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August 31, 2006

Attn: Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, NW
Washington, DC 20245

**Re: Jicarilla Apache Nation's Comments on Draft Report to Congress
(August 8, 2006)**

Dear Sirs:

The Nordhaus Law Firm represents the Jicarilla Apache Nation (the "Nation") as general counsel and submits these comments on behalf of the Nation.

These comments track the headings in the Draft Report, in the order presented there. The Nation offers these comments to assist the Department in identifying errors in the draft report. Much in the Draft Report is accurate and is supported by documented facts and competent legal and economic analysis. These comments will not attempt to identify those parts of the Draft Report the Departments got right, but will focus on the parts the Departments got wrong.

Executive Summary:

The executive summary of the Draft Report is a blank page. It is unrealistic to expect members of Congress, or even their key staffers, to have the time to read much more than the executive summary of a report such as this one. The content and emphases of the executive summary are, therefore, extremely important. Yet, the Departments have effectively prevented the tribes from providing any meaningful comments on this critical portion of the report.

The executive summary must inform Congress of the key findings of the Departments:

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1. The requirement of tribal consent derives from the inherent sovereignty of the tribe, and is a significant component of the federal government's policy of tribal self-determination. Draft Report § 2.4.
2. National energy transportation policies strongly support tribal decision-making regarding energy ROWs on tribal land. Draft Report § 3.
3. The Departments found no evidence that the requirement of tribal consent has contributed to any emergency situation regarding energy. Draft Report § 3.2.1.
4. Existing law provides the federal government with adequate authority to address any emergency situation that might arise in the future. Draft Report § 3.2.1.
5. Determining ROW compensation through the process of negotiation is consistent with the long-standing expressions of tribal sovereignty and self-determination in the federal-tribal relationship. Draft Report § 4.1.
6. Issues surrounding compensation to tribes for energy ROWs are not consequential for the nation or for consumers in general. Draft Report § 4.3.
7. It is unlikely that difficulties arising from ROW negotiations in the future could lead to significant cost impacts to energy consumers or to significant threats to physical delivery of energy supplies. Draft Report § 4.4.2.

It is essential that the Executive Summary contain these findings by the Departments. In addition, the Executive Summary should include an additional finding: that there is no demonstrated need for Congressional action in this area. Whether or not the Departments choose to make specific recommendations to Congress, they should inform Congress that there is no factual evidence that the issues identified in Section 1813 have created a problem of national, regional or even local significance.

In light of the fact that Section 1813 was enacted in the absence of any public

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hearings or public fact-finding by Congress itself, it is reasonable to interpret Section 1813 as directing the Departments to determine whether there is a problem that demands Congressional action. This factual inquiry is different from making policy recommendations on how to address an identified problem. Congress needs to know that the Departments conducted the investigation required by Section 1813 and that they did not discover any significant problems that are adversely affecting federal energy policies.

§ 1.2 Scope of Section 1813:

The third paragraph under this section, on page 2, explains the Departments' decision to rely on a small number of case studies prepared by tribes and industry groups for the analysis of historic rates of compensation required by Section 1813(b)(1). This paragraph (like the entire Draft Report) fails to acknowledge that for the last 58 years the Secretary of the Interior has had the express, affirmative statutory duty to determine that the tribe will receive "just compensation" for every ROW the Secretary of the Interior has granted under the Act of February 5, 1948. Notwithstanding that statutory duty, the Department of the Interior has offered no explanation whatsoever why records of the historic rates of compensation paid to tribes and the Secretary's determination of "just compensation" are not documented in DOI records, and why DOI has not produced that information for Congress. The Draft Report nowhere explains why the Departments have decided to put the burden on the tribes to develop this historical data Congress requested. Congress needs to know how DOI has carried out its existing statutory duty to determine that just compensation has been paid to tribes before Congress considers any of the options contained in the Draft Report.

This paragraph on page 2 also refers to "historic negotiations with tribes for energy ROWs" – a phrase that erroneously suggests that tribes actively negotiated the terms of energy ROWs throughout the "historic" period being investigated. To the contrary, virtually all of the commenting tribes explained that until very recently the Bureau of Indian Affairs determined the level of compensation for energy ROWs, and that the tribe did not actively participate in the process. Only recently have some tribes actively negotiated the compensation terms of energy ROWs on their lands.

At the bottom of page 3 and the top of page 4 this section explains that all of the different types of "energy rights-of-way" are not necessarily comparable, and that the

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Departments have adopted a more limited examination that focuses on electric transmission lines, and natural gas and oil pipelines – including both interstate transit and local distribution. This explanation suggests erroneously that ROWs that allow interstate transportation of electricity, natural gas or oil are comparable to ROWs that allow local distribution of those forms of energy. This discussion should clarify the point that issues raised by interstate transportation are not necessarily comparable to issues raised by local distribution.

In addition, the case studies include numerous ROWs that are used for local gathering (not interstate transportation and not local distribution) of natural gas and oil. Tribal comments have emphasized that economic and other issues raised by the local gathering of natural gas and oil on tribal lands, or local production of electricity, are very different from economic and other issues raised by interstate transportation of those forms of energy. By focusing on electricity, natural gas and oil, the Departments have not identified a homogeneous or uniform class of energy ROWs. That reality needs to be expressly acknowledged in the Report.

§ 1.3.1 Tribal Sovereignty, Consent and Self-Determination:

The third paragraph of this section, (first full paragraph on page 5) mentions tribal comments that tribal governments “for practical purposes, are unable to raise revenues through taxation as other sovereigns are able to do.” The Draft Report does not cite a specific comment for this point. Nevertheless, this statement needs to be narrowed or it will leave the erroneous impression that tribes cannot or do not impose taxes – either as a general proposition or specifically in the context of energy ROWs. The power to impose taxes within tribal territory is an inherent aspect of tribal sovereignty. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Many tribes (including the Jicarilla Apache Nation) exercise that power and do raise revenue for their governmental functions through taxes – including taxes on ROWs.

It would be more accurate for the Draft Report to state that tribes are confronted with both legal and practical obstacles to the exercise of their inherent sovereign authority to raise revenue through taxation – which obstacles differ from those faced by state and local governments. In response to those obstacles, some tribes have chosen to negotiate ROW payments that include amounts that state and local governments would

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typically raise through taxation or utility franchise fees rather than ROW payments.

Note that this misleading reference to “practical” obstacles to tribal taxation later becomes the definitive but erroneous assertion that “Unlike a federal or state government, a tribal government is unable to tax facilities within the energy ROW to offset administrative costs associated with energy ROW management.” Draft Report § 4.4.2(c), paragraph (a) on page 30. The Jicarilla Apache Nation, like many other tribal governments, does tax facilities within energy ROWs as well as other kinds of ROW. While it is true that some lower federal courts have imposed restrictions on the civil jurisdiction of tribes within some ROWs, the Supreme Court has never held that tribes are barred from imposing any and all taxes on property located within a ROW. The erroneous statement on the scope of tribal taxation power at page 30 of the Draft Report should be deleted.

§ 1.3.7 Cost to Consumers:

The second to last paragraph of this section, on page 9, refers to a hypothetical scenario generated by the interest group “FAIR,” which concluded that customers of Public Service Company of New Mexico (PNM) could see electric rates increase “as much as 5 percent” due to ROW costs over tribal land. See Comments of FAIR Access to Energy Coalition 9 (June 16, 2006).

The Draft Report misstates the content and assumptions behind this bizarre hypothetical. FAIR did not just assume that residential customers would fully bear “the cost increases associated with energy ROW renewal fees for all 95 tribal ROW under the jurisdiction of” PNM – as stated in the Draft Report. That statement suggests, erroneously, that FAIR was referring to actual ROW renewal fees, or at least actual requests for ROW fees. In fact, in order to arrive at a 5% increase in consumer electric rates FAIR did not rely on actual renewal fees or actual requests at all. It simply assumed that (1) the tribes will demand compensation for 95 ROWs for electric power lines equal to the dollars per mile per year that is rumored to be the Navajo Nation’s negotiation position with El Paso for a major interstate natural gas pipeline, and (2) PNM will agree to pay that amount. These FAIR assumptions do not even discuss whether any of these 95 ROW are even remotely similar to a major interstate natural gas pipeline.

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The Draft Report should be revised to make clear that the FAIR “analysis” is not based on actual ROW renewal fees, or even on actual proposals for ROW renewal fees. It is based entirely on a hypothetical situation FAIR created out of whole cloth. Further, there is no basis in the record of the Departments’ study to support FAIR’s assumption that the tribes in New Mexico will request \$4,000.00 per acre per year for these 95 ROWs, or that PNM would agree to pay that amount. All references to this FAIR “analysis” should be deleted as total speculation, or the final Report must explain the hypothetical nature of the assumptions behind that “analysis.”

§ 2.1 Statutory Background:

The last paragraph of this section (on pages 12-13) states that the existing ROW statutes “empower the Secretary to require tribal consent for a tribe organized under the tribal organization statutes,” (Emphasis added.) The word “empower” is clearly erroneous here. These statutes mandate the Secretary to require tribal consent for tribes organized under the organization statutes.

§ 4.4.2 Options for Consideration by Congress:

The Draft Report concludes that it is “highly unlikely” that occasional difficulties in ROW negotiations could lead to significant cost impacts to energy consumers or to significant threats to the physical delivery of energy to market areas. Draft Report at 27. Nonetheless, the Draft Report then lists five “options” Congress could consider if it concludes that some kind of legislative action is warranted. The Draft Report cautions that these “options” should not be considered recommendations from the Department.

This approach of listing “options” without recommendation or analysis is a gross abdication of the Departments’ responsibility. The Departments have expressly reached the conclusion that energy supplies and energy prices are not put at risk by the long-standing requirement of tribal consent. The vocal opponents of tribal consent were given every opportunity to establish a case that legislative action is necessary to protect the public – and they have failed completely. Given that failure, there is no justification for listing five “options” Congress might want to consider to address “issues” that are not harming the public in any discernable way.

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Furthermore, listing these options, without providing any analysis of their respective policy implications, costs and benefits, will create the erroneous impression that each of the options is consistent with the actual findings of the Departments. The only option that is logically and factually supported by the Departments' findings is Option 4.4.2(a): no Congressional action to change the status quo. Yet, that option is simply one of five listed. "No Congressional action" should be the Departments' recommendation to Congress, not just one of five "options."

The lack of any factual or logical connection between the "options" and the findings of the Draft Report makes the entire study a waste of time by the Departments, the tribes, industry, and all other participants. If the "options" are not going to be grounded in the facts and legal principles identified by the study, there was no need to do the study in the first place. The Departments could have come up with a list of theoretical "options" without ever investigating the issues raised by Section 1813 and the facts relating to those issues. Since these "options" are not tied to the results of the study, they should not even be included in the Report.

For example, it is irresponsible for the Departments to identify Option 4.4.2(c) on page 28 – in which the executive branch of the federal government would determine "fair compensation" – without reminding Congress that the Department of the Interior was not able to produce documentation in this very study that it has faithfully performed its existing statutory duty to determine "just compensation" under the 1948 Right of Way Act.

Similarly it is irresponsible for the Departments to list under Option 4.4.2(c)(1) the possible application of the Uniform Appraisal Standards for Federal Land Acquisition without informing Congress of the substantial policy and legal arguments why the UAS are not designed to deal with the unique attributes of lands that have been set aside by the federal government as a permanent homeland for a specific tribe. See Comments of the Jicarilla Apache Nation, 17-21 (May 12, 2006). The statement on page 28 that the UAS is "used widely to determine the value of land for various purposes" creates the erroneous impression that the UAS allow the appraiser to account for the unique legal, political, cultural, and social attributes of tribal trust land.

The statement on page 30 in Option 4.4.2(c)(2) that tribal governments are unable

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to tax facilities within an energy ROW is factually and legally wrong. (See Comments on § 1.3.1 above.)

Option 4.4.2(c) also fails to recognize valuation methods that are not based on the “market value” of the land itself. Several tribes provided examples of compensation agreements that value an energy ROW based on the value of the economic activity taking place on the land (through-put fees, percentages of revenues, etc.). If the Departments are determined to simply list available methods for calculating fair compensation for the use of tribal land, these methodologies need to be included.

It is especially irresponsible for the Departments to simply list Option 4.4.2(e) (condemnation of tribal land) – with no rationale or justification – in light of the Departments’ finding that the public interest has not been harmed by the existing requirement of tribal consent. The disclaimer that the Departments are not recommending any of the listed “options” does not neutralize the harm that could easily flow from including condemnation on the Departments’ list. The energy companies who want to expropriate tribal lands for their private profit are not going to honor a subtle distinction between a “recommendation” and an “option” for Congress to consider. Those companies will cite Option 4.4.2(e) as official recognition by the Departments that condemnation would be a rational and appropriate response to address the issues identified by Section 1813. The Departments should not lay the foundation for this kind of distortion of the study that has been conducted pursuant to Section 1813.

§ 5.5.1 Edison Electric Institute:

The discussion of the EEI analysis of ROW compensation (pages 44-46) should include a statement that using so-called “fair market value of the land” as the benchmark for comparison assumes that this is the appropriate measure of compensation. That assumption is not shared by most of the commenting tribes. It is appropriate for the Departments to summarize the data and arguments presented by EEI, but the Departments should caution the reader that describing multiples of “fair market value” begs the question of whether “fair market value” is the correct standard for compensation to a tribe for the use of its land.

On page 47 the Draft Report summarizes certain information that was not

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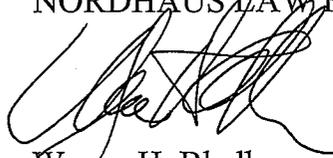
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independently “assessed.” That information should be deleted from the final Report.

The Jicarilla Apache Nation respectfully urges the Departments to correct the errors identified above.

Sincerely,

NORDHAUS LAW FIRM, LLP

A handwritten signature in black ink, appearing to read 'Wayne H. Bladh', written over the printed name below.

Wayne H. Bladh

Attorneys for the Jicarilla Apache Nation