

September 3, 2006

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

VIA E-MAIL:
IEED@bia.edu

MORONGO
BAND OF
MISSION
INDIANS



A SOVEREIGN NATION

RE: Section 1813 Draft Report Comments

Dear IEED:

We are submitting the following comments on behalf of the Morongo Band of Mission Indians in reference to the joint U.S. Department of Energy and U.S. Department of the Interior Draft Report to Congress: Energy Policy Act of 2005, Section 1813 Rights-of-Way Study (“Draft Report”), dated August 7, 2006.

I. General Comments:

The results of the Section 1813 Rights-of-Way (“ROW”) Study conducted by the Department of the Interior and Department of Energy (hereinafter collectively referred to as the “Departments”) reaffirms what Indian tribes stated repeatedly during the consultations related to the ROW Study:

- a) the existing process for negotiating energy ROWs between Indian tribes and energy companies works; and
- b) tribal consent for the establishment or renewal of energy ROWs on tribal lands does not impede the reliability or security of energy supplies to consumers, nor does it result in any significant impact on energy costs to consumers.

The above findings support the conclusion that there is no need for Congress to pass any legislation or change the current laws in any way. However, the findings are obscured within the Draft Report and are not clearly identified as findings that confirm the viability of the current legal framework for ROW negotiations and do not support the necessity of any action by Congress. The significance of these findings should be stated early in the Draft Report, as well as in its body and a separate conclusion to the Draft Report.

Section 5 of the Draft Report includes examples of the case studies conducted by Historic Research Associates, Inc. (hereinafter “HRA”). While the Departments rely on the case study approach to “shed light on past and present determinations of energy ROW compensation” there is no mention in the Draft Report of the weight or significance the Departments attributed to HRA’s research in the Departments’ analysis of the issues identified within the Draft Report. We encourage the Departments to include reference to

any analysis of the Draft Report's scope, findings, conclusions or options that were influenced or supported by HRA's research. In addition, the Departments should consider HRA's advice "to look to history to inform the future" and include within the final report an analysis of the history of energy ROWs on tribal lands in relation to the options for consideration by Congress contained in Section 4.4.2.¹

Also, missing from both the findings and throughout the Draft Report are references to the Indian Tribal Energy Development and Self-Determination Act, Title V of the Energy Policy Act of 2005.² The Draft Report makes only a fleeting reference to the Indian Tribal Energy Development and Self-Determination Act (hereinafter "Title V") in Section 2.3 Federal Policy of Tribal Self-Determination. Title V should have a much larger presence throughout the Draft Report because it provides the necessary statutory backdrop against which the Draft Report's findings and conclusions must be interpreted. Furthermore, any discussion of "options" or "recommendations" should be consistent with the foundational Indian law principles of tribal sovereignty and the federal trust responsibility that are embodied in Title V and its express and emphatic reaffirmation of the Federal policy of Tribal Self-Determination. We encourage the Departments to take a closer look at Title V and incorporate references thereto throughout the Draft Report where appropriate.

In addition, since the tribes will not have the chance to review any executive summary prepared by the Departments before the printing of the final report, the Morongo Band requests that there not be an executive summary prepared or submitted with the final report.

II. Specific Comments

Section 4.2 Summary of Comments

Section 4.2 discusses the various valuation methods for tribal lands utilized by the parties in the negotiation of energy ROWs. The Draft Report correctly points out that valuation of tribal lands in the negotiation of energy ROWs does not conform to typical "market value" approaches and provides a summary of the tribal justifications for departure from the energy industry's insistence on an "objective, consistent, transparent, and uniform standard . . ."

The final report should more precisely state that there is good reason for departure from a uniform "one size fits all" standard because Indian lands are "homelands," an aspect embodied in the "exclusive use" provisions of many treaties and in the trust responsibilities imposed on the Federal government in regard to these lands. These are not private lands that are typically bought and sold, but are lands imbued with a significance that goes beyond mere quantitative measurement to include ancestral, cultural, spiritual or historic values, not the least of which is the fact that in most situations Indian people have resided there for hundreds, if not thousands, of years. Thus, tribal lands are not just a piece of real property, a place to be bought and sold based

¹ Quotation of HRA taken from statement made by Emily Greenwald at the Denver meeting on August 24, 2006. HRA's case study at Morongo establishes that the federal valuation of tribal lands is not advisable given the documented history of the federal government's undervaluing of tribal lands for energy ROWs on Morongo tribal lands.

² Public Law 109-58 (August 3, 2005), codified at 25 U.S.C Section 3501 et. seq.

on fair market appraisals, but rather a special place, an aboriginal homeland or part thereof, which remains the single most important factor in the continued survival of Indian tribes and tribal cultures.

Although tribal governments recognize the potential benefits of energy transported or transmitted across their lands, they are responsible to their people to weigh those benefits against any related adverse consequences to other tribal interests and values, such as those mentioned above. The imposition of uniform valuation techniques for proposed rights of way would impede this essential tribal governmental process and unduly restrict the creative ways in which individual tribes and energy companies are approaching these issues and, for the most part, doing so successfully.

Section 4.3 Scope and Nature of the Issues

In Section 4.3 the Departments discuss the issues raised by the energy industry and assess the magnitude of the impact on business and consumer interests from a public interest standpoint. Section 4.3 clearly states that the issues raised by the energy industry do not have any significant impact on the general public or consumers. Additionally, Section 4.3 discusses factors affecting the negotiating climate between the energy industry and tribes. Such factors include uncertainty which the energy industry claims causes increased business “risk.” However, the energy industry’s concerns regarding their perceived increased business “risk” associated with negotiations of energy ROWs on tribal lands is not supported by the information within the Draft Report.

The Draft Report should include within its findings, that the energy industry’s arguments of increased business “risk” associated with the current state of negotiating energy ROWs on tribal lands is not supported in the sampling of industry financial statements filed with the SEC and is undercut by the increasing number of ROWs and increasing amount of energy production on tribal lands. In other words, if there is indeed an increased business risk, it does not seem to be hamstringing the parties’ abilities to reach mutually beneficial agreements and, where necessary, to obtain the capital necessary to build new generation and transmission infrastructure at reasonable cost.

Section 4.4.1 Options for Consideration By the Parties or the Departments

The Departments identify several voluntary options available to the parties in Section 4.4.1 that may help to alleviate the parties’ concerns regarding the negotiation of energy ROWs on tribal lands. It should be noted in the final report that several tribes have established business practices that provide consistency and transparency to the energy industry in the negotiation of energy ROWs on tribal lands. The established business practices of tribes have resulted in several successful negotiations between tribes and the energy industry. The Morongo Band, for example, has adopted an ordinance setting forth the process to be followed for the application and negotiation of ROWs on Morongo tribal lands. (A copy of the Morongo Ordinance is attached hereto as Exhibit A).

The Morongo Ordinance facilitates the exchange of information between the Tribe and the energy company, and establishes a timeframe for the conclusion of negotiations. In this way, the Morongo Ordinance normalizes and guides the negotiations. Development of model or standard business practices for energy ROW negotiations would serve a similar purpose and should be available to tribes if they wish to adopt them, as written or to revise them to meet specific tribal governmental needs or the demands of a particular negotiation. The voluntary, cooperative development of such model or standard business practices would also provide an opportunity for tribes and energy companies to engage in a broader discussion of their respective interests and concerns in energy ROW negotiations and to explore the kinds of business practices that would be most likely to address those interests and concerns. Partnerships build trust. The Draft Report recognizes this in the following observation: “Energy companies that built productive relationships and partnerships with tribes commented that they find tribes to be fair negotiators for energy ROW valuation on tribal lands.” Draft Report, Section 4.3, page 25.

In addition, one option presented to the parties in Section 4.4.1(c) is to broaden the scope of energy ROW negotiations. This option offers the opportunity for tribes and energy companies to bring a broader range of issues to the negotiating table and to create additional incentives for a successful outcome for both, as opposed to getting bogged down in a narrower dispute over valuation. Moreover, by broadening the scope of negotiations to issues such as tribal energy and energy infrastructure needs, mitigation of environmental and social costs associated with ROWs, future certainty for expansion or modification of ROWs to meet increasing energy demands, etc., there is a greater likelihood for the formation of partnerships and for cooperative problem-solving between the parties in the development and transportation of energy resources. There are several examples in the Draft Report of successful negotiations between tribes and the energy industry that demonstrate the benefits of such partnerships to both energy companies and tribes.³ Also, it was Congress’ intent in passing Title V of the Energy Policy Act of 2005, to encourage partnerships between tribes and the energy industry.⁴

Section 4.4.2 Options for Consideration by Congress

Section 4.4.2 puts forth several options that the Departments suggest Congress could consider to address the issues raised in the Draft Report, including options that are unsupported by the Draft Report. Therefore, those options which are contrary to the findings of the Draft Report should be removed. Although included as “options” rather than “recommendations,” only one option is supported by the Draft Report and its findings: there should be no change in the existing law. The Departments inclusion of options for consideration by Congress also implies that there is a problem which is contrary to the findings of the Draft report, implies that Congress should address the issues and puts tribes in the position of having to convince Congress that such options are not appropriate or warranted and should not be applied to negotiations for energy ROWs on tribal lands.

³ For example, Southern Ute’s partnership with the Barrett Corporation and the Ute Tribe’s relationship with Questar Southern Trails Pipeline Company, both of which are included in the case study research conducted by HRA.

⁴ 25 U.S.C Section 3501 et. seq., for example, 25 U.S.C. Section 3502(d) provides incentives to both Indian tribes and energy industry to develop partnerships by offering preference in the purchase of energy products by the federal government from business entities that are majority owned by one or more Indian tribes.

Additionally, options c, d, and e, do not include any consideration as to the impact that they would have on the nation's energy supply, tribal sovereignty, tribal self-determination, and the federal trust responsibility. Nor is there any analysis as to the drastic departure from established law, regulations, and Supreme Court precedent that would result from the implementation of options c, d, or e. Specifically, the adoption of options c, d, or e, would be contrary to Congress' intent in Title V, which, among others, is to "further the goal of Indian self-determination" in a number of specific ways, including empowering Indian tribes to grant certain energy ROWs over tribal lands without review or approval by the Secretary of Interior.⁵

Furthermore, options c, d, and e cannot be applied to all tribes. There is no "one size fits all" option that would be acceptable or applicable to all tribes. For the above reasons we respectfully request that options c, d, and e of Section 4.4.2 be removed from the report entirely.

Should the Departments not remove options c, d, and e of Section 4.4.2, there should at least be some qualifying prefatory language informing Congress that options c, d, and e on pages 28-30 of the Draft Report are not supported by the findings and conclusions of the Draft Report and are not an exhaustive list of all the options available to Congress. Furthermore, the prefatory language of Section 4.4.2 should also include a statement that the options presented have not been evaluated with regard to each option's impact on the nation's energy supply, tribal sovereignty or self-determination, or the federal government's trust responsibility to tribes through treaties or existing law. Therefore, should the Departments include a list of options to Congress, we recommend the following prefatory language:

"As discussed above, the Departments found that under existing law and regulations, the difficulties experienced by the parties in negotiating energy ROWs on tribal lands are not substantial enough to have an adverse impact on public or national interests that would necessitate Congressional action. However, we have included the following options which are representative of the options put forth by the parties in their respective comments. Having found no compelling reason that the current law be changed, the options are included only as additional information. The options are **not** recommendations of the Departments and are not exhaustive of all of the options that might be available to Congress. In addition, none of the options have been analyzed or evaluated with regard to their potential impact on the nation's energy supply, tribal sovereignty, tribal self-determination, or the federal government's trust responsibility to tribes."

The above disclaimer would help to further clarify the weight Congress or others should give to the options listed in the Draft Report. Our strong preference however, is that options c, d, and e not be included in the Draft Report.

III. Technical Comments

Section 3.2.1 Emergency Authorities

⁵ 25 U.S.C. Sections 3502(a)(1) and 3504(b).

Section 3.2.1 contains statements regarding the application of several federal laws to tribes without citation to specific authority supporting such conclusions. This section should be amended to include references to any such authorities.

Section 5.4.3 Morongo Indian Reservation

Subsections (a) and (c), incorrectly refer to the ROWs in terms of total acreage as opposed to miles. Subsection (a) should read 8.02 miles not acres. Similarly subsection (c) should read 4.73 miles rather than acres. HRA's report also incorrectly records the area in terms of acres rather than miles.

IV. Other Considerations

It is important to point out that Section 1813 itself has created uncertainty and distrust between the energy industry and tribes. Congress' intent to encourage energy development and partnerships between tribes and the energy industry in Title V has been undermined by Section 1813. Tribes and the energy industry are now more polarized than ever. We hope that the final report to Congress will lay to rest the issues raised by Section 1813 and that tribes and the energy industry can move forward to develop energy partnerships and successful relationships.

The above general, specific and technical comments are respectfully submitted to the Departments of Interior and Energy to aid in the revision and finalization of the final report to Congress. Thank you in advance for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Maurice Lyons', with a long horizontal flourish extending to the right.

Maurice Lyons, Chairman
Morongo Band of Mission Indians