

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

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VIA ELECTRONIC MAIL - ieed@bia.edu

Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

RE: Comments on Draft Indian Energy Rights of Way Study.

To Sir/Madame:

On behalf of the Intertribal Monitoring Association on Indian Trust Fund (ITMA), I am submitting these comments on the Departments' of Interior and Energy draft report on energy rights of way (ROW) on Indian lands, as required by the Energy Policy Act of 2005, P.L. 109-58, Title XVIII, Section 1813. ITMA is a representative organization of the following 64 federally recognized tribes: **Absentee Shawnee Tribe, Alabama Quassarte Tribe, Blackfeet Tribe, Central Council of Tlingit & Haida Indian Tribes of Alaska, Chehalis Tribe, Cherokee Nation of Oklahoma, Cheyenne River Sioux Tribe, Chippewa Cree Tribe of Rocky Boy Reservation, Coeur D'Alene Tribe, Confederated Salish & Kootenai Tribes, Confederated Tribes of Colville, Confederated Tribes of Warm Springs, Confederated Tribes of Umatilla, Crow Tribe, Eastern Shoshone Tribe, Ewiiapaayp Band of Kumeyaay Indians, Fallon Paiute-Shoshone Tribe, Forest County Potawatomi Tribe, Fort Belknap Tribes, Fort Bidwell Indian Community, Fort Peck Tribes, Grand Portage Tribe, Hoopa Valley Tribe, Hopi Nation, Iowa Tribe, Jicarilla Apache Nation, Kaw Nation, Kiowa Tribe, Kenaitze Indian Tribe, Lac Vieux Desert Tribe, Leech Lake Band, Mescalero Apache Tribe, Metlakatla Tribe, Muscogee Creek Nation, Nez Perce Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Ojibwe Indian Tribe, Oneida Tribe of Wisconsin, Osage Tribe, Paiute Tribe of Nevada, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Picuris, Pueblo of Sandia, Quapaw Tribe, Quinault Indian Tribe, Red Lake Band of Chippewa Indians, Salt River Pima-Maricopa Indian Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Shoshone-Bannock Tribes, Sisseton-Wahpeton Oyate Tribes, Soboba Band of Luiseno Indians, Southern Ute Tribe, Thlopthlocco Tribal Town, Three Affiliated Tribes of Fort Berthold, Tohono O'odham Nation, Turtle Mountain Band of Chippewa, Walker River Paiute Tribe, Winnebago Tribe of Wisconsin, and the Yurok Tribe.**

A core part of ITMA's mission is empowering Tribes and individuals Indians to control and manage their lands and resources, while holding the federal government accountable and responsible for its trust responsibilities owed to tribal beneficiaries. It is within this context that ITMA submits these comments.

As an initial matter, ITMA recognizes and commends the Departments' consultation and outreach to Indian country in developing the draft report. ITMA agrees with the findings and conclusions in the draft report which are supportive of tribal sovereignty and self-determination. We believe the draft report fairly and adequately addresses the main issues considered by the study. However, ITMA's has several concerns and recommendations for the Departments to consider in developing and issuing the final report.

I. EXPLICIT FINDINGS & CONCLUSIONS SHOULD BE INCORPORATED IN THE FINAL REPORT.

ITMA strongly recommends that the final report submitted to Congress include a summary of all the key findings and conclusions made in the course of the study. Though the draft report cites several important, consistent and declaratory statements throughout the document, it fails to summarize findings and conclusions. ITMA believes it is imperative that the final report include a summary of findings to inform the reader and to serve as a general roadmap to the report.

For example, based on the Departments' research, consideration and analysis of related national energy transportation policies, the draft report documents the establishment and existence of a uniform federal process, including procedures for ROW applications on tribal lands. These procedures arise from the Indian Right-of-Way Act of 1948 and implementing regulations. The draft report also acknowledges that current laws and procedures provide a comprehensive framework enabling Tribes to conduct substantial oversight authority for energy ROWs on tribal lands under the statute and regulations. Similar directly-related policies were found to exist in historical energy ROW statutes and regulations, some of which required tribal consent. Overall, tribal consent is supported as general practice.

In summary, the draft report makes significant findings and conclusion that there is no evidence supporting the contentions that tribal consent endangers national energy security or that tribal consent causes demonstrable harm or increases costs to energy consumers. The draft report also found that tribal consent does not threaten the ability of the American energy industry to compete in the global marketplace. These should be set forth as the two main findings of the report. In addition, several other findings specifically made in the draft report should be included as follows:

- Abrogating tribal consent would reduce tribal authority and control over tribal land and resources, and therefore diminish tribal sovereignty and self-determination.
- Tribal decision-making regarding energy ROWs on tribal lands is strongly supported by past and current policies put in place by Congress and the executive branch.
- Successful relationships between tribes and energy companies have a direct correlation to successful energy ROW negotiations and valuation.

While these statements and acknowledgments are clearly supported throughout the draft report, they would be much more effective if they were stated upfront in the final report rather than buried within and throughout the report.

II. ELIMINATE THE UNNECESSARY "OPTIONS" PROPOSED TO BE SUBMITTED TO CONGRESS.

The draft report found that tribal consent has no demonstrable or adverse impact on consumers or issues for handling national emergencies. The facts simply do not support the options set forth in the draft report. Therefore, the options for legislative action are not supported, and the final report should include an overall finding that no legislative action is needed by Congress. Instead, the Departments should consider incentives that promote the cooperation of both tribes and the industry to address these issues amongst themselves rather than encouraging Congress to act to address alleged problems that do not exist.

The options proposed in the draft report drastic and inappropriate. Furthermore, they are contrary to the fiduciary obligation that the federal government owes to Indian Tribes. Legislative action would negatively impact those tribes and energy companies that have followed current laws and policies to successfully arrive at an agreement on ROWs on Indian lands.

ITMA believes that, in the event the Departments determine that legislative options are necessary to be included in the final report, only the first two options suggested in the draft report are supported by the study. However, ITMA recommends that no options be included in the final report, which is consistent with the findings made by the study as well as the first option. The second option, suggesting that Congress provide a legislative clarification that tribal consent is a right enjoyed by every tribe in the United States, including non-IRA and OIWA tribes, is also supported by the study. Current laws, regulations and policies discussed in the draft report support tribal consent for IRA tribes, but in actuality and practice, these laws also apply to all federally recognized tribes.

The remaining three options are wholly inconsistent with the draft report's finding supporting and upholding tribal sovereignty and self-determination, as set forth in current law and policy. The fourth option, which specifically authorizes the condemnation of tribal lands for public necessity, is also inconsistent with the study's finding of strong support for tribal decision-making. Condemnation is an unnecessarily extreme option, particularly in light of the fact that the draft report found that tribal consent is not an issue in an emergency situation and that no major problems exist.

We recognize that while there may be a few issues with individual tribes and energy companies in negotiating ROWs on Indian lands, there are no major problems that could not be handled by the tribes, the industry and the Departments. Therefore, we encourage the Departments to modify the draft report and eliminate the latter three legislative options.

III. ADDITIONAL CONCERNS

ITMA is also concerned that the draft report fails to address the importance of Treaties and the inherent right of Indian Tribes with respect to its to tribal consent now required for energy ROWs on Indian lands. ITMA recommends that the final report discuss the implication of Treaties on tribal consent.

In addition, the draft report fails to address the government's responsibilities and compliance with regulatory and statutory requirements regarding appraisal, management and oversight of Indian ROWs, which directly contributes to the issue of historic rates of compensation.

The federal government has a legal trust responsibility to protect tribal trust lands and resources, a legal and morale obligation that does not extend to private, state and federal lands which are interpreted to exist for the "public benefit." This should be further considered and documented in the final report. ITMA believes that the federal trust responsibility owed to Indian tribes far outweighs any alleged responsibility the federal government may have in ensuring cost-efficient energy to Americans.

V. CONCLUSION

ITMA appreciates the efforts and work of the Departments of Interior and Energy in developing and conducting this study. ITMA has several recommendations to improve the final report. First, the final report should include an Executive Summary or findings that detail all of the key findings and conclusions made in the draft report to ensure that they are upfront and forthcoming with the results of the study. Second, legislative options that are not supported by those findings should be eliminated in the final report. Finally, the final report should include a discussion of Treaties as well as the federal government's fiduciary responsibilities.

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Thank you for your time and consideration of our comments and recommendations.

Sincerely,

INTERTRIBAL MONITORING ASSOCIATION
ON INDIAN TRUST FUNDS

/ S /

Mary Zuni-Chalan
ITMA Executive Director

cc: ITMA Board of Directors
ITMA Tribal Membership