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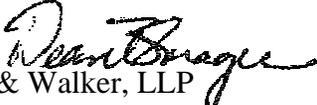
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Three Affiliated Tribes (Mandan, Hidatsa and Arikara Nation)

Subject: Energy Policy Act of 2005 Section 1813 Energy Rights-of-Way Study:  
Comments on the Draft Report to Congress dated August 7, 2006

This memorandum is submitted on behalf of the above listed tribes to express comments on the documents captioned "Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Lands Rights-of-Way Study," jointly prepared by the Department of Energy and the Department of the Interior, dated August 7, 2006. We have a few general comments as well as some that refer to specific points in the draft report.

## GENERAL COMMENTS

The draft report draws a very important finding from all of the information that was compiled and analyzed. This finding, which appears on page 27, is stated as follows:

"[T]he Departments found that under existing law and regulations, difficulties arise in ROW negotiations from time to time that are sometimes very significant to the parties. At the same time, however, it appears unlikely that these difficulties could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas."

This finding supports one of the basic points that tribal representatives made throughout the course of the public meetings and public input phase of this study – there really is no problem that calls for a legislative solution. Our concern with the way this finding is presented in the

report is that it is buried on page 27. This point needs to be made in the beginning of the report and given more emphasis. It is very important that it appear in the Executive Summary.

We are also concerned about three of the “options for consideration by Congress,” particularly options c, d, and e. As discussed in more detail below, these options are inconsistent with the federal government’s trust responsibility to Indian tribes. The draft report, on page 28, acknowledges that “[s]ome of the options would involve major changes to the long-standing relationship between the tribes and the federal government concerning tribal sovereignty and the federal policy of self-determination.” We believe that options c, d, and e should be deleted. If the Departments insist on including these three options, the introductory text in the report should make it clear that it is these options that would wreak major changes in the relationship between tribes and the federal government, and that these options would be inconsistent with the federal trust responsibility to all tribes.

## **SPECIFIC COMMENTS**

### ***The Issue of Consent and Implications for Tribal Sovereignty***

Sections 1.3.1, 2.4 (pages 5, 14).

This section of the draft report acknowledges the basic legal principle of inherent tribal sovereignty and states that the authority of a tribe “to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty.” The final paragraph in this section says that any reduction in a tribe’s authority to make the determination of whether to consent to an energy ROW across its lands “would reduce the tribe’s authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.”

The statements in this section are generally accurate, although the discussion is rather generalized and the references cited are few. At the very least, the reference to FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW should be updated to refer to the 2005 edition. (A sentence very similar to the text sentence in the draft report for which a citation is given to page 231 in the 1982 edition could be cited to page 205 in the 2005 edition.)

Our concern with this section is that it does not go far enough in explaining the implications of the consent requirement for tribal sovereignty. As noted in section 1.3.1 of the draft report (page 5):

“Several tribal parties noted that tribal governments perform the responsibilities of sovereigns by providing services such as education, health care, environmental protection, sanitation, and law enforcement, but for practical purposes, are unable to raise revenues through taxation as other sovereigns are able to do.”

This statement in section 1.3.1 skates over the surface of a set of issues that was discussed in some detail in the March 7, 2006, meeting in Denver, and which we discussed in

written comments filed on behalf of the Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and Three Affiliated Tribes, dated April 29, 2006. (That comment memorandum is cited in footnote 4 of the draft report.) The term “practical purposes” referred to in the draft report is an apparent reference to a number of case law decisions that have found limits on inherent tribal sovereign powers over nonmembers. The case law finding limits on tribal authority over nonmembers represents two different lines of cases. One line applies the judicially created doctrine of “implicit divestiture,” under which courts can rule that, in the absence of congressional legislation or treaty language on point, certain aspects of inherent tribal sovereignty have been divested by implication. The other line of cases applies the federal Indian law version of federal preemption of state powers, and such cases have held that, even where a tribe does have inherent sovereignty over nonmembers, the exercise of tribal sovereignty through the levy of a tax does not preempt the authority of the state to tax the same activity. Please refer to our April 29 memorandum for more detail and citations.

We think there are some key points that should be captured in section 2.4 of the report, including the second point set out on the first page of our April 29 comment memorandum: “A body of federal statutory law recognizes that tribes possess sovereign powers within their reservations in the general subject matters of environmental protection and cultural resources management.” This point is developed in detail on pages 3 to 6 of that memorandum. The significance of this point, as explained on page 9 of our April 29 memorandum, in light of the two legal doctrines noted above – implicit divestiture and federal preemption – is that:

- (1) In subject matters in which Congress has enacted legislation recognizing that tribes do possess inherent sovereignty, including environmental protection and cultural resources management, the implicit divestiture doctrine should not apply; and
- (2) Congress could clarify that tribes have the authority to levy taxes to support their governmental operations within rights-of-way, and that, in light of the federal policy supporting tribal self-government, state authority for taxation and regulation is preempted.

We believe that these are important points which should be incorporated into Section 2.4 of the report

A logical extension of these points would be to incorporate them into an option for the consideration of Congress. The report should suggest an option that would be a variation on the theme of option b, which appears in Section 4.4.2, page 28. (As we understand the intent of option b, it is to endorse the long-standing legal requirement established by the Department of Interior through regulations that consent of all tribes is required for a ROW on tribal land.) Congress could take a step further in support of tribal self-government and acknowledge that there are responsibilities of sovereignty that tribal governments perform on tribal lands on which energy ROWs have been granted; that tribal governments may include a factor in the negotiated consideration for ROWs to cover the costs of such responsibilities, or, like other sovereign governments, they may choose to cover such costs through taxation on activities conducted

within ROWs; and that, where a tribe assesses a tax to cover such costs, any assertion of taxing authority by a state or political subdivision of a state is preempted by operation of federal law.

### ***The Uniqueness of Tribal Lands***

Sections 1.3.8, 4.2 (pages 10, 22).

On page 10, the draft report acknowledges that tribal representatives cited the unique values of tribal lands as a reason for maintaining the current process. While the draft report does acknowledge this point, it does not seem to really understand it or accept it. Tribal cultures are deeply rooted in particular places. For the vast majority of tribes, for those that have reservations within their aboriginal territories, their reservations are but a small part of the territory that they inhabited prior to contact with Euro-Americans. This is true for all of the tribes represented in this comment memorandum.

Tribal lands are valuable for their ties to tribal histories and oral traditions and for the resources that may be used in tribal cultural practices. Tribal lands may have graves of ancestors located on them, or sites that are used in religious ceremonies. Tribal members may regard a particular place as significant simply because it is part of all they have left of their aboriginal territory, or because their ancestors fought and died to keep it. The opposition of a tribe to fixing a monetary value for tribal land should be acknowledged as one of the ways in which tribal cultural values are different from the larger American society.

### ***Sacred Places and Cultural Resources***

Sections 1.3.1, 4.2 (option c), 5.3.2 (pages 5, 30, 33).

At several points in the draft report there are passing references to the importance of cultural resources and tribal sacred sites. The report notes that it is important for tribal governments to have the capacity to protect such places, and that the presence of cultural resources or sacred places within an existing or proposed ROW is a legitimate cost factor.

While we appreciate the fact that the report acknowledges these points, we think that it does not convey a sense of how important some such places are for tribes. In the case of impacts on a sacred place, mitigation of adverse impacts may simply not be acceptable from a tribe's perspective – avoidance may be the only acceptable alternative. One example of such a conflict that was cited during the public input period of this study involved a proposal to build an electric transmission line through the Pechanga Reservation in southern California which would have meant the destruction of an ancient oak tree that the Tribe regards as sacred.

As we noted in our April 29 comment memorandum, federal statutes including the National Historic Preservation Act (NHPA) and Native American Graves Protection and Repatriation Act (NAGPRA) recognize tribal sovereign authority in the general subject matter of cultural resources management. As amended in 1992, the NHPA recognizes that places that hold

religious significance for a tribe may be eligible for the National Register of Historic Places and, as such, tribes can now use the review process established pursuant to NHPA section 106 to ensure that federal agencies consider the impacts of their actions on historic properties that hold religious importance for a tribe. NAGPRA recognizes that tribes and their members have strong interests in the graves of their ancestors, and NAGPRA also provides that graves on tribal land cannot be excavated without the tribe's consent. In addition, the Archaeological Resources Protection Act (ARPA) prohibits the excavation of archaeological resources on Indian trust land without the tribe's consent.

These federal statutes and their implementing regulations provide a legal framework that a tribe can use to prevent damage to sacred places and cultural resources, if the tribal government has the financial and human resources to use this legal framework and to insist that federal agencies comply with the law. While many tribes have cultural resources programs and some have Tribal Historic Preservation Officers (including the Mandan, Hidatsa and Arikara Nation and the St. Regis Mohawk Tribe), such tribal programs typically face many demands on limited staff. In addition, the federal legal framework that clearly recognizes tribal authority over the general subject matter of cultural resources management has developed in a relatively recent timeframe – NAGPRA was enacted in 1990 (implementing regulations in 1995); the NHPA amendments in 1992 (implementing regulations in 1999 and 2000); and ARPA was enacted in 1979 (implementing regulations in 1984). As such, there may be many existing ROWs up for renewal soon that would not have been approved or would have been relocated if the current legal framework had been in place when the ROW was originally granted, because the governing tribe would have either denied consent or insisted on the ROW being relocated to avoid sacred places or other cultural resources.

Accordingly, we recommend that the report be revised to acknowledge that avoidance of damage to a tribal sacred place or a place containing other cultural resources is not just a legitimate cost factor in determining compensation, but may also be a legitimate reason for withholding consent for a ROW.

***Legislative options that would change the tribal-federal relationship.***

Section 4.4.2, options c, d, and e, pages 28 – 31.

The options for Congress are introduced with the qualifying statements that they are not recommendations from the Department and that:

“Some of these options would involve major changes to the long-standing relationship between the tribes and the federal government concerning tribal sovereignty and the federal policy of tribal self-determination – in particular, the principle that tribal lands should not be alienated without a tribe's consent.”

As stated in our general comments, we object to the inclusion of options c, d, and e. If the Departments insist on including these options in the report, we think that the report should

explicitly link each of these options to the point that “some” of the options would wreak major changes in the tribal-federal relationship.

Moreover, the report should acknowledge that options c, d, and e would be inconsistent with the federal trust responsibility to all Indian tribes. In particular, Congress has stated that “the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.” 25 U.S.C. §3601(2). As discussed above and in our April 29 memorandum, tribal governments have sovereign responsibilities to provide governmental services within ROWs on tribal land, and Congress has enacted statutes recognizing that certain subject matters, including environmental protection and cultural resources management, are within the scope of inherent tribal sovereignty. If Congress were to enact legislation limiting the authority of tribal governments to condition the grant of a ROW by ensuring a sufficient amount of compensation to fulfill the responsibilities of sovereignty, such legislation would be inconsistent with the trust obligation to protect the sovereignty of each tribal government.

In addition, we note that courts have often drawn upon the general law of trusts in determining the scope of federal trustee responsibilities to tribes. *See* FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §5.05[2] (2005 ed.). Taking away the tribal power to grant or withhold consent, as options d and e would do, would violate the trustee’s duty of loyalty to the beneficiary.

***Historic Rates of Compensation***  
Section 5.1 (page 32).

The discussion of the report’s case study approach fails to acknowledge the historic pattern of less than adequate compensation having been paid for ROWs on many reservations. This is a point that numerous tribal representatives raised in the public meetings. In our January 20 and May 15 comment memoranda, we noted that an electric utility obtained a ROW from the St. Regis Mohawk Tribe for a 99-year term for the nominal consideration of one dollar. Other tribal representatives told of having had ROWs granted across their lands for nominal amounts. We think that this historical pattern should at least be acknowledged in the report.

Thank you for your consideration of these comments.