

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

COMMENTS ON DRAFT SECTION 1813 RIGHT OF WAY STUDY

SEPTEMBER 4, 2006

The Confederated Tribes of the Warm Springs Reservation of Oregon is a federally recognized Tribe occupying the Warm Springs Indian Reservation in north Central Oregon. The Warm Springs Indian Reservation was established by the Treaty of June 25, 1855, between the United States and the Tribes and Bands of middle Oregon. (12 Stat. 963)

The Tribe has the following comments on the Draft Report to Congress dated August 7, 2006.

1. Section 4 pertaining to Standards and Procedures fails to adequately account for the unique nature of Tribal lands. First, it gives too much credence to valuations determined pursuant to the Federal “Yellow Book” and the BLM Compensation Schedule. The Yellow Book method fails to give any consideration of the value of the lands for right of way purposes. This, despite the fact, that for many Tribal lands their use for right of way purposes is clearly the highest and best use. The Study gives absolutely no discussion regarding factors that may cause this methodology to be inappropriate for Tribal lands. The Report contains no discussion as to whether a tribe should be compensated for the use of its land based upon its value as a right-of-way. Nor does it note, in a very analogous situation, under the Federal Power Act that compensation to tribes for flowage easement and other land rights in connection with federally licensed hydro-electric projects are based on the value of the land for power production purposes.

Nor should the BLM’s methodology mentioned be included. This methodology has been heavily criticized as a give away of federal lands as a result of industry lobbying efforts that resulted in the adoption of this methodology. <http://www.appraisers.org/disciplines/BLM-14.htm> The federal government may choose not to get fair value for its own lands, but that standard should not apply to tribal lands. The Study seems to imply that there can be no logical dispute or challenge with regard to these valuation methodologies. This is despite the fact that intense criticism has been leveled against these approaches. If this is to be a serious study and policy paper it should not be based on rote repetition of industry positions. There should be a full discussion of valuation options. Not just the two methodologies advocated by the energy industry.

2. Another major shortcoming of the Report is contained in Section 4.4 relating to available options. With exception of the “No Action Alternative” all of the options

punish Indian tribes. The fundamental assumption of the Report writers appears to be that tribes are a problem and if Congress wants to deal with right-of-way issues, the only thing it can do is attack Indian tribes. The Report is seriously misguided in this respect. Indian tribes have shown themselves repeatedly to be willing partners in the energy industry. There are many things that the Congress could do to facilitate and increase that participation. And yet the Study makes no mention of those things. It only offers Congress the ability to create sticks to be used against Indian tribes. The Study should instead focus on those things that the Congress can do to facilitate tribal participation in the energy industry. The inevitable result of this study, as written, will be to further polarize the parties and confirm tribe's fears that they are about to be rolled by the Administration and industry. Following are a list of a few things that the Congress could do. The Departments of Energy and Interior should take the time to examine this list and develop other options that could create a positive atmosphere, as opposed to the negative atmosphere that the Study will inevitably lead to with this list of inappropriate options.

(1) Provide funding to develop technical capacity within both the Department of Interior and within Indian tribes. The Bureau of Indian Affairs has significant capacity in the areas of forest and range management. However, the Bureau has always been woefully inadequate in technical expertise with regard to energy issues. Few tribes have this technical expertise. And yet, the BIA and Indian tribes are expected to negotiate with sophisticated energy companies on difficult issues without adequate tools. Congress can redress this imbalance.

(2) Tribes are generally willing to enter into long term deals if there are appropriate safeguards. However, it is not clear from a legal standpoint that tribes can always do this. For example, when the Warm Springs Tribe and Portland General Electric Company entered into a settlement agreement over the ownership of the Pelton-Round Butte Hydroelectric Project, it was necessary for the parties to seek Congressional confirmation of the Settlement Agreement because of potential legal impediments. Congress can make clear the authority of Indian tribes to enter into long term arrangements if the tribes so choose.

(3) The major impediment to energy development on the Reservation is the dual taxation that frequently occurs with regard to non-indian investment on the reservations. Because state property taxes can generally be levied on non-indian property within Indian reservations there is a significant impediment to development. States frequently provide few, if any, services related to the development, such as fire, police or other protection. The Tribe is required to bear this burden and if it imposes its own tax on the development to fund these services, the double taxation often makes the development infeasible. Congress has the power to eliminate this double taxation.

(4) The landlord/tenant relationship usually established between the energy industry and Indian tribes is inherently likely to lead to long term conflicts because of the misalignment of the parties' interests that is inherent in such an arrangement. Congress could do many things to facilitate the alignment of the parties' interest, primarily through mechanisms to facilitate tribal equity ownership in energy projects. Expansion of the Tribal Tax Status Act with regard to tribal bonding authority, federal loan and performance guarantees, and tax incentives to developers are just a few of the myriad tools that are available to the Congress.

(5) Congress, DOE and DOI could assist tribes in doing the necessary land assemblage, environmental studies, engineering, and other tasks to create energy rights of way that would be attractive to industry partners and speed the right of way process. Rather than time delays being an impediment to developing rights of way across Indian reservations these efforts could enable tribes to get ahead of the curve and make rights of way available when they are needed.

3. There is inadequate discussion of treaty rights and the implications of the study with regard to those rights. If the study recommends any options that could result in an abrogation of Indian treaty rights it should at least state that this would be the result of those options so that the Congress could be fully aware of the implications of their actions. Section 1813 mandates "an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land". Shouldn't it at least be noted that abrogation of treaty rights, especially "exclusive use" provisions, negatively impacts self-determination and sovereignty interests? Conversely, why did the agencies give absolutely no consideration to any option that would **increase** tribal sovereignty and self-determination?