an identical situation where the Bureau of Reclamation sought Interior's approval of a grant of right-of-way for an electric transmission line crossing tribal lands of the Crow Tribe of Indians, a non-IRA tribe. The Crow Tribe refused to consent.¹¹ The Acting Solicitor of the Interior opined that:

there is ample authority under the [1948 Act] . . . , to grant the right-of-way, notwithstanding the lack of Indian consent.

¹⁰ Congress never intended for the "consent" provisions of the 1948 Act to apply to non-IRA tribes, such provision being inserted in the 1948 Act for the sole purpose of recognizing the "consent" powers granted to IRA tribes. Specifically:

The proposed legislation would vest in the Secretary of Interior authority to grant rights-of-way of any nature over the Indian lands described in the bill. The bill preserves the powers of those Indian tribes organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984); the act of May 1, 1936 (49 Stat. 1250), extending certain provisions of that act to Alaska; and the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967), with reference to the disposition of tribal land.

July 22, 1947 Letter from Under Secretary Oscar L. Chapman to Arthur H. Vandenberg, President pro tempore of the Senate, attached to H.R. Rep. No. 79 and S. Rep. No. 823 at 1036 (1948).

¹¹ *See* Memorandum of Acting Solicitor W.H. Flanery to the Secretary of the Interior, *Right-of-way for transmission line across Crow tribal lands to Yellowtail dam site* (September 10, 1952) (the "Flanery Memorandum"), attached as Exhibit "A" to this memorandum.

Such consent is not necessary unless required by the act of Congress authorizing the grant of a right-of-way, and traditionally tribal consent had not been required by Congress in authorizing the grant by the Secretary . . . of various rights of way (see 25 U.S.C., 1946 ed., secs. 311-22). *The 1948 act requires the consent of the tribe only if it has organized under the Indian Reorganization Act . . . in view of the wide powers of Congress over the management of Indian tribal property, the necessity of securing tribal consent cannot be read into the statute by implication.*

Flanery Memorandum at 1-2 (emphasis added).¹² The consent of the non-IRA Navajo Nation to the Secretary's granting of the Application here is likewise unnecessary because, as the *Flanery Memorandum* recognized, the 1948 Act does not require the Nation's consent. The Secretary, therefore, should grant the Application pursuant to 25 U.S.C. § 323.¹³

While Interior has continued to apply 25 C.F.R. § 169.3 to non-IRA tribes in violation of the 1948 Act, "an agency's interpretation, even if well established [by passage of time], cannot be sustained if, as in this case, it conflicts with the clear language and legislative history of the statute." *Escondido*, 466 U.S. at 779 n.22. The

¹² See also Memorandum of Solicitor Nathan R. Margold to the Commissioner of Indian Affairs, *Isleta and Santo Domingo Pueblos – Rights-of-Way* (September 2, 1936), reprinted in 1 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974, at 668-69 (explaining that non-IRA tribes such as the Nation may not veto BIA's issuance of a right-of-way because Section 16 of the IRA is "without application" to such non-IRA tribes), attached as Exhibit "B" to this memorandum.

¹³ As the *Flanery Memorandum* makes clear, the consent of the non-IRA Nation is also not required for the granting of pipeline rights-of-way under 25 U.S.C. § 321. Notably, the contemporaneous Treaty with the Crow Tribe of Indians, 15 Stat. 649, does not contain those express consent provisions to works of utility or necessity found in the Navajo Treaty's Article IX, clause 6th, and the Kiowa and Comanche Treaty's Article XI, clause 6th, 15 Stat. at 585, at issue in *Andrews*, wherein the tribes agreed not to oppose works of utility or necessity ordered or permitted by the laws of the United States. In this case, the plain language of the Treaty conveying the Nation's consent warrants further adherence to the Solicitor's opinion in the *Flanery Memorandum*, given the Solicitor's recognition of the distinction between IRA and non-IRA tribes even absent a similar express consent to works of utility or necessity in the contemporaneous treaty with the Crow Tribe.

consent requirement of 25 C.F.R. § 169.3 impermissibly expands upon and directly conflicts with the plain language of the 1948 Act. The Secretary need not obtain the Nation's consent as a condition precedent to renewal of El Paso's rights-of-way, when such condition is contrary to the IRA and not required by the 1948 Act.

B. Even if the consent requirement imposed by 25 C.F.R. § 169.3 were applicable to non-IRA tribes, which it is not, this consent has already been secured by virtue of the Nation's 1868 Treaty.

Even if the consent requirement imposed by 25 C.F.R. § 169.3 were applicable to non-IRA tribes, which it is not, such consent has already been secured by virtue of the Nation's 1868 Treaty. The people of the Nation affirmatively voted in 1935 not to reorganize under the IRA. As such, the Treaty – not the IRA – determines the Nation's rights and obligations with respect to rights-of-way. The Treaty, being “continuously effective” as to the Nation's reservation, *see Means v. Navajo Nation*, 420 F.3d 1037, 2005 U.S. App. LEXIS 18031 at *28-*30 (9th Cir. Jan. 28, 2005); *Tsosie v. United States*, 825 F.2d 393, 394 (Fed. Cir. 1987), expressly authorizes federally-ordered works of utility and necessity on Navajo Lands. The Nation clearly consented to the construction and operation of such works of utility or necessity by agreeing not to oppose the same. Accordingly, 25 C.F.R. § 169.3's consent requirement does not stand as a barrier to the immediate approval of El Paso's Application, inasmuch as such consent has already been given under the terms of the Treaty.

C. The Interior Board of Indian Appeals’ decision in *Transwestern* does not prevent approval of El Paso’s renewal Application.

The Interior Board of Indian Appeals’ (“IBIA”) decision in *Transwestern Pipeline Company v. Acting Assistant Secretary*, 12 IBIA 49, 90 I.D. 474 (1983), applied the 1948 Act consent requirement to federally-ordered works of utility or necessity on Navajo Lands. However, this holding does not prevent approval of El Paso’s renewal Application.

In rendering its decision, the IBIA failed properly to distinguish *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D. 1958). In *2,005.32 Acres*, the United States, acting through the Corps of Engineers, sought to *condemn* a significant portion of the Standing Rock Sioux Indian Tribe’s reservation for construction of a dam and reservoir. *See 2,005.32 Acres*, 160 F. Supp. at 195, 201. The issue of treaty-based consent to rights-of-way was not before the district court.¹⁴ As explained in the opinion, “it is unreasonable and contrary to the rule of *ejusdem generis* to include the huge takings of reservation land . . . within the context of the provisions of Article 11 of the 1868 [Sioux] treaty concerning ‘other works of utility or necessity.’” *Id.* at 201. El Paso does not herein request a “taking” of Navajo Lands. Rather, unlike the Government in *2,005.32 Acres*, it simply seeks renewal of its existing rights-of-way in accordance with the Treaty, including the obligation to pay the Nation such damages as the Commission may assess. *Id.* at 201.

¹⁴ The Sioux Treaty at issue in *2,005.32 Acres* contains nearly identical provisions to the Navajo Treaty’s Articles II, IX and X. As stated above, the same is true of the Kiowa and Comanche Treaty examined in *Andrews*. Significantly, the Standing Rock Sioux Tribe *is* reorganized under the IRA and therefore *could* avail itself of 1948 Act “consent” requirements that are wholly unavailable to the Nation.

In reaching to find further support for its “consent” finding in *Transwestern*, the IBIA improvidently relied upon the Ninth Circuit’s opinion in *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), *cert. denied*, 464 U.S. 960 (1983), *reh’g denied*, 464 U.S. 1064 (1984). That decision is inapposite to the question of the Nation’s consent to the construction and operation of works of utility or necessity under the Treaty. This is partly so because, as the Ninth Circuit acknowledged, the Walker River Piaute Tribe of Nevada is an IRA tribe. *See Southern Pacific*, 700 F.2d at 554 n.1. Therefore, as applied to the Walker River Piaute Tribe, an IRA tribe, application of the consent provisions of 25 C.F.R. § 169.3 was consistent with the statutory authorization.

Moreover, the question before the court in *Southern Pacific* was whether a specific railroad right-of-way granted pursuant to 25 U.S.C. §§ 312-318 (*not* the 1948 Act), was an *in praesenti* grant under which the Secretary was prohibited from imposing tribal consent-for-grant requirements. *See Southern Pacific*, 700 F.2d at 553-54. The railroad act expressly authorized the Secretary to establish by “regulation, grant preconditions, including one of tribal consent [if she so chooses].” *Id.* at 552. However, unlike the railroad act at issue in *Southern Pacific*, the 1948 Act expressly applies only to IRA tribes, such as the Walker River Piaute Tribe. Therefore, unlike *Southern Pacific’s* railroad act, the 1948 Act does not authorize the Secretary to impose consent-for-grant requirements for the Nation, a non-IRA tribe.

Finally, the IBIA in *Transwestern* could not reach the issue of whether departmental regulations imposing consent requirements for non-IRA tribes are illegal.

See Oklahoma Petroleum Marketers Assoc. & Muskogee County Oklahoma, Commissioners v. Acting Muskogee Area Director, 35 IBIA 285 (2000). That being the rule, the IBIA in *Transwestern* could not, and did not, examine 25 C.F.R. § 169.3 to determine its validity. The Solicitor's Office is the only office of Interior to have ruled upon the Secretary's authority to extend IRA rights to non-IRA tribes when issuing rights-of-way. The Acting Solicitor found no such authority. *See Flanery Memorandum* at 1-2. *See also* OPINIONS OF THE SOLICITOR at 668-69.

The Secretary's regulation at 25 C.F.R. § 169.3, which purports to apply the 1948 Act's consent requirement to the Nation, a non-IRA tribe, exceeds the express congressional intent embodied in the IRA and the 1948 Act. Denial of El Paso's renewal Application on the basis of this consent requirement would be arbitrary and capricious and beyond the Secretary's statutory authority. *See* 5 U.S.C. § 706. Nor does *Transwestern* dictate a denial of El Paso's renewal Application. *Transwestern's* holding cannot withstand authoritative review, and the Secretary, unlike the IBIA, may disregard or waive her regulation and properly refuse to apply 25 C.F.R. § 169.3's consent requirement to El Paso's Application.

III. EL PASO’S APPLICATION MUST BE GRANTED TO AVOID A CONFLICT WITH FERC’S JURISDICTION OVER EL PASO UNDER THE NATURAL GAS ACT.

As a result of orders issued by FERC and its predecessor agency, the Federal Power Commission (“FPC”), millions of end-users of natural gas in New Mexico, Arizona, Nevada, and California, including Indian customers, have come to rely on El Paso’s interstate pipeline system to provide the vital natural gas needed to heat their homes and businesses, run their factories, and generate electric power for cooling, lighting, and other uses.

FERC has exclusive authority to authorize the construction, operation, and abandonment of El Paso’s interstate natural gas pipeline facilities. While the Secretary clearly lacks authority to permit any tribe to override FERC’s jurisdiction, it is not necessary to reach that broader issue here because the Nation is not organized under the IRA, and thus has no claim to exercise the consent provision set forth in 25 U.S.C. § 324 or 25 C.F.R. § 169.3. Accordingly, the narrow question presented is whether the Secretary can acquiesce in a non-IRA tribe’s attempt to override FERC’s authority by, in effect, requiring El Paso to abandon service through its pipelines crossing Navajo Lands. As explained below, the clear answer is that the Secretary cannot.

A. Failure to grant the Application would be tantamount to requiring an unauthorized abandonment of El Paso’s pipeline facilities.

The Natural Gas Act (“NGA”) provides FERC with broad regulatory authority over El Paso’s interstate pipeline facilities, including El Paso’s pipeline facilities crossing Navajo Lands and the services provided by those facilities. Pursuant to its exclusive

authority to certificate the construction of interstate pipeline facilities under Section 7(c) of the NGA, the FPC first authorized El Paso to construct and operate its interstate pipeline, known as the San Juan Mainline, in 1950. *See El Paso Natural Gas Co.*, Docket No. G-1177, 9 FPC 170 (1950) (construction of facilities with capacity to transport 167,000 Mcf of natural gas per day). A series of subsequent orders issued by FPC and FERC in the intervening decades authorized El Paso to expand the San Juan Mainline several times to serve the increasing demand for natural gas by residential, commercial, governmental, and tribal customers located in New Mexico, Arizona, Nevada, and California.¹⁵

Three fundamental principles define FERC's authorization of El Paso's interstate pipeline. First, as the U.S. Supreme Court has held, the federal interest in interstate

¹⁵ *El Paso Natural Gas Co.*, Docket No. G-2106, 12 FPC 1037 (1953) (construction of facilities for the transport of an additional volume of 404,610 Mcf of natural gas per day), *modified*, 13 FPC 787 (1954), *further modified*, 14 FPC 536 (1955); *El Paso Natural Gas Co.*, Docket No. G-8940, 14 FPC 157 (1955) (enlargement of pipeline system to provide for an increase in system sales of 455,175 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. G-10499, 16 FPC 1354 (1956) (construction of facilities for the transport of an additional 151,725 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. G-11797, 19 FPC 393 (1958) (construction of facilities to provide additional capacity of 185,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. G-12580, 22 FPC 900 (1959) (construction of facilities to enable the supply of an additional 100,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP61-202, 25 FPC 1115 (1961) (construction of facilities necessary to provide approximately 20,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP61-296, 27 FPC 85 (1962) (construction of facilities to increase transport capacity by approximately 100,000 to 109,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP64-76, 36 FPC 176 (1966), *rev'g* Presiding Examiner's Initial Decision Upon Application for Certificate of Public Convenience and Necessity Under the Natural Gas Act, issued Dec. 16, 1965, *modified*, 36 FPC 491, *reh'g denied*, 36 FPC 1010 (1966) (expansion of present pipeline system to deliver an additional 250,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP79-337, 12 FERC ¶ 61,215 (1980) (construction of facilities to increase transport capacity by 195,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP89-896, 53 FERC ¶ 61,020 (1990) (construction of facilities to increase transport capacity by approximately 165,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP90-2214, 56 FERC ¶ 61,198 (1991) (construction of facilities to provide an additional capacity of 400,000 Mcf of natural gas per day); *El Paso Natural Gas Co.*, Docket No. CP94-575, 72 FERC ¶ 61,174 (1995) (construction of facilities to provide an additional 300,000 Mcf of natural gas per day of incremental pipeline capacity).

commerce with respect to natural gas sales and natural gas pipeline facilities extends continuously from the wellhead all the way to the burner tip, without interruption. *People of the State of California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965) (“The result of our decisions is to make the sale [or transportation via pipeline] of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption ‘in interstate commerce’ within the meaning of the [Natural Gas] Act.”); *Associated Gas Distrib. v. FERC*, 899 F.2d 1250, 1255 (D.C. Cir. 1990) (“[I]f gas crosses a state line at any time from its production at the wellhead to its consumption at the burner tip, then that gas is deemed to be ‘in interstate commerce’ throughout the entire journey.”). FERC’s broad regulatory power over interstate transportation of natural gas unquestionably includes interstate transportation across Navajo Lands.

Second, FERC’s authority over the interstate flow of gas is exclusive. Where FERC has jurisdiction, *no* governmental entity may attempt to assert concurrent authority or otherwise interfere with FERC’s authority to regulate interstate pipeline facilities. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301 (1988); *Nat’l Fuel Gas Supply Corp. v. Public Serv. Comm’n of State of N.Y.*, 894 F.2d 571, 576 (2d Cir. 1990); *Public Utilities Comm’n of the State of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) (“First we must correct California’s assumption that FERC’s and its jurisdiction are concurrent Here, if there be Commission jurisdiction over some component of the transaction, it is exclusive over that component.”); *see also* the discussion *infra* of *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 52 (D.C. Cir. 1953) (holding that the

Secretary of the Interior’s refusal to grant rights-of-way to El Paso without certain conditions encroached on the FPC’s jurisdiction under the NGA).

Third, once FERC has authorized the construction and operation of an interstate pipeline facility by issuing a certificate of public convenience and necessity, that pipeline cannot abandon such facility or terminate service until it obtains an order from FERC authorizing the abandonment under Section 7(b) of the NGA. *Nat’l Fuel*, 894 F.2d at 573. Section 7(b) states: “No natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of [FERC], or any service rendered by means of such facilities, without the permission and approval of the [FERC] first had and obtained, after due hearing” 15 U.S.C. § 717f(b). A certificate of public convenience imposes a “continuing duty” on an interstate pipeline to deliver natural gas to its customers until further order from FERC. *Farmland Indus., Inc., v. Kansas-Nebraska Natural Gas Co., Inc.*, 486 F.2d 315, 317 (8th Cir. 1973). Based on the clear language of Section 7, the Supreme Court has found that “once gas [or an interstate pipeline facility] has been dedicated to interstate commerce, ‘there can be *no* withdrawal of that supply from continued interstate movement *without Commission approval.*’” *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 536 (1979) (quoting *Atlantic Refining Co. v. Public Service Comm’n of State of N.Y.*, 360 U.S. 378, 388 (1959)) (emphasis in original).

These principles require the Secretary to grant El Paso’s renewal Application to avoid a conflict with FERC’s powers, and El Paso’s duties, under the NGA. By certificating El Paso’s interstate pipelines, FERC has determined that the “public convenience and necessity” require El Paso to transport natural gas through those

facilities and across Navajo Lands for the benefit of millions of residential, commercial, governmental, and tribal end-users in the southwestern United States who depend on natural gas. To the extent a denial of the Application would require El Paso to terminate service, El Paso would be required to abandon its pipeline facilities and service in violation of Section 7(b) of the NGA. Only FERC can authorize El Paso to abandon its facilities or the service El Paso provides through those facilities, and only then upon a determination that “the available supply of natural gas is depleted to the extent that continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.” 15 U.S.C. § 717f(b). FERC has made no such determination. The supply of gas in the San Juan Basin has not been depleted. Nor has the “present or future public convenience or necessity” for access to that gas abated, and it is not likely to abate in the foreseeable future.

In *Escondido*, 466 U.S. 765, the Supreme Court interpreted language of the NGA’s sister act, the Federal Power Act (“FPA”). The FPA, unlike the NGA, gives the Secretary authority to impose certain conditions on FERC-licensed hydroelectric projects for the protection of Indian tribes on whose reservation the projects would be located. In rejecting a tribe’s argument that it could veto a FERC facility under the FPA, the Court, after observing that the Secretary lacks authority to veto FERC-licensed facilities under the FPA, stated: “[w]e cannot believe that Congress nevertheless intended to leave a veto power with the concerned tribe or tribes. The Commission need not, therefore, seek the Bands’ permission before it exercises its licensing authority with respect to their lands.” *Escondido*, 466 U.S. at 787.

The Court's holding in *Escondido* is equally applicable to FERC-certificated pipelines under the NGA. Under the rationale of *Escondido*, because the Secretary lacks authority to veto a FERC certificate, the Secretary also lacks authority to vest the Nation with veto authority. This conclusion is particularly germane to non-IRA tribes such as the Nation, where the consent provision set forth in 25 U.S.C. § 324 applies only to tribes organized under the IRA and does not apply in this case. In this situation, the public interest in the uninterrupted flow of natural gas to consumers in states across the southwestern United States, as clearly expressed in the NGA, trumps any parochial interest the Nation may have and deprives the Nation of any argument that it can veto a FERC certificate by effectively requiring an abandonment of El Paso's pipelines crossing Navajo Lands.

Consistent with the numerous precedents affirming FERC's exclusive authority under the NGA, the D.C. Circuit has previously enjoined the Secretary from imposing unlawful conditions on El Paso's construction and operation of the very same pipeline facilities at issue here. *See Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953). The injunction issued in *Chapman* foreshadowed the *Escondido* holding that the Secretary may not veto a FERC-approved facility. In *Chapman*, the D.C. Circuit affirmed a district court order requiring the Secretary to issue rights-of-way to the extent the El Paso pipelines crossed public lands. The court found the Secretary lacked authority to refuse to issue the rights-of-way unless El Paso agreed to certain conditions, and held that the conditions the Secretary sought to impose on El Paso conflicted with the "careful and detailed standards" set forth in the NGA (including provisions of NGA

Section 7).¹⁶ According to the court, “Congress expressed itself fully concerning the extent to which pipe line companies are to be regulated within the scope of federal authority, and jurisdiction for such regulation was placed in the Federal Power Commission,” FERC’s predecessor. *Chapman*, 204 F.2d at 52. “[I]n the absence of unequivocal language placing jurisdiction for regulation in both the Commission and the Secretary of the Interior, we are not persuaded that the Secretary of the Interior is authorized to impose the conditions which he has sought to attach to the issuance of rights-of-way concerned in this litigation.” *Id.*

The *Escondido* and *Chapman* decisions stand for the proposition that, in cases in which a federal agency seeks to rely upon its statutory authority to take an action that creates a conflict or apparent conflict with another federal agency or statute, then the relevant statutory provisions must be harmonized to ensure a result in furtherance of congressional policies. See 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 53:01 (6th ed., rev. vol. 2000) (Courts have “a duty to construe statutes harmoniously where that can reasonably be done.”) (footnote omitted). The Supreme Court in *Escondido* held that conditions the Secretary imposed must stop short of vetoing FERC’s authorization of a facility FERC deemed to be in the public interest. Similarly, the D.C. Circuit’s decision in *Chapman* furthered the broad congressional objectives reflected in the NGA to ensure the transportation and delivery of natural gas in interstate

¹⁶ The Secretary sought to impose, as a condition of granting the right-of-way, a requirement to expand the pipeline and other common carrier obligations. The court found that this conflicted with Section 7(a) of the NGA, which specifically states that FERC shall have no authority to compel a pipeline to expand its facilities except in limited circumstances. *Chapman*, 204 F.2d at 51.

commerce for the benefit of residential and business consumers, and held that the Secretary cannot establish conditions that interfere with the congressional mandate expressed in the NGA.

Here, these precedents dictate that the Secretary's statutory authority should be construed in a manner that is consistent with the fundamental public interest objectives Congress enacted in the NGA and the authority of FERC to take actions implementing those objectives. Where, as here, there would be a conflict between, on the one hand, any refusal by the Secretary to grant the Application and, on the other hand, the certification and abandonment requirements of Section 7 of the NGA, the public interest objectives FERC serves must be preserved. *See Escondido*, 466 U.S. at 776-77 ("Congress could not have intended to paralyze with one hand what it sought to promote with the other") (citations and internal quotation omitted). In short, the Secretary cannot encroach on FERC's exclusive jurisdiction to regulate interstate pipelines. A refusal to renew El Paso's rights-of-way crossing Navajo Lands would do just that, amounting to a *de facto* order to abandon the El Paso pipelines, in derogation of FERC's exclusive jurisdiction to certificate the San Juan Mainline facilities and to determine whether an abandonment of pipeline service to El Paso's numerous customers through these facilities is in the public interest.

Indeed, the interest in avoiding a conflict is even greater here than it was in *Chapman*. The *Chapman* court prohibited the Secretary from effectively preventing the construction of the San Juan Mainline. In part as a result of the *Chapman* court's order, the San Juan Mainline has been in operation for more than fifty-four (54) years, and

millions of end-users have come to rely on the pipeline to meet their need for natural gas. Given this reliance, the interest in renewing El Paso's rights-of-way crossing Navajo Lands is even more compelling than the interest that the *Chapman* court found to bar the Secretary's actions.¹⁷

It also bears mention that, even if the Secretary refused to renew the rights-of-way, El Paso would still be required to continue operating its pipelines crossing Navajo Lands in the absence of any abandonment authorization from FERC. An abandonment without FERC authorization constitutes a serious violation of the NGA, for which FERC can impose significant civil penalties and for which the United States Attorney General can seek substantial criminal penalties (in the case of a knowing and willful violation).¹⁸ *See, e.g., Tenn. Gas Pipeline Co.*, 8 FERC ¶ 61,137 (1979). A denial of El Paso's Application, or any effort by the Nation to initiate a civil trespass action or otherwise prevent El Paso from operating its interstate pipelines, could put El Paso in an impossible

¹⁷ As one commentator has observed:

At the [pipeline right-of-way] renewal stage, . . . frustration of federal interests in efficient natural gas production is significant enough to conflict with the tribe's dependent status. A tribe's interest in imposing a consent restriction [on any pipeline right-of-way] is attenuated at renewal. The tribe has presumably already granted consent for the initial right-of-way issuance. It faces little threat of detriment to the reservation beyond the continuing encumbrance of the pipeline company's operations. In effect, this "encumbrance" amounts to the continuing underground flow of gas.

Andrew S. Montgomery, *Tribal Sovereignty and Congressional Dominion: Rights-of-Way for Gas Pipelines on Indian Reservations*, 38 STAN. L. REV. 195, 220-21 (1985).

¹⁸ The Energy Policy Act of 2005, Section 314, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005) (the "Act"), increases FERC's criminal penalty authority from \$5,000 to \$1,000,000, with the possible maximum jail term increasing from 2 years to 5 years. The Act also increases the criminal penalty for willfully and knowingly violating a FERC rule, regulation or order issued under the NGA from \$500 to \$50,000 for each day of continued violation. The Act further amends the NGA to grant FERC authority for the first time to assess civil penalties for violations of the NGA or any FERC action made under the authority of the NGA. This new authority allows FERC to impose civil penalties of not more than \$1,000,000 for each day of continued violation.

“Catch 22,” and expose the Nation to the sanctions provided under the NGA. To avoid any conflict with the civil and criminal penalty provisions imposed by the NGA, the Secretary must grant El Paso’s Application to renew its rights-of-way.

B. El Paso’s use of the rights-of-way, combined with the terms of the 1948 Act, impliedly provide El Paso a right to renewal upon reasonable terms.

El Paso’s fifty-four year history of use of the rights-of-way crossing Navajo Lands, combined with the 1948 Act, impliedly provide El Paso with a right to renew its existing rights-of-way upon reasonable terms. In 1950, the FPC issued El Paso a certificate of public convenience and necessity pursuant to the NGA for the construction and operation of its interstate natural gas pipeline across portions of Texas, New Mexico and Arizona, including Navajo Lands. *See* 9 FPC 170 (1950). Since that time, El Paso, with FPC (and later FERC) approval,¹⁹ has invested millions of dollars in constructing, maintaining and expanding its pipeline system to provide an adequate and stable supply of natural gas to millions of residential, commercial, governmental, and tribal end-users in New Mexico, Arizona, Nevada, and California.

As discussed above, the NGA mandates that El Paso continue its interstate gas transportation service until FERC authorizes the cessation of such service. *See* 15 U.S.C. § 717f(b). FERC also regulates the rates and charges for El Paso’s services to protect the interest of consumers in an adequate supply of gas at reasonable rates. *See Clark v. Gulf*

¹⁹ See note 15, *supra*, for a list of FPC and FERC orders pertinent to El Paso’s pipelines crossing Navajo Lands.

Oil Corp., 570 F.2d 1138 (3d Cir. 1977); *Florida Power & Light Co. v. FERC*, 598 F.2d 370 (5th Cir. 1979).

Nothing in the 1948 Act or its implementing regulations authorizes the “Secretary to disregard or sweep aside legitimate existing contractual” or business expectations of El Paso or the customers it serves. *See Woods Petroleum Corp. v. United States Dep’t of the Interior*, 18 F.3d 854, 858 (10th Cir. 1994), *op. adhered to on reh’g*, 47 F.3d 1032 (10th Cir. 1995). In *Woods*, the Tenth Circuit set aside the Secretary’s administrative order that rejected an agreement to communitize Indian and non-Indian mineral interests for oil and gas drilling and production. In doing so, the court reminded the Secretary of the need to weigh “the contractual rights of oil-producing companies such as plaintiffs, which commit millions of dollars in drilling costs in reliance on provisions in leases executed” with Interior’s knowledge, against the duty to protect and maximize the return to Indians from their lands. 18 F.3d at 855; *see also Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983) (holding that tribe lacked authority to terminate commercial lease without obtaining Secretarial approval thereby avoiding an “impasse between the Secretary and a unilaterally terminating tribe” which might “insist upon new terms in any new lease which the Secretary might not be inclined to approve”). The Ninth Circuit also observed that a unilateral tribal cancellation of power ultimately could adversely affect the value of tribal leases. *Id.*

The 1948 Act empowers the Secretary to “grant rights-of-way for all purposes,” 25 U.S.C. § 323, and directs that the compensation for such rights-of-way to be “as the Secretary . . . shall determine to be just.” 25 U.S.C. § 325. In exercising that authority,

the Secretary must take into account the fifty-four year history of investment, reliance and expectations that El Paso and its customers bring to the table. El Paso has obtained renewals of these rights-of-way on acceptable terms that have not adversely affected the rates of El Paso's customers. The Nation's current and exponentially increasing demands for compensation at a rate that is many multiples of the fair market value for the rights-of-way exceed any "just" compensation. Such demands should not be sanctioned or facilitated by the Secretary. Not only are such demands contrary to past dealings between El Paso, the Secretary, and the Nation concerning these very rights-of-way, but they could increase the costs borne by El Paso's customers by hundreds of millions of dollars, as FERC is required by law to give El Paso a reasonable opportunity to recover its prudently incurred expenses. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Acceding to the Nation's unreasonable demands would also set a dangerous precedent for all customers of utilities and pipelines that cross tribal lands, creating the specter of significantly increased costs at a time when energy prices are already approaching record high levels. At a time when one of the Administration's central goals is to encourage policies that yield reasonably priced and geographically diverse supplies of domestically produced energy for all Americans, *see generally* discussion of Energy Policy Act of 2005, note 18, *supra*, the Secretary should reject any effort by the Nation that would frustrate that goal.

IV. IMPOSITION OF UNREASONABLE RIGHT-OF-WAY TERMS BY THE NATION WOULD BE AN UNLAWFUL EXERCISE OF REGULATORY AUTHORITY OVER NON-INDIANS, BEYOND THE SCOPE OF ITS TRIBAL JURISDICTION, AND IN NO WAY IMPEDES THE SECRETARY'S ABILITY TO APPROVE EL PASO'S RENEWAL APPLICATION.

It is undisputed that Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978). However, these attributes of sovereignty are not unlimited and, in many respects, have been divested by virtue of an Indian tribe’s dependent status. *Id.* at 326. Specifically, any “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana v. United States*, 450 U.S. 544, 564 (1981). Thus, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Id.* at 565.

The prevailing case law, starting with the Supreme Court’s decisions in *Montana* and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), makes clear that the Nation lacks regulatory and adjudicatory authority over El Paso as it relates to the pipeline rights-of-way at issue here. The Nation’s attempt to impose unreasonable renewal terms is tantamount to an unlawful exercise of regulatory authority over non-Indians. Stated differently, and irrespective of the terms of the 1868 Treaty or the application of the 1948 Act and its implementing regulations, the Nation’s unreasonable terms of “consent” are invalid and do not, under any circumstance, act as a barrier to the Secretary’s renewal of El Paso’s rights-of-way. *See Strate*, 520 U.S. at 442 (holding that state highway built on federally-granted right-of-way crossing Indian trust land is the functional equivalent of

non-Indian fee land over which tribal court lacked jurisdiction); *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000) (Tribe lacks adjudicatory jurisdiction over federally granted railroad right-of-way because the tribe lost “dominion and control over the right-of-way”); *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) (concluding that right-of-way easements owned by electric cooperative over Indian reservation were equivalent of non-Indian fee land and that tribe’s 3% *ad valorem* tax on all utility property located on tribal or trust lands was unlawful exercise of tribal regulatory authority); *see also Nevada v. Hicks*, 533 U.S. 353, 374 (2001); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653 (2001).

A. Neither of *Montana*'s two exceptions to the limitation on tribal sovereignty applies.

Noting the tribes' "diminished status as sovereigns," the *Montana* Court pointed to two narrow exceptions to the general rule that a tribe has no civil regulatory authority over tribal non-members. *Id.*, 450 U.S. at 565. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* Neither of *Montana*'s two exceptions to the limitation on tribal sovereignty applies so as to confer upon the Nation regulatory jurisdiction over El Paso and its rights-of-way.

1. A federally-created right-of-way does not amount to a continuing consensual relationship between the Nation and El Paso.

As previously stated, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. However, a federally-created right-of-way does not amount to a continuing consensual relationship between the tribe and the grantee. *See Red Wolf*, 196 F.3d at 1064 (citations omitted). *See also Chiewewe v. Burlington Northern & Santa Fe Ry.*, 239 F. Supp. 2d 1213, 1217 (D.N.M. 2002) ("An unconditional transfer of Indian

property interests, whether by a direct congressional grant or through the procedure[s] established [by Congress] in [the federal statutes], does not create a ‘continuing’ consensual relationship between the tribe and the owner of the right-of-way.”); *Reservation Tel. Co-op. v. Henry*, 278 F. Supp.2d 1015, 1023 (D.N.D. 2003) (statutes and regulations authorizing the Secretary to grant rights-of-way over Indian lands for construction of telephone lines and for all other purposes with tribal consent does not equate to a “consensual relationship” with an Indian tribe because “federal law requires the rights-of-way and provides a statutory mechanism to acquire the rights-of-way”); *Adams*, 219 F.3d at 951 (agreements creating an electric cooperative’s rights-of-way for transmission and distribution systems over tribal lands, which were granted by the Secretary with the consent of the tribe, “were insufficient to create a consensual relationship with the Tribe[.]”). Consistent with this prevailing precedent, El Paso’s federally-created rights-of-way across Navajo Lands, certificated by FERC and granted by Interior, are insufficient to establish a consensual relationship with the Tribe.

Even assuming the existence of a consensual relationship, the first exception to *Montana* does not grant a tribe unlimited regulatory or adjudicative jurisdiction over a non-member. *See Adams*, 219 F.3d at 951. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of “the *activities* of nonmembers who enter [into] consensual relationships.” *Id.* (quoting *Montana*, 450 U.S. at 565) (emphasis added). The Nation’s efforts to regulate El Paso’s pipeline through the imposition of unreasonable renewal terms does not amount to a regulation of the *activities* of a non-member, but instead represents a regulation of *property* owned by a non-member, a form

of regulation that is not included within *Montana*'s first exception. *See id.* (concluding that tribe's *ad valorem* tax on value of utility property "is not a tax on the activities of a nonmember, but is instead a tax on the value of property owned by a nonmember, a tax that is not included within *Montana*'s first exception"). In short, the *Montana* "consensual relationship" exception has no application to the facts of this case.

2. **There is no threat to the Nation's political integrity, economic security, or welfare.**

Montana's second exception holds that the Nation may exercise civil authority over the conduct of non-Indians on non-Indian fee lands when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This exception is equally unavailing.

Courts have given *Montana*'s second exception a narrow construction and only allow an Indian tribe to do "what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459; *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998). As the Supreme Court's decision in *Atkinson Trading Co.*, 532 U.S. at 656, n.12, explains:

Montana's second exception "can be misperceived." The exception is only triggered by non-member conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually "imperils" the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

See also Yellowstone County v. Pease, 96 F.3d 1169, 1176-77 (9th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (noting that the “impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe”).

The Nation cannot colorably claim that El Paso’s pipeline “imperils” the health or welfare of the Nation or that it otherwise threatens the Nation’s political integrity and interest in self-government. *See Reservation Tel. Co-op.*, 278 F. Supp.2d at 1024 (finding that provision of telephone services from rights-of-way and related sales and service of equipment did not endanger tribe’s political integrity, economic security, health or welfare); *Adams*, 219 F.3d at 951 (rejecting tribe’s argument that tribal treasury would be irreparably harmed and essential tribal services would have to be scaled back absent *ad valorem* tax on electric utility easements); *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1221 (9th Cir. 2000), *cert. denied*, 535 U.S. 927 (2002) (while recognizing cultural, social, and religious importance of White Deerskin Dance, non-member’s proposed logging was not type of activity that triggers second *Montana* exception). El Paso’s pipeline facilities have been located on Navajo Lands since 1950, and those facilities have operated without the slightest consequence to the Nation’s self-government, political integrity, or security. That half-century record constitutes overwhelming evidence that renewal of El Paso’s rights-of-way will not remotely imperil the Nation’s ability to self-govern, nor its ability to control its internal relations so as to invoke the second *Montana* exception.

By requiring the Nation's consent to Treaty-established rights-of-way, the Secretary would be facilitating and endorsing the Nation's conduct beyond the scope of its regulatory powers and jurisdiction as defined by federal law. The Nation's unreasonable and unlawful consent terms are invalid and do not, under any circumstance, impede the Secretary's ability to approve El Paso's Application.

V. THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS SHOULD DECIDE EL PASO'S RENEWAL APPLICATION AND ANY APPEAL THEREOF.

Renewal of El Paso's rights-of-way is critical to the United States' profound public interest in the stable supply of natural gas in interstate commerce. Interior's decision to approve or deny the renewal Application will dramatically affect El Paso's pipelines, the United States' interstate natural gas market, those who transport gas on the interstate system, and those utilities, industrial and governmental facilities, families and businesses in the southwestern United States who consume the gas. Because of the expansive regulation of El Paso's pipeline facilities and the duties imposed upon it by FERC, the matter also implicates far-reaching inter-agency decisions and governmental policy best-suited for review and decision by the Assistant Secretary. Regardless of the route the issues take, it seems certain that the Assistant Secretary will be called upon to review and decide the Application.

Assistant Secretarial review should be conducted in concert with the BIA's analysis of the Application. Together, the Assistant Secretary and the BIA should make a

decision on the Application for the reasons set forth in this memorandum.²⁰ The Assistant Secretary's decision on the Application itself, or to approve the BIA's decision prior to promulgation, will be a final Interior determination and will preclude lengthy and costly appeals at the IBIA by any party interested in the BIA's decision on renewal of the rights-of-way. *See* 25 C.F.R. § 2.6(c); and 43 C.F.R. § 4.331(b). Such potential administrative appeals would inject unacceptable risks of disruption to the secure flow of natural gas through the pipelines.

The Assistant Secretary cannot avoid the issues raised in the Application by declining to exercise his authority and deferring a decision on the Application to the BIA. If the BIA were to deny the Application, El Paso would surely appeal to the IBIA. Likewise, if the BIA were to approve the Application, the Nation would likely appeal to the IBIA. Upon appeal, the appellant is required to send a notice of the appeal to the Assistant Secretary – Indian Affairs. 25 C.F.R. § 2.20(a). The purpose of the regulation is to give the Assistant Secretary twenty days to decide whether to issue a decision in the appeal. *Id.* at (c)(1); 43 C.F.R. § 4.332(b). During that twenty-day period, the Assistant Secretary would need to review the Application and the arguments in light of the Treaty and the law, including FERC's preemptive authority, before deciding whether or not to

²⁰ *See* 25 U.S.C. § 323 (authorizing the Secretary to grant rights-of-way for all purposes); 25 U.S.C. § 1a (delegating powers of the Secretary concerning Indian Affairs); 109 DM 8.2 (delegating to the Assistant Secretary leadership over the Bureau of Indian Affairs); 209 DM 8.1 (authorizing the Assistant Secretary to exercise all Secretarial authority except where otherwise limited); and SO#3259A1 (August 11, 2005) (temporarily redelegating all functions, duties, and responsibilities of the Assistant Secretary delegated by 209 DM 8, except as otherwise required by statute or regulation, to the Associate Deputy Secretary).

take the appeal from the IBIA.²¹ Thus, rather than waiting to conduct this analysis until after El Paso or some other party appeals a BIA decision, the Assistant Secretary should exercise his lawful authority to consider the Application in the first instance and issue a decision on the Application which is final for Interior. *See* 5 U.S.C. § 704; 25 C.F.R. § 2.6(a) & (c); and 43 U.S.C. §§ 4.314 and 4.331(b).

Finally, if left without the direction of the Assistant Secretary, the BIA would be called upon to exercise its discretionary authority in deciding the fate of the Application. For example, BIA would have to decide the lawfulness of 25 C.F.R. § 169.3 in this setting and the inapplicability of the IBIA's *Transwestern* decision, both of which the BIA may argue are matters within its discretion. The IBIA may not adjudicate "[m]atters decided by the Bureau of Indian Affairs through exercise of its discretionary authority." 43 C.F.R. § 4.330(b)(2). If the IBIA were to take an appeal of a discretionary decision of the BIA, the IBIA would be compelled to dismiss the appeal or refer the issues to the Assistant Secretary for his further consideration. *See* 25 C.F.R. § 2.20(f); and 43 C.F.R. § 4.337(b).

The inescapable conclusion is that all roads lead to the Assistant Secretary when it comes to making a final departmental decision on the Application. The best course, therefore, would be for the Assistant Secretary to consider the Application immediately upon its submission and approve or disapprove the Application at the outset rather than

²¹ *See also* 43 C.F.R. § 4.5(a)(1) (the authority reserved to the Secretary and her delegates includes the authority to take jurisdiction at any stage of any case before any employee of the Department including the IBIA and render a final decision in the matter); and 209 DM 13.7.B (same).

delaying a final appealable decision by Interior and risking damage to and interruption of the interstate gas market during the interim. *See* 43 C.F.R. § 4.331(b).

CONCLUSION

For the reasons set forth above, El Paso respectfully requests the United States Department of the Interior approve its Application for renewal of El Paso's rights-of-way crossing Navajo Lands without regard to the Nation's consent.

Respectfully submitted,

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