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INTERIOR-ENERGY SCOPING MEETING

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- I. Earlier this afternoon, Mr. Sansonetti claimed that in Section 1813, Congress determined that the status quo – where tribes must consent to rights-of-way across their lands for transportation of energy – is not an option for the Departments to consider in this study. That is simply not so.
 - A. The energy industry (specifically the New Mexico Oil and Gas Association) asked Congress to amend the Energy Policy Act of 2005 to remove the existing legal requirement that energy companies obtain tribes’ consent for rights-of-way over tribal lands. Congress rejected that proposal, and instead enacted Section 1813.
 - B. Section 1813 by its plain language requires the Departments to prepare a study “making recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions and renewals of energy rights-of-way on tribal land.” Congress did not in any way limit what recommendations the Departments could make.
- II. In fact, the Departments should recommend that the appropriate procedure for determining fair and appropriate compensation to tribes for rights-of-way over tribal lands should remain as it is today – bilateral negotiations between each tribe and each company. The Department should also recommend that the parties to each right-of-way agreement should remain free to agree between themselves on the standards for compensation. This is so for several reasons:
 - A. Treaties between the United States and tribes and Supreme Court decisions beginning with the Marshall Court have uniformly required tribes’ consent to any conveyance or use of tribal lands by non-Indians.
 - B. For over 70 years, federal statutes and regulations have specifically required tribal consent to rights-of-way over their lands.
 - C. The policy of every Administration since the late 1960s – both Republican and Democratic – and of every Congress for the past four decades – has been tribal

self-determination, meaning that tribes should control their lands and affairs. This policy is specifically embedded in the Energy Policy Act of 2005.

- D. The Departments have a trust responsibility to tribes which weighs heavily in compelling a recommendation by the Departments to Congress that the existing legal regime of bilateral negotiations and tribal consent to rights-of-way over their lands continue.
- III. Every alternative recommended by Mr. Sansonetti today and by every industry representative proposing changes in the status quo would regress federal Indian policy to the long discarded and discredited policies of late 19th and early 20th centuries where some federal entity or bureaucracy controlled the ultimate decisions on how tribes' lands would be used and what tribes would be paid for that use.
- A. On the procedures for determining appropriate compensation, history teaches what happens when federal agencies or entities make the ultimate decisions about use of tribal lands. Tribes are underpaid for those uses, and the lands are devoted to uses desired by non-Indians, not the ones tribes wish. Any procedure by which a court or federal agency determines that a right-of-way must be granted or renewed over tribal lands where a tribe has not consented, or sets a monetary compensation the tribe has not agreed to, is a forcible condemnation of those tribal lands by eminent domain, a position Mr. Sansonetti himself dismissed in his remarks on March 7 as an extreme one.
 - B. As for appropriate standards, every industry proposal would substitute some structure imposed by the federal government for one voluntarily agreed to by tribes and companies:
 - 1. The industry proposal that the standards for compensating tribes for rights-of-way should be similar to those standards governing rights-of-way over federal public lands should be rejected because:
 - a) tribal lands have unique historic, cultural and religious values, as they were set aside as permanent homelands for tribes by treaties and other federal documents. Almost all federal lands (except for portions of some national parks) are very different in this respect;
 - b) tribal lands taken for energy rights-of-way usually cannot be replaced with lands of comparable historic, cultural and religious significance to tribes;
 - c) unlike the federal and state governments, tribes' power to tax or regulate the activities of non-Indians using tribal lands to defray the cost of general governmental services and specific services tribes must provide to protect

their reservations from actual and threatened impacts of those activities has been limited by the courts – often in cases where energy companies have challenged tribal authority;

d) while the United States has historically provided access over its lands at low rates of compensation to encourage companies to transport energy products nationwide, Indian reservations have not received benefits of energy transportation comparable to those enjoyed by the general public. Indian communities are the most underserved parts of the country with respect to access to gas, electricity, oil and other energy products. Energy companies have typically harvested raw materials on reservations and transported them to distant non-Indian communities, often without serving the reservation at all, or have used tribal lands as a conduit to move products from points outside the reservation to other points outside the reservation. This gross disparity in access to energy products between Indian reservations and non-Indian communities should be discussed in the study, and the Departments should develop recommendations to eliminate it.

2. The industry proposal that some “objective” standard should be followed should also be rejected, because, as stated above (Paras IIIB(1)(a) and (b)), tribal lands have unique historical, cultural and religious significance that cannot be reduced to some “objective” economic value. In addition, imposition of some standard tribes have not agreed to would reach the same outcome as condemnation by eminent domain and offend against established and longstanding legal principles, the policy of self-determination and the federal trust responsibility.