

**BLM & U.S. FOREST SERVICE
RENTAL VALUATION
IMPACT STUDY**

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Glossary

BLM	Bureau of Land Management, U.S. Department of the Interior
CFR	Code of Federal Regulations (Title 43 – Public Lands)
FLPMA	Federal Land Policy and Management Act (43 U.S.C.)
FY	Fiscal Year (U.S. Government, October 1 – September 30)
IG	Inspector General (Department of the Interior)
IM	Information Memorandum (BLM, January 24, 2001)
MLA	Mineral Leasing Act (30 U.S.C.)
NFS	U.S. National Forest Service
PR	Proposed Rule (BLM, June 1999)
ROW	Right-of-way; Rights-of-way
Sq	Square, as in Square Acres
T-Cubed	Thoroughbred Technology and Telecommunications, wholly owned subsidiary of Norfolk & Southern Railroad

Executive Summary

Recent right-of-way rental fee proposals by the U.S. Bureau of Land Management (BLM) could increase fees for natural gas pipelines by more than 100 times, which could negatively impact national security, the successful implementation of the U.S. National Energy Policy and U.S. living standards.

In 1999 the BLM issued a proposed rule abandoning the traditional linear fee rent method, where rent is calculated based on the area of right-of-way times the market value of the land, in favor of a value of throughput rent method (called fiber rent method after its applicability to the cable industry). Under the fiber rent method right-of-way rent would be based on the value of the throughput.

Because of strong opposition the BLM issued an Information Memorandum (IM) in 2001 establishing interim policies and procedures. The final right-of-way rent method is now subject to a rulemaking. However, the IM allows an appraisal method to be employed prior to the final rulemaking. The U.S. National Forest Service (NFS) has collected and published appraisal information suggesting that the market value for fiber optic cable is between \$0.58 and \$2.72 per linear foot, up from less than \$0.01 under the current, linear fee method for gas pipelines.

Recently there have been several out-of-court settlements between private landowners and fiber optic companies at rental rate multiples of up to 300 times the historic rate under the linear fee method. Also, on November 8, 2001 H.R. 3258 was introduced in the House of Representatives to address the potential for "unreasonable increases" in right-of-way costs associated with critical infrastructure such as gas pipelines.

Currently, in addition to processing fees, the gas pipeline industry pays \$1.6 million per year for approximately 15,600 miles of rights-of-way on Government lands. This represents about 7% of the more than 200,000 miles of gas transmission pipelines in the U.S. This \$1.6 million could become between \$40 million and \$150 million if the BLM's value of throughput is applied to natural gas. Based on the documented need for 38,000 miles or additional transmission pipelines in the National Energy Policy, which we estimate could include approximately 3,800 miles on Government lands, the range increases to \$50 million to \$190 million annually, compared to \$2 million per year under the linear fee method.

BLM's proposed cost increase, which the pipeline companies would have to file costly rate cases to have the opportunity to recover from their customers, comes at a time when the National Energy Policy requires the upgrading and expansion of the gas pipeline infrastructure for economic, energy and national security purposes. For most Americans natural gas is a basic service, and such increases would lower their standard of living.

Employing this fiber rent valuation method has no basis in the natural gas industry where pipelines act as common carriers and receive no benefit from the value of the gas being transported. Further, such a throughput tax is not representative of market value, as it must under current legislation, because it does not represent the change in value that occurred across the pipeline right-of-way.

1. Preface

This report, commissioned by the INGAA Foundation, assesses the potential impact on the natural gas transmission pipeline industry (pipelines), and indirectly on the U.S. National Energy Policy, from proposed changes in pipeline right-of-way fees.

The proposed methodology studied is the Fiber Rent Method, which was proposed by The Bureau of Land Management (BLM) in 1999, and is now subject to a formal rulemaking process. The proposal, generically, seeks to establish right-of-way (ROW) rental rates based on the value of the throughput passing through the right-of-way.

Introduction

On January 24, 2001, on the strength of strong pipeline industry intervention, the BLM issued an Information Memorandum (IM) on "*Right-of-Way (ROW) for Fiber Optic Uses – Interim Policies and Procedures for Application Processing, Rental Determination and Administration*". See Attachment II. This IM is effective until September 30, 2002 or until new rental regulations for fiber optic projects can be implemented through a formal rulemaking process. There has been no action toward a formal rulemaking to-date.

The BLM IM was preceded, in June 1999, by a proposed rule (PR) to revise rent and other procedures and fees since the current regulations became effective in July 1987. [Federal Register: June 15, 1999

(Volume 64, Number 114) Page 32105-32143, available online from www.wais.access.gpo.gov Document ID: fr15jn99-28]. The PR states that the U.S. Forest Service (NFS), in the Department of Agriculture, intends to adopt these rules to the extent applicable.

While the IM and PR refer specifically to fiber optic rent, there is reason to believe it could set a precedent for pipeline and other rent as well.

In 2001 there have been some out-of-court settlements between landowners and fiber optic companies where the settlements have been at significant multiples (more than 300 percent) to the similar rent charged pipeline companies under the current BLM Linear Fee Schedule Method.

Linear Fee Schedule Method

The current Linear Fee Schedule method, effective since July 8, 1987, consists of the following formulation:

1st Year: Base Rental Fee = Right-of-Way Zone Value x Impact Adjustment x Interest Rate x Number of Acres Impacted.

Subsequent Years = Base Rental Fee x Annual Inflation Index.

The Linear Fee Schedule method is documented in Volume Two of this Study and its results summarized in Chapters 4 and 5 of this Volume.

Fiber Rent Method

In late 1999, the BLM, supported by the NFS, proposed a revision to its linear fee schedule for right-of-way pertaining to the fiber optic industry. Traditionally, annual rents on these lands have been assessed to operators of linear facilities on the basis of area impact of land. The proposal by these agencies departs from the traditional methodology in favor of a fee schedule that places a value on each fiber in the conduit rather than the conduit itself or easement area (fiber rent). This approach to valuation essentially attempts to value the commerce being conducted on a linear facility.

Interim Policy Method

Outcry from the fiber industry and congressional concerns has caused these agencies to retract this proposal. A second proposal (interim policy) submitted was also damaging in that it permitted the NFS to perform individual appraisals on renewals and the BLM to enjoy the benefits of a retroactivity clause until the final rule could be developed. This interim policy also allows the BLM to “bundle” or “group” Individual fibers by each subcontract or lease arrangement. A few fiber companies already have experienced rent increases with at least one paying 150 times more than they had been paying.

While the focus of the BLM and NFS efforts has been in the fiber industry, industry intelligence has determined that the power and pipeline industries could be the next targets with regard to revisions in the linear rate schedule. The problem is clearly not limited to the natural gas

industry, but encompasses the utility industry in general including power, telecommunications, water and any other linear infrastructure.

Implications

The potential negative financial impacts of this valuation methodology are many:

1. It could damage the integrity of the existing utility infrastructure across lands administered by these federal agencies;
2. It will expose the effected pipelines to seek the opportunity to recovery of these additional costs from its customers through formal regulator processes;
3. It could impair these pipeline's ability to obtain access to capital markets to maintain and develop the needed pipeline infrastructure to meet U.S. National Energy Policy requirements; and,
4. It could threaten the viability and integrity of gas pipeline infrastructure, which is classified as critical infrastructure by the U.S. Government;

thus harm customers and ratepayers across the U.S.

H.R. 3258

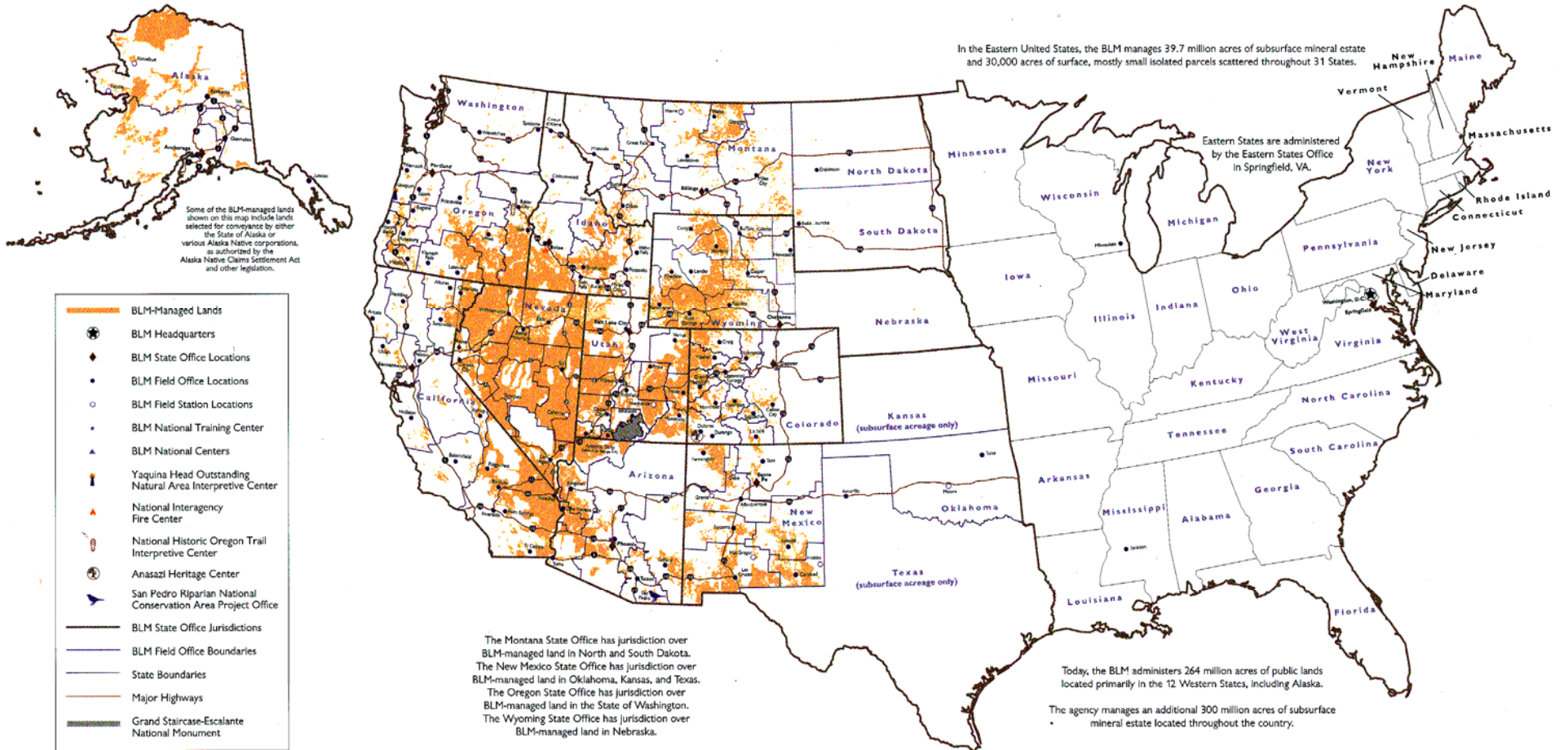
On November 8, 2001, H.R. 3258 was introduced to amend the Federal Lands Policy and Management Act of 1976 to “prevent unreasonable increases in certain costs in connection with the deployment of communications and other critical infrastructure. See Attachment I. This bill, if enacted as introduced, would cap the fair market value at the lowest of:

1. The value to the Secretary concerned of the land encumbered by the right-of-way.
2. The diminution in the value of the land to the Secretary concerned as a result of the right-of-way.
3. The amount necessary to restore the land to its use immediately before the initial grant or issuance of the right-of-way.

The bill specifically references the fair market value be determined from using traditional federal government land-use principles regardless of the technology present or related commercial value of the facilities.

H.R. 3258 appears to represent a reasonable solution to the question of compensation for federal land use by linear utility facilities. It would set a clear policy for the federal agencies, and resolve the long-standing debate over land-use fees.

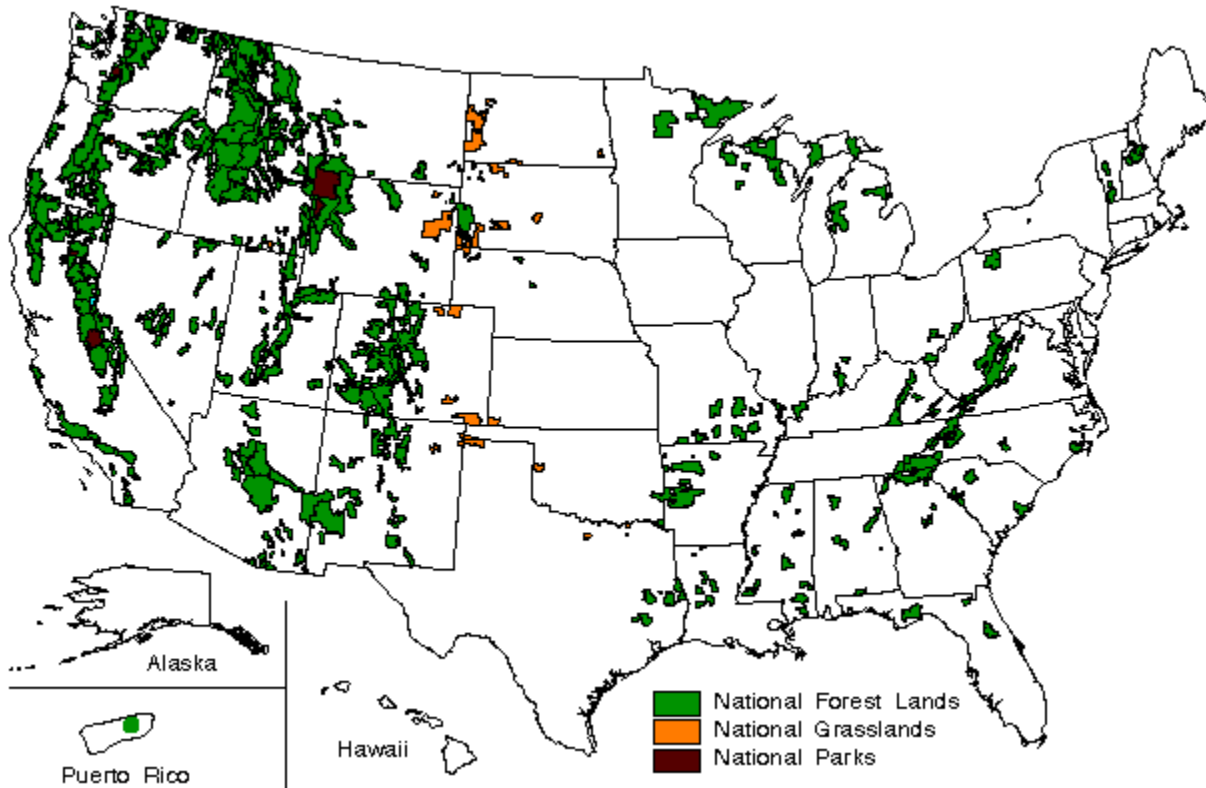
Public Lands Managed by the Bureau of Land Management (BLM)





USDA Forest Service

*Caring for the Land and
Serving People*



2. Federal Legislation

This Chapter provides a statement of certain relevant legislative, judicial and regulatory requirements and precedent. It also constructs a timeline documenting how the process has progressed to the current situation.

3.1 Bureau of Land Management (BLM)

The Bureau of Land Management (BLM), an agency of the Department of Interior, administers 264 million acres, primarily in the Western U.S. including Alaska. There are over 80,000 active right-of-way grants under BLM administration, with less than 100 east of the Mississippi River. The distribution of grants by type are summarized in Table 3.1:

Table 3.1 Right-of-Way Grants by Type	
<u>Type</u>	<u>Percent</u>
Roads and Highways	28%
Oil and Gas systems	28%
Communications sites	4%
Electric generation and transmission lines	13%
Other – Telephone, telegraph, miscellaneous	27%
TOTAL	100%

The BLM does not distinguish between oil, products and natural gas pipelines, and does not distinguish between gas transmission and gas distribution.

3.2 Federal Land Policy and Management Act of 1976, and Minerals Leasing Act

Section 501 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1761, authorizes the BLM to issue and renew rights-of-way under, over, and through lands under its jurisdiction.

Section 28 of the Mineral Leasing Act, as amended (MLA), 30 U.S.C. 185, authorizes the Secretary of the Interior to grant to qualified applicants rights-of-way through Federal lands for transporting oil, gas, synthetic liquids or gaseous fuels, or other refined products. The MLA also allows for temporary use permits to supplement each pipeline right-of-way for the purposes of constructing, operating, maintaining and terminating the pipeline and to protect the natural environment and public safety.

FLPMA Section 504(g)

Section 504(g) of FLPMA authorizes BLM to recover the “reasonable” costs of processing and monitoring rights-of-way issued under Title V, 43 U.S.C. 1761. Section 504(g) is codified in the Code of Federal Regulations (CFR) at Title 43 – Public Lands: Interior – Chapter II – Bureau of Land Management, Department of the Interior – Part 2800 – Rights-of-Way, Principles and Procedures – Subpart 2803 – Administration of Rights Granted – Section 2803.1-2 – Rental:

“(a) The holder of a right-of-way grant or temporary use permit shall pay annually, in advance, except as provided in paragraph (b) of this section, the *fair market value* as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices.”
(*emphasis added*)

Section 304(b) of FLPMA allows the Secretary of the Interior to establish “reasonable costs”, citing several factors that the Secretary might consider, including the following:

- Cost of special studies;
- Preparing and distributing environmental documents, such as environmental assessments and environmental impact statements;
- Monitoring the construction, operation, maintenance, and termination of facilities; and,
- Other special activities.

The BLM first issued cost recovery regulations for linear and aerial rights-of-way in 1979.¹ This was successfully challenged in federal court in *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Circuit 1983) on the basis that the regulations did not sufficiently consider each of the “reasonable criteria” in section 304(b) of FLPMA (43 U.S.C. 1734(b)). BLM developed definitions for these criteria, which were published in July 1987.

¹ Aerial or non-linear rights-of-way include communication site and reservoirs; all others including gas pipelines are linear.

Inspector General Report - 1995

In March 1995 the Inspector General (IG) for the Department of the Interior audited BLM’s cost recovery efforts on rights-of-way finding BLM’s financial system was not adequate to give a good estimate of the costs of the right-of-way program.

The BLM, in its July 1999 PR adopted the IG’s recommendations by proposing to:

- (1) Increase the processing and monitoring costs for right-of-way applications;
- (2) Provide for cost adjustments to accommodate increases in the economic indicator reflecting the general cost of labor; and,
- (3) Eliminate fixed dollar amounts from the regulations to allow for periodic cost adjustments.

The 1995 IG report references private rentals at 50-200 times BLM rates.

More importantly the 1995 IG report references private rentals at 50-200 times the rental rates of BLM and NFS. The IG found that ‘(I)n terms of potential lost rental revenues, under the current linear rental fee schedule, BLM charges from \$0.001 to \$0.02 per linear foot for a typical fiber optic cable. Appraisal information collected by the NFS indicates that the market value of fiber optic rights-of-way on comparable private lands were in the range of \$0.58 to \$2.72 per linear foot for fiber optic cable.’

The IG report concludes:

- ‘Not revising the per-acre rental

base for the linear right-of-way rental fee schedule has led to a situation in which BLM may not be fulfilling its statutory obligation to recover fair market value for linear rights-of-way.'; and,

- 'Not revising the schedule has prevented BLM from reacting to technological changes that will increasingly affect public lands, namely the replacement of copper wire with fiber optic cable.'

Since the law requires BLM to seek fair market value, this report appears to be the initial catalyst to BLM's current initiative to consider alternative rent methods.

Fair Market Value

FLPMA does not define the term fair market value. BLM has used the definition used by the Interagency Land Acquisition Conference in 1973 as the basis of fair market value policies and procedures in land acquisitions, disposals, and leasing since 1973. This definition states:

"Fair market value is defined as the amount of cash, or in terms of reasonable equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy. In ascertaining that figure, consideration should be given to all matters that might be brought forward and reasonably be given substantial weight in bargaining by persons of ordinary prudence, but no consideration whatever should be given to matters not affecting market value."

Since public lands are not for sale, BLM looks to values in the private market. For example, if a buyer and seller have a question about the value of a property, they can use knowledgeable appraisers.

H.R. 3258

On November 8, 2001, bill H.R. 3258 was introduced in the House of Representatives to clarify the method by which the Secretary of the Interior and the Secretary of Agriculture determine the fair market value of right-of-way granted, issued or renewed. See Attachment I.

This legislation provides the industry the opportunity to address the specific issues addressed in this study. As outline in the preceding chapter this bill, if enacted as introduced, would cap the right-of-way increases allowed by BLM, NFS and other Government agencies based on the lowest of several methods, all of which are derived from the Government's traditional land-use methodologies, rather than focusing on the technology or the commercial value of the facilities.

This study did not analyze H.R. 3258, but it clearly suggests that the fair market value definition discussed above would be superseded, as would any comparison between right-of-way grants in the private sector and this public sector.

4. BLM Right-of-Way Data

The following information was provided by the BLM in August 2001, and covers their entire right-of-way program, not just natural gas pipelines. Separate gas pipeline data was not readily available. Also, Fiscal year 2000 (as of September 30, 2000) was the latest summary BLM could provide. The rental amounts in this chapter do not include processing fees collected by the BLM to process any Right-of-Way applications. Total processing fees, of which gas pipelines would be a subset, were \$6.7 million in FY 2000, up from \$6.2 million in FY1999. Hence, processing fees represented 40% of annual right-of-way rental fees in 2000.

4.1 BLM Right-of-Way

Table 4.1 provides the total number of BLM Rights-of-Way authorized through September 30, 2000:

Table 4.1 Total BLM Authorizations (September 30, 2000)			
State	MLA	FLPMA/Other	Total
Alaska	11	1,234	1,245
Arizona	281	4,479	4,760
California	237	5,943	6,180
Colorado	1,119	5,178	6,297
US East	17	45	62
Idaho	105	5,023	5,128
Montana	273	4,150	4,423
Nevada	82	6,763	6,845
N Mexico	15,808	7,451	23,259
Oregon	21	8,898	8,919
Utah	689	3,979	4,668
Wyoming	4,361	8,445	12,806
TOTAL	23,004	61,588	84,592

Notes to Table 4.1: MLA (Mineral Leasing Act) and FLPMA (Federal Land Policy and Management Act) are defined in Chapter 3.

The total BLM authorizations grew by 2,771 authorizations in FY2000, or more than 3%.

About one-half of BLM Right-of-Way is not subject to rent, as Table 4.2 documents:

Table 4.2 Total BLM Authorizations Subject to Rent (September 30, 2000)			
State	MLA	FLPMA/Other	Total
Alaska	n/a	n/a	n/a
Arizona	1,346	247	1,593
California	2,726	223	29,49
Colorado	1,680	1,098	2,778
US East	7	4	11
Idaho	1,587	92	1,679
Montana	628	244	872
Nevada	2,627	78	2,705
N Mexico	2,811	15,564	18,375
Oregon	1,642	15	1,656
Utah	1,418	657	2,075
Wyoming	3,291	4,159	7,450
TOTAL			
X Alaska	19,763	22,380	42,143

Exemptions are available to Government entities, but not generally to the private sector.

Comparable Right-of-Way rental receipts for FY 2000 are provided in Table 4.3. This table includes all Right-of-Way rental fees, not just the natural gas pipeline industry:

Table 4.3 Total BLM ROW Rental Receipts (FY 2000) (Rounded to \$000)			
State	MLA	FLPMA/Other	Total
Alaska	\$165	\$48	\$213
Arizona	\$829	\$56	\$885
California	\$1,842	\$85	\$1,927
Colorado	\$366	\$198	\$564
US East	\$1	\$1	\$2
Idaho	\$528	\$29	\$557
Montana	\$101	\$31	\$132
Nevada	\$572	\$777	\$1,349
N Mexico	\$7,265	\$68	\$7,333
Oregon	\$596	\$10	\$605
Utah	\$383	\$63	\$446
Wyoming	\$726	\$557	\$1,283
TOTAL	\$13,374	\$1,921	\$15,295

Rental receipts are increasing annually because of two factors:

1. More Rights-of-Way granted; and,
2. Changes in the market value of the land upon which the Rights-of-Way exist.²

4.2 BLM Communication Sites

Table 4.4 provides Communication Site Rights-of-Way Authorized, subject to rent and FY 2000 rent.

Table 4.4 Total BLM Communication Sites (FY 2000) (Rounded to \$000)			
State	Authorized	Subject to Rent	Rent
Alaska	n/a	n/a	\$12
Arizona	270	160	\$539
California	446	261	\$890
Colorado	297	144	\$181
US East	0	0	\$0
Idaho	217	118	\$221
Montana	127	50	\$52
N Mexico	776	344	\$705
Nevada	269	194	\$247
Oregon	360	177	\$164
Utah	236	123	\$199
Wyoming	278	184	\$217
TOTAL	3,276	1,755	\$3,427

4.3 Total BLM Income - FY2000

Table 4.5 summarizes the income generated by the BLM in FY 2000, which exceeded \$25 million, with 60 percent from Right-of-Way rent.

Table 4.5 Total BLM Income – FY2000	
Revenue Source	Income (\$000)
Processing Fees	\$6,671
Right-of-Way Rent	\$15,295
Communication Sites	\$3,427
TOTAL	\$25,393

Natural gas pipelines account for approximately 10% of right-of-way rent.

² There is also the potential for the zone to change to a higher rate zone, but this has not occurred frequently since its implementation in 1987. These zones are described in Chapter 5.

5. Natural Gas Transmission Pipelines on Government Lands

This Chapter identifies the amount of natural gas pipeline right-of-way on U.S. Government land and the cost to the pipeline industry based on BLM's linear fee schedule method. Please note that in this chapter we applied the BLM method to all pipeline data on Government lands, and not to just BLM lands.³

5.1 Natural Gas Pipeline Data

Using the Pennwell database and methodology (available in a separate document), we determined that there were 15,616.58 miles of interstate gas pipelines on Federal lands in the U.S. (Alaska excluded). Table 5.1 breaks this down between BLM, NFS and other Federal agencies.

Table 5.1 Gas Pipeline Miles on Federal Lands		
<u>Government Agency</u>	<u>Miles</u>	<u>%</u>
BLM	6,841.07	43.8
NFS	4,356.53	27.9
All Other	4,418.98	28.3
Total Government	15,616.58	100

The Government leases its right-of-way based on the area utilized, not the linear distance. In the absence of actual information we arbitrarily

³ This assumption is reasonable as the second largest provider of Rights-of-Way, the NFS, adopts BLM process and procedures.

assumed that the average right-of-way width was 50 feet.⁴ Applying this to the data in Table 5.1 produces the following table:

Table 5.2 Gas Pipeline Area on Federal Lands		
<u>Government Agency</u>	<u>Area (Sq Acres)</u>	<u>%</u>
BLM	41,461.03	43.8
NFS	26,403.21	27.9
All Other	26,781.70	28.3
Total Government	94,645.94	100

The BLM established eight zones based on typical raw land values ranging from \$50 per acre to \$1,000 per acre. Each county of the country was assigned to one of these 8 zones. The zone for each county is available from the BLM, including from their BLM website. We used this website along with the Pennwell data base to match pipeline Rights-of-Way to each of the eight zone types.

The FY2000 Linear Right-of-Way rate, as determined from the legislation outlined in Chapter 3, is provided in Table 5.3:

⁴ During construction 'temporary' right-of-way often exceeds 50', with 75' and 100' common.

**Table 5.3
Linear Right-of-Way Rates
(Dollar per Sq Acre for 12 Months)**

<u>Zone</u>	<u>Energy</u>	<u>Electric</u>
1	\$3.62	\$3.16
2	\$7.23	\$6.32
3	\$14.50	\$12.68
4	\$21.71	\$19.02
5	\$28.99	\$25.35
6	\$36.21	\$31.69
7	\$43.46	\$38.05
8	\$72.43	\$63.38

These rates are adjusted annually under FLPMA guidelines and implementing regulations.

Applying the energy rates to gas pipeline data produces the rental fee results for the gas industry in Table 5.4A and 5.4B, or a total of \$1.6 million dollars.

**Table 5.4B
Gas Pipeline
ROW Fee by Agency
(\$000 per year)**

<u>Zone</u>	<u>BLM</u>	<u>FS</u>	<u>Other</u>	<u>Total</u>
1	\$10	\$0	\$1	\$11
2	\$181	\$10	\$105	\$295
3	\$134	\$60	\$14	\$208
4	\$58	\$138	\$59	\$255
5	\$45	\$289	\$148	\$482
6	\$6	\$41	\$15	\$62
7	\$0	\$130	\$120	\$250
8	\$0	\$32	\$4	\$36
Total	\$434	\$700	\$466	\$1,600

The resulting average rate paid was \$16.905 per square acre per year.

**Table 5.4A
Gas Pipeline
ROW Fee by BLM Zone**

<u>Zone</u>	<u>Length (Miles)</u>	<u>Area Sq Acres)</u>	<u>ROW Fee (\$000)</u>
1	509.6	3,088.2	\$11
2	6,745.8	40,883.2	\$296
3	2,369.6	14,361.0	\$208
4	1,935.9	11,732.8	\$255
5	2,744.4	16,632.7	\$482
6	281.6	1,706.6	\$62
7	949.9	5,738.7	\$250
8	82.86	502.2	\$36
Total	15,606.6	94,585.4	\$1,600

Table 5.4B presents the same data by Federal Agency, separating BLM and NFS from all other.

6. Impact of Fiber Rent Methodology

This Chapter calculates the potential impact on the gas pipeline industry from alternative Right-of-Way methods. The Fiber Rent Methodology has not been finalized so estimates were obtained from actual private industry settlements.

Table 6.1 repeats Table 5.4B showing the cost to the industry under the Linear Rent Method, approximately \$1.6 million per year.

Table 6.1 Gas Pipeline ROW Fee by Agency (\$000 per year)				
<u>Zone</u>	<u>BLM</u>	<u>NFS</u>	<u>Other</u>	<u>Total</u>
1	\$10	\$0	\$1	\$11
2	\$181	\$10	\$105	\$296
3	\$134	\$60	\$14	\$208
4	\$58	\$138	\$59	\$255
5	\$45	\$289	\$148	\$482
6	\$6	\$41	\$15	\$62
7	\$0	\$130	\$120	\$250
8	\$0	\$32	\$4	\$36
Total	\$433	\$700	\$466	\$1,600

6.1 T-Cubed Rental Settlement

Citations: (1) See 'Landowners win cash for cable lines' by The Associated Press, special news to CNET News.com on June 6, 2001, 3:40 p.m. PT on the Internet at:

<http://news.cnet.com/news/0-1004-200-6209301.html?tag=st.ne.1004.saslnk.saseml>; (2) 'Railroad Settles With Landowners', The Associated Press, August 29, 2000, 1:59 p.m. PT, Indianapolis. (3) The federal judge's

approval of the contested settlement in U.S. District Court for Southern Indiana is found on the Internet at <http://www.insd.uscourts.gov/search-opinions.htm> - Cause No. IP 00-1232-C B/S 8/28/01 Uhl, et al. v. T-Cubed.

This class-action lawsuit settlement, reached on June 5, 2001, and approved by U.S. District Court Judge Sarah Evans Barker on August 29, 2001, requires a Norfolk Southern Corporation subsidiary to pay landowners when it installs underground fiber-optic lines along rail tracks in 15 states. Overall, the settlement involved paying some 58,000 landowners along 2,500 miles of railroad track several millions of dollars.⁵

The fiber optic cable company, Thoroughbred Technology and Telecommunications or (T-Cubed), is the telecommunications subsidiary of Norfolk Southern. The class action suit was filed in the summer of 2000 after an Indiana farmer refused to sign a waiver allowing T-Cubed to dig on his land.

T-Cubed argued that it could use property rights of way for rail traffic to ship digital information on the cables, without further payment to landowners. The plaintiffs said digital information should not be treated like

⁵ The states covered are 15: Pennsylvania, Alabama, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, Virginia and West Virginia. This covers about 12% of the Norfolk Southern system of 21,000 miles.

rail freight. The plaintiffs argued that Norfolk Southern's rights of way were limited to rail traffic, and that the landowner has the legal right for compensation for the use of a corridor of their land. In the settlement compensation consisted of three components:

Cable Side Class Members Only:⁶

1. **Cash:** \$6,000 per linear mile (about \$1.14 per linear foot);
2. **Percentage of Revenues:**
 - a) Conduits 1-3: Nothing
 - b) Conduits 4-7: the greater of 7.5% of gross receipts or \$30,000.00 per mile
 - c) Conduits 8 and above:⁷ the greater of 11.25% of gross receipts or \$30,000.00 per mile.

The cap includes the \$6,000.00 initial cash payment.⁸

All Class Members:

3. **Class Corridor, LLC:** All class members will gain an ownership interest in Class Corridor, LLC, which will operate on behalf of the class. Class Corridor, LLC, will receive the easements from class members and transfer them to T-Cubed. T-Cubed will transfer to

Class Corridor, LLC a note for each Settlement Corridor. The note will provide that four years after the date the judgment and order are final, T-Cubed will pay Class Corridor, LLC \$316.00 for each mile of dark-fiber-optic stands it installs or acquires in a particular railroad corridor. If after the first year, but before the end of the fourth year, T-Cubed has disposed of the fourth conduit in its network for its own account, Class Corridor, LLC may, instead of taking a cash payment, demand that T-Cubed transfer to the company the lesser of one-half of the number of strands controlled by T-Cubed or 16 strands in lieu of payment under the note (Agreement, ¶IV,F).

A purpose of Class Corridor, LLC, was to allow landowners to own an enterprise that will control the future use of their land under the railroads for fiber optic cable purposes.

Therefore, the landowners with cable on their side of the tracks will receive at least \$6,000 in cash per mile after the first of three planned pipes are installed. Depending on how much additional cable is laid, property owners could receive as much as \$31,875 per mile of property used. This cap is based on the landowners receiving 10-15 percent of any profits that T-Cubed gets from leasing its fiber-optic network to other companies (information on this settlement was not provided by area, or acre). Those owning land on the other side of the track will receive nothing.

The settlement provides a guaranteed minimum \$30,000 on

⁶ At the time of the settlement most class action members did not know whether they would be "cable side" landowners or not.

⁷ T-Cubed projects as many as 12 cables.

⁸ Class Counsel fees include \$2,000 per linear mile plus 2.5% of gross receipts from conduits 4-7, and 3.75% from conduits 8 and thereafter.

these profits, hedging against any downturn in the bandwidth market.

The landowners received cash plus an interest in future profits, and a guaranteed minimum from T-Cubed.

In the T-Cubed settlement the property owners are also getting their own fiber, which will be owned by a corporation owned in aggregate by all of them. Landowners on both sides of the track will be eligible to own equity in a company that will own the telecommunications easements on the side of the railroad without cable.

Analysis:

1. No Impact on Pipeline Company or Pipeline: The T-Cubed settlement, and the court's approval of the settlement, attributed no value or additional landowner rights to either the railroad company or the railroad tracks. Therefore, buy extension it could be argued that the laying of fiber optic cable in the pipeline company's right-of-way should impact neither the pipeline company nor the pipeline.⁹

2. Pipelines Can Protect Themselves: By not attributing any value to existing rights-of-way, the pipeline company may be able to protect itself by agreeing with any telecommunications company that wishes to use the pipeline's rights-of-way that any and all incremental

⁹ The impact could be on the fiber optic company, which could be affiliated with the pipeline company.

rights-of-way cost are to be borne by the telecommunications company.

3. BLM, NFS Revenue Potential: Assuming the railroad corridor is similar in width to a gas pipeline corridor we can estimate the impact of the T-Cubed settlement on total right-of-way costs on existing pipeline rights-of-way on Federal lands, which we have summarized in Table 6.2 – the \$1.6 million per year becomes \$498 million (please note that the units and time period are different than Table 6.1):

Table 6.2 Gas Pipeline ROW Fee by Agency T-Cubed Settlement Method (\$000,000)				
Zone	BLM	NFS	Other	Total
1	\$15	\$0	\$1	\$16
2	\$131	\$7	\$77	\$215
3	\$49	\$22	\$5	\$76
4	\$14	\$34	\$14	\$62
5	\$8	\$52	\$27	\$87
6	\$1	\$6	\$2	\$9
7	\$0	\$16	\$15	\$31
8	\$0	\$2	\$0	\$2
Total	\$218	\$139	\$141	\$498

Since T-Cubed is a relatively new company, industry spokespersons have downplayed its applicability to others.

6.2 AT&T Rental Settlement

Citation: See 'Bottleneck on the high-speed highway' by John Borland, staff writer, CNET News.com, May 29, 2001, 4:00 a.m. PT on the Internet at <http://news.cnet.com/news/0-1004-200->

6046529.html?tag=st.ne.1004.saslnk.saseml

AT&T was one of the first to settle a fiber-optics claim, paying \$45,000 per mile for short stretches of land in Ohio, Connecticut and Maine in March 2001 for railroad right-of-way that was no longer in use.

and assuming a 50' easement width (or 6.0606 acres per mile) this produces \$4,169 - \$19,550 per pipeline mile in annual rent. This equates to a 5,000 – 20,000 percent increase in pipeline rights-of-way rent if applied (i.e., 50 to 200 times increase). The following tables illustrate the impact of this NFS appraisal result if applied to the gas pipelines on Government lands on an annual basis.

Table 6.3 Gas Pipeline ROW Fee by Agency AT&T Settlement Method (\$000,000)				
<u>Zone</u>	<u>BLM</u>	<u>NFS</u>	<u>Other</u>	<u>Total</u>
1	\$22	\$0	\$1	\$23
2	\$185	\$11	\$108	\$304
3	\$69	\$30	\$7	\$106
4	\$20	\$47	\$20	\$87
5	\$12	\$74	\$38	\$124
6	\$1	\$8	\$3	\$12
7	\$0	\$22	\$21	\$43
8	\$0	\$3	\$1	\$4
Total	\$309	\$195	\$199	\$703

This represents more than a 400 percent increase over the Linear Rent method if applied on an annual basis.

6.3 NFS Appraisal Value

Relying on appraisal information collected by the NFS, the market value for fiber optic rights-of-way on comparable private lands were in the range of \$0.58 to \$2.72 per linear foot for fiber optic cable.¹⁰ Arbitrarily applying this to the pipeline industry

¹⁰ We have not seen the NFS appraisal study to verify the appraisal method employed or other aspects of their study.

Table 6.4 Gas Pipeline ROW Fee by Agency NFS Appraisal Result @ 70x (\$000,000 per year)				
<u>Zone</u>	<u>BLM</u>	<u>NFS</u>	<u>Other</u>	<u>Total</u>
1	\$1	\$0	\$0	\$1
2	\$13	\$1	\$7	\$21
3	\$9	\$4	\$2	\$15
4	\$4	\$10	\$4	\$18
5	\$3	\$20	\$11	\$34
6	\$0	\$3	\$1	\$4
7	\$0	\$9	\$8	\$17
8	\$0	\$2	\$0	\$2
Total	\$30	\$49	\$33	\$112

Table 6.5 Gas Pipeline ROW Fee by Agency NFS Appraisal Result @ 320x (\$000,000)				
<u>Zone</u>	<u>BLM</u>	<u>NFS</u>	<u>Other</u>	<u>Total</u>
1	\$3	\$0	\$0	\$3
2	\$58	\$3	\$34	\$95
3	\$43	\$19	\$4	\$66
4	\$18	\$44	\$19	\$81
5	\$15	\$93	\$47	\$155
6	\$2	\$13	\$5	\$20
7	\$0	\$41	\$39	\$80
8	\$0	\$11	\$1	\$12
Total	\$139	\$224	\$149	\$512

6.4 Gas Pipeline Rate Impact

This section looks at two potential rate impacts on gas pipelines:

1. the impact of imposing rental rates based on the value of fiber optic cable; and,
2. the impact of imposing rental rates based on the value of the gas in the pipeline.

Fiber Rent Rate Impact

Throughput on interstate pipelines in 2000 was approximately 24 Tcf¹¹, or approximately 0.120 BCF per mile of available transmission pipeline based on 200,000 miles of gas transmission pipelines. Using 50' ROW width equates to 6.0606 square acres per mile or about 0.020 BCF per square acre of ROW per year. Thus the BLM Linear Rate, using the FY 2000 average of \$16.905 per square acre per year (see end of Chapter 5), creates a unit rate of \$0.0085 per Mcf.

The NFS has collected appraisal information that suggest the value for fiber optic cable on private lands range from \$0.58 to \$2.72, or 70 to 320 times the unit rate under the linear fee method. If the full appraisal value were imposed, the unit rate would increase to between \$0.60 and over \$2.50 per Mcf, or the largest cost component besides the cost of gas itself.

Gas Value Rate Impact

¹¹ This is based on deliveries to end consumers. Actual throughput will be less than that for deliveries not involving pipelines, but offset by throughput involving more than one pipeline and for throughput into and out of storage.

The value of the gas commodity varies from time to time, and the short-term value (e.g., next day, monthly spot or futures market, seasonal market) can fluctuate widely from day to day. During the 1990s the average price of natural gas on interstate pipelines was approximately \$2.25 per Mcf. With the increased use of natural gas for electricity generation most long-term projections suggest this price is now in the \$3.00 to \$4.00 range, with some of this range explained by location. This higher value is supported by trends in the cost to develop new natural gas supplies to meet this higher demand.

If rent were based on recovering the cost of developing the commodity,¹² such as rental rates on other property, then the annual rent could be 10%-20% of the value, or \$0.225 to \$0.80 depending on the value and percentage employed. This results in between a 25 and 95 times increase in the rental rate. The \$1.6 million would become \$40 to \$150 million per year.

Change in Rights-of-Way Width

The above analysis and impact has been based on an assumed 50' Rights-of-Way width. To the extent the average Rights-of-Way width was different, each number in this study would be changes proportionately. For example, a 75' average would raise the impact 50%.

¹² By making this assumption we are not suggesting any plausible basis as the pipeline cost is normally not included in the determination of the finding and development cost of the gas.

7. Analysis and Recommendations

7.1 Throughput Tax

Employing a Fiber Rent valuation philosophy is tantamount to a “throughput” tax to the natural gas pipeline industry and would have a significant negative cost impact in terms of not only ongoing expenses, but also capital expansion projects.

Since the pipeline owner and/or operator no longer can own the gas it transports, it is inconsistent to impose such a tax on that value on the pipeline company since the value has no meaning to the carrier.

A throughput tax does not attempt to measure the value added by the movement of gas across the right-of-way, but simply attempts to capture the full value of the commodity in the pipeline at that point in time.

7.2 Franchise Tax Precedent

Any deviation away from the linear fee schedule method could be inconsistent with legal precedent regarding the payment by common carriers for franchise and similar taxes on what is carried through the pipeline. Specifically, in the 1980s, when gas pipeline services were unbundled and pipelines no longer provided merchant service (no longer owned the gas they were transporting), it was no longer appropriate for the pipelines to pay local franchise and other similar taxes based on the value of the product being transported. The

courts determined that the responsible party to any franchise or value added tax was the shipper.

7.3 Implications to National Energy Policy

The implications of a Fiber Rent method on pipeline right-of-way rents is more significant when it is put in the context of building new pipelines needed to implement our nation’s National Energy Policy. The May 2001 National Energy Policy speaks directly to the challenges the country faces:

“The second challenge is to repair and expand our energy infrastructure. Our current, outdated network of electric generators, transmission lines, pipelines, and refineries that convert raw materials into usable fuel has been allowed to deteriorate. ... Natural gas distribution, likewise, is hindered by an aging and inadequate network of pipelines. To match supply and demand will require some 38,000 miles of new gas pipelines, along with 255,000 miles of distribution lines.”

The National Petroleum Council (NPC)¹³, in their December 1999 report, also documented the need for 38,000 miles of new gas transmission pipelines and 255,000 miles of new gas distribution facilities. Because of the increasing role of gas pipeline infrastructure in the electricity industry¹⁴ the cost of

¹³ The NPC is a non-political, federally chartered, privately funded oil and natural gas advisory committee serving the Secretary of Energy.

¹⁴ New technologies and environmental concerns have increased the role of gas-fired generation and gas

pipelines, including right-of-way rents, will have a significant impact on both the natural gas and electricity industries.

Table 7.1 calculates the impact on the pipeline industry for each 10,000 miles of pipeline right-of-way on Federal lands under the Linear Rent Method (assuming 50' right-of-way width) and the Fiber Rent Method.

Table 7.1 Gas Pipeline ROW Fee Each 10,000 Miles Linear Rate v Fiber Rate		
Linear Fee Schedule Rate		
<u>Category</u>	<u>Amounts</u>	<u>Units</u>
Miles	10,000	Miles
Acres	60,606	Sq Acres
Average Rate	\$16.905	\$/Sq Acre/Year
Rent	\$1.0245	Million
Fiber Rent		
<u>Category</u>	<u>Amounts</u>	<u>Units</u>
Miles	10,000	Miles
Fiber Rent	\$31,875	T-Cubed Settlement
Rent	\$318.75	Million
Difference		
Rent	\$317.7255	Millions

If all of the 38,000 and 255,000 new transmission lines were to be built on Government lands this difference would become \$9.3 billion (incremental cost just for right-of-way). Such a price tag, or even a fraction of it, would severely inhibit our nation's and industry's ability to achieve the energy objectives of the country.

pipelines are to be used to move gas to these new generation sites, often in urban areas.

Such an implication of a Fiber Rate Method may not be that far-fetched. A comparison of the BLM administered land in Figure One and the Forest Service land in Figure Two with the current source of U.S. supply (see Figure Three) shows that the majority of new supplies, and associated pipelines, will originate in BLM or adjacent lands.¹⁵

Figure Three: North American Supply



7.4 Critical Infrastructure

President Clinton, in July 1996, established the President's Commission on Critical Infrastructure Protection. In its October 1997 report: *Critical Foundations: Protecting America's Infrastructures*, the Commission identified eight critical infrastructures that are considered so vital that their incapacity or destruction would have a debilitating effect on our country's defense and economic security:

- Telecommunications;
- Banking and finance;
- Water supply;

¹⁵ This supply zone accounts for more than 90 percent of North American supply while East and West Coast markets account for two-thirds of demand.

- Electric power;
- Oil and natural gas;
- Transportation;
- Government services; and
- Emergency services (e.g., medical, police, fire)

In May 1998, President Clinton issued Presidential Decision Directive 63, *Protecting America's Critical Infrastructures*, calling for a national effort, combining public and private sectors, to ensure the security of the nation's critical infrastructures.

In February 2001, President Bush submitted to Congress a report on the status of federal critical infrastructure protection activities (http://www.ciao.gov/CIAO_Document_Library/CIP_2001_CongRept.pdf) In June 2001 the NPC, at the direction of the Department of Energy, issued its Executive Summary of *Securing Oil and Natural Gas Infrastructures in the New Economy* (the full report has not been released). While the focus of the report was on protection (and public-private coordination), there were several findings that bear on this analysis:

- Holistic – all components of U.S. energy sector should be viewed as a single energy infrastructure, including oil, gas, electricity, other energy sources, and their transportation modes, due to convergence and interdependence by the market;
- Public Benefit – a single energy infrastructure, through the creation of an integrated market allowing free trading and other value-added services offerings,

creates value for the market; and,

- Sharing – information, technology and other cost saving initiatives should be encouraged to the extent that provisions of the Freedom of Information Act exemptions should be considered.

It is inconsistent, therefore, to impose unnecessary and additional costs on these critical components of our society. This is even truer when it is recognized that interstate pipelines are allowed through the regulatory process an opportunity to recover these additional costs. Under the current rate design policy, such as straight-fixed-variable and enhanced-fixed-variable, fixed costs such as right-of-way expenses are generally recoverable in the demand component of a pipeline customer's rate.

7.5 Fair Market Value

The pipeline industry may be able to sustain the current definition and use of fair market value, as originated in the 1973 Interagency Land Acquisition Conference, by showing that definition to be applicable to the industry.

It may also be possible during the regulatory review to require the BLM to demonstrate that this definition of right-of-way rent is unjust and unreasonable before an alternative definition could be considered. Given the higher cost that would be imposed on the industry, and its

customers, it could be easier to show that the value of the pipeline has not increased and that a rent increase will reduce the market value of the pipeline. That is, it is not appropriate to value a component of a purchase in isolation and that the valuation of the whole must be considered.

7.6 Pipeline versus Fiber Optics

The pipeline industry views the new BLM proposal as a divergence from historical practices in that it inappropriately uses product throughput to determine fair market value. The pipeline industry, like other effected utilities, is working with BLM and the NFS to develop a more reasonable and appropriate methodology.

While BLM is currently focused on the fiber optics industry, it is still important for future discussions to make distinctions between pipelines and other linear facilities. Throughout the development of a rationale for different rental rates for fiber optic cable BLM continues to reference features of fiber optics that do not apply to pipelines:

	lesser value
The price is competitive with the high-end alternative types of cable required for high-speed computer networks	In an increasingly integrated gas industry the price will be dictated by competitive pipelines, not cost (lower of cost or market)
Increased BLM workload to replace copper lines	To achieve National Energy Policy objectives the BLM could experience greater demand, which might offer scale economies within the agency
Each fiber could be considered a separate right-of-way	On this basis pipeline right-of-way costs should be 144 to 1 million times lower than a fiber optic cable
Fiber optic cable is often installed with empty or partially full conduit with cable installed subsequently based on demand	Pipelines require a substantial portion of its uncompressed capacity to be contracted before it is economic to construct
Fiber optics operate at a high load factor	Pipelines operate at a lower load factor in most cases

7.7 Clear Title

Conceding that digital information is not freight, Norfolk Southern Railroad have raised an issue applicable to any pipeline owner that leases its pipeline right-of-way to a separate fiber-optics company and/or an affiliate set up for the purpose of participating in the fiber-optics industry. Since some pipeline companies have taken an equity interest in some of these telecommunication networks, the implications are potentially greater.

Table 7.2 Fiber Optics v Pipelines Illustrative Differences	
Fiber optics	Pipelines
Represents a new technology compared to when FLPMA was passed	Is essentially the same technology compared to when FLPMA was passed – in some cases due to decreases in MAOP due to encroachment it is of

Referring to the pipeline company only, and not whether it took an equity position in a fiber-optics network, one of the issues emerging from the growth of fiber-optic networks on pipeline rights-of-way is whether the pipeline had clear title to license the land to the network companies in the first place. In many cases the pipeline companies bought surface rights to lay pipelines, and the question is whether this can be extended to or can include fiber-optic cable.

None of the aforementioned lawsuits have gone to trial so there is no court judgment that serves as establishing precedent. However, despite the telecommunication industry's dismissal of the increasing number of suits, class-action status continues to be granted to these lawsuits. The current estimate, covering all right-of-way owners such as pipelines and railroads, is in the billions of dollars of exposure.

Clearly the pipeline industry needs to establish what, exactly, are its surface rights.

7.8 H. R. 3258

On November 8, 2001, H. R. 3258 was introduced in the House of Representatives. Its stated purpose is to prevent unreasonable increases in certain right-of-way costs for critical facilities such as natural gas pipelines. The bill, by design, removes the need to address such issues as asset ownership between the pipeline owner and its shipper, and asset operatorship now increasingly common (and mandated by regulation) in the industry. As introduced, with some clarification on the scope of the Secretary of the Interior and Secretary of Agriculture's discretion on assigning value to Government, including diminution of value and the reclamation or salvage value for restoring the land, this bill could address many of the commercial and other concerns raised in this study.

Attachment I: H. R. 3258

Note to reader – the line numbers in this attachment may not exact correspond to H.R. 3258 due to formatting differences.

107TH CONGRESS
1ST SESSION

H. R. 3258

To amend the Federal Lands Policy and Management Act of 1976 to clarify the method by which the Secretary of the Interior and the Secretary of Agriculture determine the fair market value of rights-of-way granted, issues, or renewed under such Act to prevent unreasonable increases in certain costs in connection with the deployment of communications and other critical infrastructure.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 8, 2001

MRS. CUBIN introduced the following bill; which was referred to the Committee on Resources

A BILL

To amend the Federal Lands Policy and Management Act of 1976 to clarify the method by which the Secretary of the Interior and the Secretary of Agriculture determine the fair market value of right-of-way granted, issued, or renewed under such Act to prevent unreasonable increases in certain costs in connection with the deployment of communications and other critical infrastructure.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Reasonable Right-of-Way Fees
3 Act of 2001”.

4 **SEC. 2. CLARIFICATION OF FAIR MARKET VALUE**

5 **DETERMINATIONS FOR PUBLIC LANDS AND**
6 **FOREST SERVICE RIGHTS-OF-WAY.**

7 Section 504(g) of the Federal Land Policy and Management Act
8 of 1976 (43 U.S.C. 1764(g)) is amended –

9 (1) by inserting “(1)” after “(g)”;

10 (2) in the first sentence, by striking “thereof” and inserting
11 “of the holder’s use of the land encumbered by the right-of-
12 way; and

13 (3) by adding at the end the following new paragraphs:
14

15 “(2) For purposes of paragraph (1), the fair market value of a
16 use of land encumbered by a right-of-way granted, issued, or
17 renewed under this title may not exceed the lowest amount
18 determined using the following valuation methods:

19

20 “(A) The value to the Secretary concerned of the land
21 encumbered by the right-of-way.

22 “(B) The diminution in the value of the land to the
23 Secretary concerned as a result of the right-of-way.

24

- HR 3258 IH

3

1 “(C) The amount necessary to restore the land to its use
2 immediately before the initial grant or issuance of the right-
3 of-way.

4 “(3) Fair market value and related rents shall be de-
5 termined from the perspective of Government as a land holder
6 and willing seller of the right-of-way under this title. Right-of-
7 way uses that have similar initial or potential physical impacts
8 on the land or adjacent lands, including the disturbance
9 necessary to establish the right-of-way and directly related
10 ancillary facilities, including points of access, substations,
11 compressor stations, and regeneration facilities, shall be valued
12 based on the fee value of the underlying land, regardless of the
13 technology present or related commercial value of the
14 facilities.”.

○

- **HR 3258 IH**

Attachment II: Information Memorandum

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

January 24, 2001

In Reply Refer To:
2800 (WO 350) P
Ref. IM 2000-171

EMS TRANSMISSION 01/25/2001
Instruction Memorandum No. 2001-080
Expires: 09/30/2002

To: All Field Officials

From: Assistant Director, Minerals, Realty and Resource Protection

Subject: Rights-of-Way (ROW) for Fiber Optic Uses - Interim Policies and Procedures for Application Processing, Rental Determination and Administration

Program Area: ROW Management

Purpose: This Instruction Memorandum (IM) establishes interim policies and procedures for processing and authorizing fiber optic ROW applications across public lands.

Policy/Action:

A. Interim Policy: The Bureau of Land Management (BLM) will assess a rental fee for fiber optic ROW projects based upon the current linear ROW rent schedule, as adjusted annually (43 CFR 2803.1-2), until new rental regulations for fiber optic projects can be implemented through a formal rulemaking process. Standard Stipulation No. 3 on the ROW grant form (Form 2800-14) will however continue to provide for adjustments of rent at the time that any new rental regulations are implemented and should be retained in all fiber optic ROW grants. In the interim, BLM will authorize and administer fiber optic projects, including rent determination, in accordance with this Instruction Memorandum.

Fiber optic projects, by their nature, can have a variety of owners and/or separate telecommunication service providers. Project proponents often find it economically beneficial to design and construct a fiber optic project with excess capacity (fibers, cables, conduits, and other equipment beyond the proponent's own needs which can be sold or leased to other parties). These additional users must each have their own authorization from BLM or the original ROW grant must include a subleasing provision that authorizes additional use(s) as the need arises (43 CFR 2801.1-1(f)).

A subleasing provision included in the ROW grant would accommodate any change in the ownership of any portion of the project, and/or the subleasing of excess space or equipment to additional providers. These additional telecommunication service providers lease excess space (and/or equipment) from the primary project owner and holder of the ROW authorization. With a subleasing provision included in the original authorization, any additional telecommunication providers would not be required to obtain a separate grant for their use. However, the holder of the ROW remains liable for compliance with the terms/conditions of the grant by all parties using the fiber optic facility.

Owners and telecommunication service providers may also sublease to a customer for that customer's own internal communication needs. A customer is not selling or providing a communication service to others, and would therefore never need a separate authorization from the BLM.

An inventory of re-generation equipment can assist in distinguishing between "owners", "telecommunication service providers" and "customers". "Owners" and "telecommunication service providers" would typically have their own, separate, re-generation equipment, housed in their own building, to service their own equipment and business needs. In some cases, the holder will lease excess rack space in a re-generation facility to accommodate the re-generation equipment of an additional telecommunication service provider. "Customers" would not have separate re-generation equipment for their use. Field Offices (FO) should periodically inventory re-generation stations and equipment to help determine the number of separate owners and/or third-party telecommunication service providers for a particular fiber optic project, to assist in management of the right-of-way authorization.

B. New Authorizations

1. Preferred Authorization: Issue a single ROW grant with subleasing provision.

Because of the many benefits which subleasing provides to the BLM and the ROW holder, it is the preferred policy of BLM to issue a single ROW grant (Form 2800-14), with a subleasing provision, for all new fiber optic projects. Grants would include, but are not limited to, the following terms and conditions:

a. A provision to allow subleasing of space/equipment to additional telecommunication providers without further approval from the BLM. Subleasing includes any change in ownership of any portion of the project, or the subleasing of space to additional telecommunication service providers. These additional telecommunication providers will not be required to obtain a separate grant for their use. No additional rent will be assessed to the ROW holder for the additional sublease owner(s) or telecommunication provider(s) within the project or facility. The holder is liable and responsible for compliance with all terms/conditions of the grant, including compliance with the terms/conditions by any additional user.

b. A provision which obligates the holder to notify BLM of any change in the future ownership status of the fiber optic project, or the subleasing to separate telecommunication service providers.

c. A ROW width that adequately accommodates the project, but not less than 10 feet.

d. A ten-year maximum term.

e. A provision to allow the BLM to adjust the rent, consistent with regulations and rental schedules. Standard Stipulation No. 3 (RENTAL) on Form 2800-14 provides for such an adjustment and should be retained in all ROW grants.

f. Collection of an advance annual (or other term as specified in the grant or via regulatory provisions) rent that is determined by using the existing linear rent schedule. The ROW grant will be issued as an actual rent grant, and **not** as an "estimated rent" grant.

The holder will be assessed an annual rent that is determined by using the existing linear rent schedule found at 43 CFR 2803.1-2(c). The authorized ROW area shall include an appropriate width to accommodate the construction, operation/maintenance and termination of all components of the project, including all conduits, marker poles, maintenance stations, in-line amplifiers, and re-generation facilities. A short-term ROW grant may be issued to accommodate temporary construction activities.

g. The holder must amend the ROW grant at any time additional land, equipment, and/or new uses are proposed which are beyond the scope of the existing authorization.

2. Importance of the pre-application meeting with the fiber optic project proponent(s).

FO's must explain to the proponent the financial obligations associated with processing a ROW application, and the potential monitoring costs and rental obligations if the application is approved.

3. ROW Application Requirements

The fiber optic project proponent must submit a completed application on Standard Form 299 in accordance with the provisions contained in 43 CFR 2802.3 and 2802.4. The project proposal must specifically describe in detail (preferably in a Plan of Development) the components of the fiber optic facility and/or system, including but not limited to, the size, number, and type of conduits, innerducts, cables, and fibers. The proposal must include a specific description (by project segment) of the number of fibers in each conduit or innerduct, and the use (commercial, public purpose, or internal) and ownership of fibers (via a fiber content map). If the ROW is granted, it must contain a stipulation or provision, which requires the holder to provide an updated fiber content map (including the number of active and installed but inactive fibers) on an annual basis. Finally, the project proposal must describe all ancillary components, including but not limited to, re-generation stations (number of individual sites and individual re-generation facilities at each site, distance between sites, access and power requirements, fencing needs, etc.), in-line amplifiers, fiber-splicing vaults (man-holes and/or hand-holes), and warning markers.

4. Alternative Authorization: Issuance of a new ROW grant without a subleasing provision.

For administrative efficiencies, issuance of one ROW grant per fiber optic project (with subleasing provisions) as described above, is BLM's preferred policy. However, BLM, at its discretion and at the request of the proponent/applicant, may issue a ROW grant for a

fiber optic project without subleasing provisions. If only one entity is involved, BLM shall condition the grant and inform the applicant of the following:

- a. Future desires to sublease any portion of the fiber optic project must be approved in advance by BLM.
- b. The ROW grant will require an amendment to authorize any future subleasing.
- c. All amendments to the ROW grant will be subject to cost recovery fees.
- d. In lieu of an amendment that provides for subleasing, each additional owner and/or telecommunication service provider must obtain their own separate authorization, which would be subject to rent based upon the current linear rent schedule. A proposed new owner would also need to submit a request and receive BLM approval for a full or partial assignment of the grant from the original ROW holder.

For multiple-owner projects that do not desire the subleasing provision, individual ROW grants without a subleasing provision can be issued to each separate owner or telecommunication service provider involved in the project in order to accommodate the needs of that specific business transaction. When one project has two or more ROW grants to accommodate different ownership entities or telecommunication service providers, rent is assessed to each holder based upon the existing linear rent schedule.

C. Existing Authorizations

1. Single Owner Projects Authorized Without Subleasing Provisions.

Many of the existing fiber optic projects that BLM has authorized to date have not included a subleasing provision, which allows additional users without BLM approval. Rent has been assessed based on the existing linear rent schedule. Some of these existing authorizations were issued subject to an "estimated rent", again based upon the current linear rent schedule. **Any ROW grant with an "estimated rent" provision must be revised to eliminate the "estimated rent" provision.** In addition, any future request by the holder to accommodate either additional owners or telecommunication service provider(s), must be approved by BLM and authorized by either:

- a. Issuance of a separate ROW grant to each new owner(s) or telecommunication service provider(s), or
- b. Amending the original grant to allow for "subleasing" of equipment and space within the authorized facilities. If the grant is amended to provide for subleasing, the holder must agree to notify BLM of any change in the ownership status of the fiber optic project, or whenever space has been subleased to additional telecommunication service providers.

2. Multiple Owner Projects Authorized Without Subleasing Provision.

- a. Infrequently, ROW grants are held jointly by two or more entities, but the holders would be considered a single entity for rental determination purposes. For example, Companies A, B, & C may own equal shares of a ROW project and hold the ROW grant "jointly" or "in common". While each company is individually liable and responsible for

compliance with all terms and conditions of the ROW authorization, for rental determination purposes, treat the grant as a single, one-entity authorization and establish rent by using the current linear rent schedule.

b. Instead of one ROW grant held in "joint ownership", companies may have been issued their own ROW grant for that portion of the project that they have an ownership interest. In these cases, use the current linear rent schedule to determine rent for each authorization holder.

D. Installation within an Existing Transportation or Utility ROW Authorization

BLM will issue a new ROW grant when a fiber optic use is proposed for installation within an existing transportation or utility ROW authorization (including Federal Aid Highway projects), unless the authorization provides for the subleasing of new uses (specifically fiber optic uses) without additional approval.

However, no approval or authorization is necessary from BLM for any new use (including fiber optic projects) proposed within a pre-Federal Land Policy Management Act (FLPMA) railroad ROW (Reference Solicitor's Opinion, M-36964, and memo to State Offices dated July 7, 1999, from the Assistant Director, Minerals, Realty and Resource Protection).

Whenever a pre-FLPMA railroad ROW becomes abandoned and the ROW reverts to public land status, non-railroad uses also terminate. Therefore, existing non-railroad uses previously authorized by the holder of the railroad grant must be re-authorized by BLM.

E. Installation of a Fiber Optic Project on Existing or within Existing and/or Proposed ROW Facilities (whose primary use is something other than fiber optic telecommunications)

BLM will encourage holders of existing ROWs, to the greatest extent practical, to accommodate the placement of fiber optic projects within their ROW.

BLM will also encourage fiber optic project proponents/applicants to locate, to the greatest extent possible, their fiber optic project within existing ROWs.

Fiber optic projects to be installed on an existing (or proposed) utility structure whose primary use is something other than fiber optic telecommunications (i.e., electrical transmission power line or a pipeline for petroleum products, etc.) will require a separate ROW grant for the fiber optic use. The grant shall include a subleasing provision and be issued subject to rent as explained in Section B. above. The ROW width for the fiber optic project can vary from that of the primary use, but cannot be less than ten feet. The term of the authorization for the fiber optic ROW grant will not exceed 10 years.

F. Authorization, Construction and Installation of Empty Fiber Optic Conduits

A fiber optic project that is authorized and/or constructed with empty conduits (no fiber optic cables) is considered a single line when determining rent under the existing linear rent schedule. Rent is determined in accordance with Section B. above.

G. Application of Policy to Holders Exempt From Rent

All holders who utilize fiber optic lines for commercial purposes are subject to rent in accordance with the existing linear rent schedule, unless they are specifically exempted from rent by statute or regulation, including facilities that are eligible for financing pursuant to the Rural Electrification Act of 1936, as amended (43 U.S.C. 1764 and 43 C.F.R. 2803.1-2(b)(1)(iii)).

Rent-exempt holders who lease/sell excess capacity for commercial purposes to other telecommunication service providers that are not exempt from rent by statute or regulation, lose their exemption for that portion of the fiber optic project being sold or leased for the commercial purposes. Given this exception, rent is determined in accordance with Section B. above.

H. Interagency Projects

Many of the major fiber optic projects being proposed to the BLM and the Forest Service (FS) include lands administered by both agencies. When such a fiber optic project is proposed, both agencies have typically collaborated and agreed upon a lead agency. The lead agency processes the application and oftentimes authorizes the project. This is a sound management practice that shall continue. FO's shall continue to make the lead agency determination based upon the nature of the project, its impact to the land and resources, issues or concerns about the proposal, availability of resources to process the application, and customer service to the applicant. (Refer to BLM Manual 2801.35B.1.f. (Coordination) for further guidance on determination of a lead agency).

Until a fiber optic rental regulation is adopted, the BLM and the NFS have agreed that the land use rent for interagency projects will be determined in accordance with the existing linear ROW rent schedule found at 43 CFR 2803.1-2 (c).

I. Alternative Rent Determinations

The BLM will not apply the criteria found at 43 CFR 2803.1-2(c)(1)(v) to deviate from the current linear rent schedule in favor of an appraisal or other method to determine rent. However, many companies have indicated that they prefer to make a one-time rent payment rather than annual payments. To accommodate these requests, the BLM will consider alternative methods to establish fair market value rent, but only when requested by the applicant and approved by the BLM.

The applicant may request an appraisal to establish fair market value rent for a fiber optic project, subject to the following terms and conditions:

1. BLM and the applicant must jointly agree to establish rent via an appraisal.
2. An appraisal provided by the applicant must be approved by the BLM.
3. An appraisal provided by the BLM must be accepted by the applicant.
4. All BLM appraisal and review work must be funded by the applicant via cost recovery.

5. Once an acceptable rent has been determined, the applicant can choose to pay the rent on a one-time basis for the term of the grant; or as otherwise provided by regulations.
6. Rent established by an appraisal (or by negotiations based on relevant market data) will be considered actual rent for the full term of the grant.
7. Once a revised rental schedule is adopted by regulation for fiber optic uses, it cannot be applied to ROW grants where actual rent has been paid for the full term of the grant.

J. Rent Reduction and Appeal Rights

With the concurrence of the State Director, the authorized officer may reduce rent when it is determined that payment of full rent will cause undue hardship on the holder/applicant and that it is in the public interest to reduce said rental. This "hardship" provision is found at 43 CFR 2803.1-2(b)(2)(iv). Appeal rights (under 43 CFR part 4) are available to all holders whose rent is determined by the existing linear rent schedule.

K. LR2000 Notations

A new commodity code (972) has been established to identify ROW uses for fiber optic facilities and to track these uses within LR2000. Please refer to WO Instruction Memorandum No. 2000-171, dated August 4, 2000, for guidance on the use of this new commodity code.

Timeframe: This IM is effective upon receipt.

Budget Impact: The application of this policy will have a minimal impact on budget and workload. The current linear ROW rental fee schedule will continue to be used, until new rental regulations are developed and implemented through a formal rulemaking process. However, there is a positive impact through the implementation of consistent procedures in the processing of fiber optic rights-of-way under existing regulations.

Background: The Bureau of Land Management (BLM) is receiving, processing and authorizing a growing number of proposals for the installation of fiber optic telecommunication lines across public lands. As a result of this ongoing activity, a number of questions have been raised by FO's regarding the authorization and administration of ROW applications and grants for fiber optic projects, and specifically, the determination and assessment of appropriate rent.

A growing volume of data indicates that the market value of fiber optic ROWs may exceed the annual land use rental rates in the existing linear ROW rent schedule found at 43 CFR 2803.1-2(c). In the last year or so, the BLM has routinely authorized projects and assessed an "estimated" rent, based upon the current linear rent schedule, while awaiting development of internal policy or regulations which would establish a rent schedule for fiber optic projects. Recently, BLM made an agreement with Congressional leaders that any new rent schedule for fiber optic uses would only be established via the regulatory process with full public participation.

It is to the benefit of both the BLM and the NFS, as well as the customers we serve, that consistent policies and procedures be developed for the authorization and administration of fiber optic projects now located or proposed to be located on both the public lands and National Forest System lands. The BLM and NFS have thus agreed to conduct a market study of fiber optic uses, with the objective of establishing a market based schedule of rates and/or methods that can be easily and consistently used by field managers in determining and assessing a fair market rent for fiber optic projects.

Manual/Handbook Sections Affected: BLM Manual 2801, ROW Management and HandbookH-2801-1, is affected by this IM and policy.

Coordination: The development of this policy was coordinated within the Department, and at the Director and Assistant Director level. BLM State Office and FO were contacted for input. Considerable Congressional interest has been expressed regarding the development of fiber optic ROW policies and numerous briefings of Congressional staff has been facilitated by the BLM Washington Office (WO), Legislative Affairs staff.

Contact: Any questions concerning the content of this IM should be directed to the WO, Lands and Realty Group (WO-350) and the attention of Ron Montagna, at (202) 452-7782 or Bill Weigand, at (208) 373-3862.

Signed by:
Carson W. Culp
Assistant Director
Minerals, Realty and Resource Protection

Authenticated by:
Barbara J. Brown
Policy & Records Group, WO-560

Attachment III: Study Methodology

Natural gas transmission pipeline data was purchased from Pennwell MAPSearch, an industry leader in the collection, verification, and distribution of pipeline data. The data were received digitally in Environmental Systems Research Institute (ESRI) ArcInfo Export files (a format that enables easy transfer of spatial data). These data included information that describes each pipeline. A detailed data dictionary of the PennWell pipeline data is available in a separate document or from PennWell.

County boundaries converted to a digital format were obtained from ESRI at a scale of 1:100,000. Federal Lands digital data, created by the U. S. Geological Society, were downloaded from the U.S. National Atlas Federal and Indian Land Areas web site. These digital data layers were also obtained in the ESRI format for easy data exchange. The two data layers were overlain with one another using ESRI's ArcInfo GIS software, resulting in a data layer in which all-spatial data and associated attributes were

combined into one data layer. This resulting data layer determines which Federal Land lies in which county.

This county/federal land jurisdiction data layer was overlain by the natural gas transmission pipeline data layer using a similar spatial data function. The resultant data layer, which is a combination of the pipeline, county and Federal Lands data layers, now contains the pipeline and the associated county and Federal Land that it crosses.

Each pipeline segment was then attributed with 2001 right-of-way rent prices for the appropriate zone that is associated with the different counties. Right-of-way acreages were calculated based on a 50-foot right-of-way and the length of pipeline that crossed each zone. The resulting data were extracted from the spatial database and imported into MS Excel files.