



CONFEDERATED TRIBES  
of the

*Umatilla Indian Reservation*

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**MEMORANDUM**

To: Department of Interior  
Department of Energy

From: Antone Minthorn, Chairman, Board of Trustees  
Confederated Tribes of the Umatilla Indian Reservation

Date: September 1, 2006

Re: Comments on the Confederated Tribes of the Umatilla Indian Reservation  
on the Draft §1813 Report

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The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) welcomes the opportunity to provide its comments to the draft §1813 Report. The CTUIR has previously commented on and has closely monitored the development of this §1813 Report. The CTUIR submitted comments by letter dated January 6, 2006 setting forth the Tribe's experience with energy rights-of-way (ROW) across its Reservation. Following the submission of these comments, CTUIR representatives have participated in the consultation meetings held in Denver in March and April of this year, with Tribal Board of Trustee member Bill Quaempts submitting both written and oral comments at the meeting on March 7, 2006.

I. Introduction.

The CTUIR has a long history with various ROWs across our Reservation. The first was the Oregon Trail. We were forced to cede 6.4 million acres of our aboriginal territory in exchange for a Reservation of 245,000 acres in our 1855 Treaty in large part due to the influx of settlers on the Oregon Trail which passed through our aboriginal territory and through the middle of what became the Umatilla Indian Reservation. This 19<sup>th</sup> century ROW was established without our consent and to our detriment. We will not permit the recurrence of the taking of our Reservation without our consent.

The Oregon Trail found its way on to our aboriginal lands because it is the easiest and most direct path to traverse the Blue Mountains and to descend to the Columbia

Plateau. Following in the path of the Oregon Trail, for similar reasons, is the Union Pacific Railroad line, successor to the permanent and uncompensated railroad ROW issued by President Buchanan in 1881, Interstate 84 and the Northwest Natural Gas Pipeline.

In the past, energy and transportation ROWs on the Umatilla Indian Reservation have been negotiated, granted and developed with little or no Tribal involvement, and either without Tribal consent, or with BIA officials essentially serving as agents of the energy pipeline company or transportation entity. As a result, even when the CTUIR and its members consented to ROW agreements, we did so without being properly represented and without Tribal government capability to protect the Tribe, Tribal members or our Tribal homeland.

That has changed in the past few decades. The CTUIR has taken advantage of the current Federal Indian Policy supporting Tribal self-determination. We have developed considerable governmental capacity by contracting Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) functions under the Indian Self-Determination and Educational Assistance Act. Our Tribal government now employs 400 persons including lawyers, doctors, dentists, accountants, fisheries biologists, planners, engineers, educators and many other professionals.

During the same time period, the CTUIR has also developed a Reservation economy. Our economy provides employment for Tribal members and the region and generates revenue to support Tribal government operations and provide services to Tribal members. We own and operate a casino, hotel, golf course, RV park, Tribal museum, truck stop and travel plaza, convenience store, restaurants, mobile home parks, Tribal farm enterprise, and regional waste disposal transfer facility.

The CTUIR employs over 1100 employees and is the second largest employer in Umatilla County. The transformation of the CTUIR government and economy over the past two decades is a story that has played out over many Indian reservations in this country. The CTUIR, like other tribes, are now in a position to exercise and defend their sovereignty. This is the context in which the energy ROWs on the Umatilla Indian Reservation originated, and has evolved, and helps explain why the direct involvement by our Tribal government in ROW matters is changing the landscape.

As pointed out in our comment letter dated January 6, 2006, it was a landscape needing change. Our energy ROW experience with the Northwest Natural Gas Pipeline Company affects and informs CTUIR positions on this issue and our comments to the draft §1813 Report. The total compensation paid to the CTUIR and its members by the Northwest Natural Gas Pipeline Company for the two mainlines (22 and 30 inches in diameter) and the service line (6-5/8 inch diameter), that cross more than 13 miles of trust lands on our Reservation, totaled \$38,000 for the 40 year time period between 1955-1995. The CTUIR played no role in those ROW negotiations.

Our January 6<sup>th</sup> letter identified the terms of the 1995-2015 renewal ROW. We demanded and received compensation that not only covered the 20 year renewal period, but also for the unconscionably inadequate compensation for the previous 40 years. The ROW renewal also authorized landowners to submit claims for loss of agricultural production that had never been claimed or paid.

The CTUIR does not claim to know the history of other Tribal ROWs, but if other tribes have similar experiences to ours, then it is no surprise compensation paid for Tribal energy ROWs has risen in recent years. It demonstrates that the days of BIA negotiated agreements for little or no compensation is over. It is a sign that the Tribes have capability to manage their own affairs, to negotiate their own energy ROW agreements and that the day of taking advantage of Tribes is over. As we said in our testimony on March 7<sup>th</sup>, the CTUIR contributed to the recent increase in energy ROWs, and it was long overdue. The CTUIR position then is the same now: the Departments of Interior and Energy and Congress should not use our recent success in correcting an injustice as a basis for another taking of our Treaty reserved homeland.

## II. Comments on Draft §1813 Report.

With that as an introduction, the CTUIR has the following specific comments to the draft §1813 Report:

1. We begin by expressing our support for key findings contained in the draft Report. Contrary to the oft-repeated, but never substantiated, claims by energy and pipeline industry representatives, Tribal consent for energy ROWs across tribal lands do not constitute a threat to national security (§3.2.1), have not and do not create any energy supply emergency (§3.2.1), and is not “consequential” in terms of energy costs for either the nation or consumers (§4.3). We believe the Report needs to plainly state that based upon the Report’s findings, energy ROWs across Indian lands is not a problem that requires any Congressional action.

2. The Report fails to include any meaningful discussion of the trust obligation owed by the Departments of Interior and Energy to Tribes, nor is this fiduciary obligation incorporated in the key findings, options and recommendations contained in the Report. The trust responsibility is mentioned only once, in §1.3.8, and only as a summary of Tribal comments. This is an omission especially glaring in light of Interior’s involvement in the drafting of the Report. While all Federal departments and agencies have the duty to uphold the trust responsibility owed to Tribes, the Department of Interior has the primary obligation to do so. Interior includes the Bureau of Indian Affairs which has primary authority within the federal government to serve and protect Tribes and their trust resources. The Report needs to explain the Department’s trust obligation to Tribes, their members and their trust assets, and then incorporate that fiduciary duty and perspective into the Report’s findings, recommendations and conclusion.

3. The Report needs to properly characterize the impact of the action options set forth in §4.4.2.d and e. The Report sets forth five options for Congressional

consideration in §4.4.2. Options d and e would permit energy ROWs on Tribal lands to be created, expanded or renewed without Tribal consent. The Report should make it clear that these options, or any option that eliminates Tribal consent, violates treaty rights.

Article I of the CTUIR Treaty of 1855 states:

That so much of the country described above as is contained in the following boundaries shall be set apart as a residence for said Indians, which tract for the purposes contemplated shall be held and regarded as an Indian reservation; ...all of which tract shall be set apart and...surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and the superintendent.”

(Emphasis added).

Our Treaty is clear and unambiguous on the requirement that Tribal consent is required for an energy ROW to be placed on Tribal lands on our Reservation. It is not enough for the Report to state, as it does in §1.3.8, that Tribal commenters “asserted” that condemnation of Tribal lands would violate “exclusive use” Treaty provisions. The Departments should include in the Report a clear statement that any proposal or option to remove Tribal consent from the grant, expansion or renewal of an energy ROW on Tribal lands would violate numerous treaties between the United States and Tribes.

4. The CTUIR supports several sections of the Report.
  - a. We find that the characterization of the Tribal sovereignty and current Federal Policy supporting Tribal self-determination in Chapter 2 of the Report is excellent. Sections 2.1 and 2.2 of the Report make the important point that Tribal consent has historically been required for ROWs being established within Reservations. Moreover, the description of federal policy and Tribal self-determination in §2.3 and the importance of consent to such ROWs for Tribal sovereignty in §2.4 are significant policy considerations for the Departments’ development of options for Congressional consideration in Chapter 4 of the Report.
  - b. We also find the summary of national energy transportation policies related to energy ROWs on Tribal lands in §3 to be adequate. Significantly, the Report accurately finds that national transportation policies relevant to energy ROWs on Tribal lands are consistent with federal policy supporting Tribal self-determination and sovereignty. Chapter 3 concludes that while there are few such policies directly related

to energy ROWs on Tribal lands, those that do exist “strongly support Tribal decision-making regarding energy ROWs on Tribal lands.”

- c. The Report identifies in §3.2.1 that both the Natural Gas Policy Act and the Federal Power Act give emergency powers to the Secretary of Energy to ensure that energy ROWs do not contribute to an emergency situation. Therefore, there is no need to enact or amend law to limit Tribal sovereignty over energy ROWs across Tribal lands to address emergency situations.
- d. Finally, the discussion in Chapter 4 regarding the issues for stakeholder consideration in energy ROWs on Tribal lands is insightful. In particular, the discussion in §4.3 on the scope and nature of the issue is instructive. Section 4.3 makes the important point that the rate of compensation for energy ROWs on Tribal lands is not “consequential for the nation or consumers in general for at least 3 or 4 reasons.” The reasons provided is that total energy transportation costs are but a small component of overall energy costs, the fraction of energy transportation infrastructure on Tribal lands is small, that negotiations for energy ROWs on Tribal lands have not led to any adverse impacts on reliability or security of energy supplies to consumers and because the problem is self-limiting. Based upon these findings, and historic federal policy supporting Tribal sovereignty and self-determination, the Departments do not advocate for any change in law to permit the condemnation of Tribal lands for energy ROWs, or for any other granting, expanding or renewing such ROWs without Tribal consent. That said, we believe the Report should clearly articulate the conclusion that, based upon its study, the Departments found no basis to support Congressional legislation to change existing law relevant to energy ROWs on Tribal lands.

5. Section 1.3.2. Based upon the CTUIR experience with its natural gas pipeline ROW, §1.3.2 should be expanded to explain that one of the reasons for the recent increase in cost for energy ROWs on Tribal lands is that Tribes now have the capability to conduct the energy ROW renewal negotiations themselves, and that many Tribes will be seeking compensation not only for the renewal ROW period, but also for the inadequate compensation paid under prior ROWs. For the CTUIR, the inadequacy of the prior 40 years of energy ROW compensation from the Northwest Natural Gas Pipeline Company justified a significant percentage of our ROW renewal compensation in 1995.

6. Section 1.3.8. The CTUIR objects to any proposal to develop a standard for valuing Reservation land where an energy ROW is located, especially if use of the standard was mandatory and the standard could be used to establish, expand or renew an energy ROW on Tribal lands without Tribal consent. To impose a standard appraisal methodology that Tribes would be required to accept when negotiating the grant, expansion or renewal of an energy ROW would violate fundamental Treaty rights.

Moreover, Indian Tribes, unlike private landowners, have a very different set of values when it comes to their Reservation Homeland. Tribal lands are not considered merely land where a home or a business could be built, and later sold, but rather lands aboriginally occupied and reserved for the exclusive and permanent use of Tribal members as a Tribal Homeland. These Tribal lands are where our ancestors are buried, where our traditional ceremonies have taken place, and constitute lands that our Tribes have historically occupied. We are committed to preserving our Tribal Homeland for future generations. The standard appraisal methodologies are foreign and inappropriate to this situation.

When the CTUIR negotiated the Northwest Natural Gas Pipeline ROW renewal in 1995, we took into consideration, as we believe other Tribes appropriately do, the proximity of the ROW to Reservation population centers, cultural resources, critical natural resources, *etc.* As mentioned in our January 6, 2006 comments, the natural gas pipeline on the Umatilla Indian Reservation exploded sending flames hundreds of feet into the air. Thankfully, this rupture and explosion occurred away from the Reservation population center. But, since the ROW passes through the main Reservation population center, and runs through the Reservation housing projects, the next time we may not be so fortunate. These factors are appropriately taken into consideration by Tribes involved in energy ROW negotiations.

7. The CTUIR has no objections to the proposals in §4.4 developed by the Departments to address the issue of the grant expansion or renewal of energy ROWs across Tribal lands. In fact, we think many of these ideas would be useful for Tribes that may be negotiating such ROW agreements for the first time. For example, CTUIR officials negotiating the 1995 natural gas pipeline renewal ROW in 1995 and 1996 would have benefited by the ROW inventories, the model for energy ROW transactions, and the proposed industry – Tribal ROW institute. That said, the CTUIR wants to make it clear that these would be optional resources available to the industry and to Tribes; they would not be mandatory and would not in any way affect the authority of the Tribe to consent to the grant, expansion or renewal of an energy ROW.

8. Section 4.4.2. Options for Consideration by Congress. Given the clear findings by the Departments in the Report (*i.e.*, energy ROWs on tribal lands do not constitute a threat to national security, or to energy transmission, and do not noticeably increase energy costs to consumers), the Report should conclude that there is no justification for a departure from existing law regarding Tribal consent to the grant, expansion or renewal of energy ROWs across Tribal lands, or from federal law and policy recognizing and respecting Tribal sovereignty and self-determination. The Departments should be more forceful in §4.4.2 to say that, based upon their investigation of this matter, it can find no justification for, and therefore does not recommend, that there be any change in federal law regarding energy ROWs across Tribal lands that would permit either the condemnation of Tribal trust land, or that any energy ROW would be granted, expanded or renewed without Tribal consent.

9. In the Report and at recent consultation meetings, industry representatives claim to be concerned about the increased cost to consumers caused by compensation paid Tribes for energy ROWs on Tribal lands. Industry representatives at the Denver consultation meeting on August 24<sup>th</sup> expressed their concern that any increases in cost on the use or transmission of domestic energy resources would result in increased reliance on foreign sources for our energy needs. If these are truly industry's concerns, one has to wonder why they lobbied Congress so diligently to have a study on costs associated with energy ROWs on Tribal lands. The Departments have found that these Tribal ROWs are an insignificant factor in terms of energy costs and, by implication, have little or no impact on whether domestic or foreign energy sources are used in this country. Meanwhile, there is no study of what really affects consumer energy costs such as:

- a. the record breaking profits of the major oil companies, which are some of the biggest corporations on earth, in recent years;
- b. the cost of state taxes or fees on energy development, transmission, refining or use;
- c. the failure to impose greater automobile fleet fuel efficiency standards to reduce dependence on foreign oil.

Accordingly, the final §1813 Report should not only state that energy ROWs on Tribal lands are insignificant factors in terms of user energy costs, the competitiveness of domestic energy resources and on our reliance on foreign energy resources, it should identify the factors that do significantly affect those important energy issues.

This completes the comments of the CTUIR to the draft §1813 Report. In the event you have any questions regarding this matter, feel free to contact me or Tribal Attorney Dan Hester at (303) 673-9600.