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September 1, 2006

*By Electronic Mail; and
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Mr. Darryl Francois
Attention: Section 1813 ROW Study
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1849 C Street, N.W.
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Washington, D.C. 20240

**Re: Comments on Draft Report to Congress: Energy Policy Act of
2005, Section 1813, Indian Land Right-of-Way Study**

Dear Sir/Madam:

On behalf of the Pueblo of Isleta, the Pueblo of Sandia and the Pueblo of Zia, we submit the following comments on the Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study.

I. The core conclusions of the study should be strengthened and clearly expressed in the Report.

We support to Departments' ultimate conclusion that there is no national-scale problem

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On behalf of the Pueblo of Isleta, the Pueblo of Sandia and the Pueblo of Zia, we submit the following comments on the Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study.

I. The core conclusions of the study should be strengthened and clearly expressed in the Report.

We support to Departments' ultimate conclusion that there is no national-scale problem requiring Congress to consider changing the longstanding requirement that tribes consent to energy rights-of-way over tribal lands. The Report correctly concludes that any difficulties faced by parties in bilateral negotiations between energy companies and tribes do "not appear to be consequential for the nation or consumers in general." Report at 24. This conclusion is the heart of Report because it resolves whether there is any issue that needs to be addressed with legislation. Congress directed that the Report be prepared in response to pressure from some energy companies, which claimed the law should be changed because of the supposed impact of

tribal compensation for rights-of-way on consumers and on the supply of energy products. The Departments' conclusion refutes that claim as baseless.

The Departments give specific reasons for this conclusion. First, the Report concludes that total energy transportation costs are a small component of overall energy costs. Report at 24. Second, an even smaller fraction of transportation costs is attributable to rights-of-way over tribal lands. *Id.* Third, the comments and data provided revealed "no evidence to date . . . [of] any adverse impacts on the reliability or security of energy supplies to consumers." *Id.* In other words, the study revealed no significant impact on consumer prices and no threat to energy reliability or security. These, as noted, were the two principal concerns invoked by the energy industry to urge Congressional action and in the course of public meetings concerning preparation of the Report, and both were refuted by the evidence before the Departments.

The Report should not wait until page 24 to present its conclusion or analysis on this matter. The Report should clearly state this conclusion in the opening paragraphs and in any executive summary.

A review of the economic analyses submitted by tribes and energy companies supports the Departments' conclusions. In response to claims by industry that right-of-way fees were causing significant increases in consumer energy costs, and at the request of the Departments that tribes submit information and analyses of right-of-way compensation, several tribes hired economists to analyze the effects of right-of-way fees on costs to consumers. These analyses demonstrated that tribal right-of-way acquisition costs are a very small cost factor for transportation of gas and electricity.¹ These analyses also discussed how even small added costs may not pass through to consumers at all, due to net back pricing in a deregulated market.² Finally, the comments submitted by the Ute Tribe of the Uintah and Ouray Reservation contain a review of utility filings with the Securities and Exchange Commission demonstrating that the vast majority of companies themselves did not identify increased right-of-way compensation to tribes as a risk factor in future investment and business plans.³ These analyses convincingly refuted industry's claims, and the Report should discuss them more fully.

In contrast, energy companies provided no analysis supporting their claims of escalating costs and assertions that tribal right-of-way costs will be passed on to consumers.⁴ A supplemental report submitted by the FAIR Access to Energy Coalition (FAIR)⁵ purported to provide an economic analysis in response to those provided by tribes, but it contained only

¹ Energy Policy Act Section 1813 Comments: Report of the Ute Indian Tribe of the Uintah and Ouray Reservation for Submission to the U.S. Departments of Energy and Interior (May 15, 2006) ("May 15 Northern Ute Comments"), 35-46; The Economic implications of Navajo Right-of-Way Fees (May 15, 2006), 6, 8-9.

² May 15 Northern Ute Comments, 43; Impacts on Natural Gas Markets of Charges Assessed for Tribal Rights-of-Way in the Southwestern United States (May 15, 2006) (submitted with May 15 Comments of the Southern Ute Tribe), 4.

³ May 15 Northern Ute Comments, 47-50.

⁴ *E.g.*, May 15 Comments of the Interstate Natural Gas Association of America, 2 n.1, 4; May 15 EEI Data and Comments for BIA and DOE Section 1813 Study, 11-12.

⁵ FAIR Supplemental Report: Economic Analysis of the Impact of Tribal Rights-of-Way Fees (June 16, 2006).

unsupported conjecture. For example, FAIR stated that energy companies have a “strong incentive” to route pipelines and transmission lines around reservations and that these alternate routes “might” be more costly to the environment and to consumers.⁶ The analysis also warned that transporters might decide to uproot existing facilities and rebuild elsewhere rather than renew a right-of-way across tribal land.⁷ Yet, FAIR could name no specific examples of companies which had relocated solely because of difficulties with renewal negotiations. This hypothetical discussion of incentives completely fails to support the claim that tribal right-of-way costs have any significant effect on consumer energy costs. The Report recognizes this conclusion, stating that any effects of tribal right-of-way compensation “are not large enough to have a significant effect on overall energy transportation costs and the total cost of delivered energy paid by consumers,” at 24, but it should contain more discussion of the evidence leading to it, and the lack of any contrary evidence.

Finally, the Departments also correctly note that any problem may be self-limiting because tribes and energy companies have an incentive to work together. Report at 24. This is an important observation, supported by experience, and it indicates that the current system of bilateral negotiation is working well. This conclusion could be strengthened with a discussion of the successful partnerships and creative negotiations described in comments from tribes and from some energy companies.

We believe the Report would be stronger and more useful if this discussion was placed at the beginning, and in an executive summary. This would allow the Departments to set forth the answers to the statutory questions and state the study’s conclusions and limitations clearly at the outset. We suggest that the following points be addressed in the executive summary:

- There is no evidence that the current requirement that energy companies obtain tribal consent to rights-of-way has actually resulted in either disruption of energy supplies or a significant increase in the delivered price of any energy product to any consumer anywhere.
- Based on the information provided by tribes and energy companies, it appears very unlikely that any conflicts, difficulties or uncertainties that may arise in the future between the parties to a negotiation could lead to significant cost impacts to energy consumers or to significant threats to the physical delivery of energy supplies to market areas.
- Tribal consent to incursions onto and uses of tribal land, including energy rights-of-way, is a fundamental aspect of tribal sovereignty and has been reflected in federal laws, regulations and departmental practice for many decades. Any change or weakening of this consent requirement would be a major departure from long-established federal policy, and it not justified by the evidence before the Departments.

⁶ *Id.* at 3.

⁷ *Id.* at 4.

- Tribal land is unique and its value cannot be determined by standard procedures for valuing federal or private land for condemnation purposes.
- Tribes have historically been grossly under-compensated for rights-of-way granted across their land. In most cases, the lowest rates of compensation were obtained when the BIA negotiated rights-of-way on behalf of tribes and presented them to tribes for approval.
- Based on these conclusions, the Report should affirmatively recommend that Congress take no legislative action.

II. Section-by-Section Analysis of the Report

A. Section 2 – Negotiations for Energy ROWs on Tribal Land and the Implications for Tribal Self-Determination and Sovereignty

Overall, the report fails to adequately describe the breadth and importance of the tribal sovereignty interests at stake. In the summary of comments, tribal sovereignty concerns are collapsed into a single paragraph, Report at 4-5, while energy company concerns are discussed in detail, Report at 5-10. This is especially inappropriate, since many energy companies stated that they actually support tribal sovereignty. *See* our May comments (p. 3 n.5). For example, the Report's discussion of trespass, Report at 8, is framed in terms of industry concerns that expiring agreements could leave energy companies in trespass. The Report entirely fails to mention, however, that many of these trespass situations are caused when companies themselves delay approaching tribes to begin renewal negotiations. Given tribes' uncontested assertions that no tribe has ever sought to evict a company in trespass, Report at 8, there is no reason to highlight this industry concern. In order to adequately capture the concerns expressed in tribal comments, the report must treat sovereignty-related concerns more carefully and in greater detail.

As discussed in detail in our May comments (pp. 12-13) each tribe is a sovereign government with authority over its land and responsibility for its citizens and resources. Each government has a right to assess any proposal to use tribal lands, including proposals by energy companies seeking to use the land for an energy right-of-way, based on the impact of the proposal on that tribe's citizens, territory and resources. For example, a tribal government considering a proposal for a gas pipeline must consider the environmental impacts of the pipeline, the risk of harm to its citizens in the case of an explosion or leak and any cost of providing police, fire and emergency services associated with this risk.

Another concern addressed in many tribal comments, but not discussed at all in the Report is the uniqueness of tribal land – in contrast to other lands in federal ownership, like BLM lands. As discussed in our May comments (pp. 13-15) tribal lands have a unique historic, cultural and religious significance that cannot be reflected by a standardized valuation formula. For many tribes, reservations encompass homelands on which the tribe has lived for centuries and irreplaceable sacred sites that are essential to the tribe's religious ceremonies. Other

reservations contain significant natural resources that the tribes depend on for cultural, religious and economic purposes. If the law were changed to empower the federal government to condemn tribal lands for an energy right-of-way, a tribe would lose its inherent rights to protect natural resources, sacred sites, wildlife and communal resources within or adjacent to the right-of-way. The loss of sovereignty that tribes would suffer if the consent requirement were weakened thus goes beyond property and compensation negotiations to impact areas such as religion and protection of natural and cultural resources, areas that have always been exclusively reserved to tribes.

The Report contains too sparse a discussion of the legal requirement that tribes must consent to any incursion onto their lands, which has been a defining cornerstone of tribal sovereignty as recognized by federal law since at least the early 1800s. This requirement has been increasingly embodied over time in specific laws and regulations and is enshrined in recent statutes and executive orders. We discussed this history in detail in our January comments (pp. 3-11) and again in our May comments (pp. 3-4). The Report acknowledges this history generally, but could be read as implying that the legal requirement of obtaining tribal consent for rights-of-way is a relatively recent development, which it clearly is not.

The Report's discussions of the history of the present-day consent requirement for energy rights-of-way across tribal lands in federal statutes and regulations are inaccurate and contradictory. The Report discusses the statutory and regulatory background of the tribal consent requirement twice – in the section on tribal sovereignty interests, at 11-13, and again in the section on national energy transportation policies, at 15-17. We agree that this legal framework is relevant to both discussions, but the differences between the two sections render the report confusing, internally inconsistent and misleading. (The Report's discussion is also at odds with the comprehensive history of tribal consent provided in the Report by Historical Research Associates. HRA Report at 3-16.)

For the reasons discussed below, the second discussion on pages 15-17 more fully captures the statutory and regulatory history. We recommend deleting the first discussion, moving the second discussion to sections 2.1 and 2.2, and simply referring back to that discussion in the section on national energy policies.

First, the 1948 Act and the regulations issued by Interior to implement it require tribal consent for all energy rights-of-way on tribal land, reflecting Congressional and administrative determinations that consent is necessary. This is clearly stated on page 16, whereas the discussion on page 12-13 erroneously states that the statute and regulations together “empower the Secretary to require tribal consent for a tribe organized under the tribal organization statutes and . . . vest the Secretary with the discretion” to require consent from others. As the discussion on page 16 correctly states, the statutes and regulations read together impose a legal requirement, not a discretionary authority, on the Secretary.

Second, the discussion of the regulatory history on page 13 is incomplete and historically inaccurate. It states only that Interior did not require consent for rights-of-way from tribes prior to 1948. In reality, the 1948 Act and the 1951 regulations were the culmination of gradually

increased recognition by the Interior Department of the consent requirement over prior decades. In 1938, Interior regulations required that applications be presented to the tribal council of any IRA tribe and strongly recommended that the significant rights-of-way be presented to the council in all cases. During this period, the Department's practice was in fact to obtain tribal consent in virtually all cases. Thus, although tribal consent was not expressly required in Department regulations before 1948 and 1951, it has been an implied requirement and a recognized practice within the Department at least since passage of the IRA, and the roots of the consent requirement extend even further in history. In fact, as shown in our January comments (pp. 3-9), the legal requirement is anchored in cases going back over 100 years before the IRA. The statute and regulations simply codified this practice, and the discussion at pages 16-17 captures this more accurately.

B. Section 3 – National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land

It is an astonishing oversight that the draft Report barely mentions the most recent and directly relevant expression of national energy policy concerning tribes—Title V of the Energy Policy Act of 2005. Title V is an important expression of national energy policy and is the only piece of recent federal legislation that directly addresses both energy transportation needs and the specific issue of energy rights-of-way on tribal land. As stated in the Department of the Interior's recent notice of proposed regulations implementing the TERA provisions, the intent of TERAs "is to promise tribal oversight and management of energy and mineral resource development on tribal lands and further the goal of Indian self-determination." 71 Fed. Reg. 48,626 (August 21, 2006). As discussed on our January comments (p. 11), Title V – especially the TERA provisions – embodies a clear decision by Congress to increase tribal control over energy development and management on tribal lands and decrease federal oversight where tribes desire to do so. It is important to recognize that any effort to limit tribal power to consent when companies seek to install or renew rights-of-way across tribal land would be directly contrary to the carefully crafted policy determinations made by Congress when it passed Title V.

The Energy Policy Act of 2005 also reduced the time for companies to depreciate energy infrastructure from 20 years to 15 years. This is significant because several energy industry comments raised concerns about the possibility that unsuccessful renewal negotiations would result in abandoned infrastructure and a huge economic loss for companies. This claim is misleading. When a company enters into a lease for a term of years, the company customarily depreciates the full cost of any capital investments over time so that there is no net loss when the lease ends. No company has claimed otherwise. As noted, the 2005 Act made changes to federal law that benefited companies even more, by providing accelerated depreciation allowing complete recovery in 15 years of all investments with a term of greater than 15 years.

While ignoring Title V completely, the Report does discuss several national energy transportation policies that indirectly relate to energy rights-of-way across tribal lands. In this section, the Report mentions several emergency authorities that supposedly "inform the Departments' study of national energy transportation policies on tribal lands." Report at 17. The Report claims vaguely that "an analysis of emergency authorities addresses the system integrity

and security issues raised by some industry parties in the section 1813 study.” *Id.* The Departments claim that the Natural Gas Policy Act and the Federal Power Act provide for emergency transfers of energy supplies and that “these generally applicable statutes could apply to tribes” in an emergency. The Departments do not cite to any specific sections of the Natural Gas Policy Act or the Federal Power Act that they believe could circumvent the tribal consent requirement, though they acknowledge that they are “rarely used.” *Id.*

We are unaware of any provision in either statute granting any federal agency such power. In fact, the general condemnation authority in the Federal Power Act has been held not to authorize condemnation of lands owned by the United States in trust for tribes. *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 111-14 (1960); *Escondido Mut. Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786 n.239 (1984); *Pend Oreille Public Utility District No. 1*, 28 F.3d at 1548, 1551-42 (relying on *Tuscarora* and *Escondido* to hold that a FERC licensee under the Federal Power Act may not condemn tribal lands held in trust by the United States and located on an Indian reservation). Nor does the Natural Gas Act authorize condemnation of lands held in trust for tribes by the United States. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 883-84 (10th Cir. 1974) (“the power of eminent domain afforded holders of certificates of public convenience and necessity under Section 7(h) of the Natural Gas Act does not extend to lands owned by the United States”).

As there is no basis for the claim that these “emergency authorities” would apply to tribal lands, this section should be deleted.

Finally, as we discussed at length in our January comments (pp. 12-19), Indian reservations are grossly underserved by energy companies and utilities. National energy transportation policies require expanding equitable service and increased access to these areas. The Report barely mentions this issue. Report at 18. It is obviously unreasonable for energy companies to suggest changing the law to require tribes to grant energy companies right-of-way over tribal lands at lower rates than the tribes wish while the companies have failed to address the dire under-service of energy products on most reservations. By contrast, as the Report recognizes, at 38-40, 42, 50; *see also* HRA Report, 85, in many instances when companies have agreed to provide service to reservation residents as part of a right-of-way negotiation, tribes have accepted lower compensation.

C. Section 4 – Issues for Stakeholder Consideration Concerning Standards and Procedures for Negotiation and Compensation for Energy ROWs on Tribal Land

After reviewing the information collected during the study, including case studies and economic analyses produced by both tribes and energy interests, the Departments correctly conclude that “it appears unlikely that these difficulties [that arise from time to time during right-of-way negotiations] could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas.” Report at 27. In other words, there is no problem of national significance that would merit Congressional intervention. It follows from this conclusion that the Departments’ recommendation to Congress should be that Congress not make any change in the existing law. The Departments were asked by

Congress to make recommendations for Congressional action or inaction based on the study's findings, and the only recommendation supported by the evidence is a no action recommendation. Instead, the Report sets forth several "options" for Congressional consideration, many of which are not supported at all by the evidence before the Departments. These options should be eliminated from the Report.

Two of the options set forth in the Report, at 30-31, would authorize condemnation of tribal land and would drastically alter the course of federal Indian policy by removing the requirement that tribes consent to intrusions onto their land. The Departments defended this choice in the tribal consultations held in late August by stating that they wanted to set forth a complete range of possible options. Congress requested recommendations, not options.

Moreover, the Report does not discuss the severe consequences of these options. Any change in the requirement for tribal consent for incursion onto and uses of tribal land will result in the erosion of tribal sovereignty in areas where tribal sovereignty has been long recognized in federal statute, federal policy, and Supreme Court decisions including the protection of cultural and sacred sites, fish and wildlife resources, water quality and community health. *See* discussion in Section II.A and our January comments (pp. 3-11). These options are not responsive to Congress' request and are completely unsupported by the evidence before the Departments and the Departments' conclusions. They should not be included in the report.

More specifically, the final option (option (e)) discussed in the Report is for Congress to authorize outright condemnation of tribal land, completely ignoring the special status of Indian land, the treaty obligations of the United States and the unique needs of tribal governments. In its discussion of Option (e) – suggesting that "Congress could specifically authorize condemnation of tribal lands for public necessity" – the Report correctly states that "it is important to note that no legislation authorizes the condemnation of Indian tribal lands in specific terms." Report at 31.

The Report then states:

Congress may exercise its plenary power over Indian affairs and manifest its intent to impose projects on Indian lands thereby effectuating a condemnation. Numerous district court decisions prior to the Indian Civil Rights Act and the Indian Self Determination Act have held that an appropriation act that appropriates money for a specific project will manifest a clear intent to engage in the project.¹²¹ The clear and precise intent expressed by Congress in an appropriations act, when considered with the General Condemnation Act, may furnish authority for taking land within an Indian Reservation.¹²²

¹²¹ *United States v. 40 Acres of Land*, 162 F. Supp 939, 940 (D. Alaska 1958); *United States v. 5,677.94 Acres of Land*, 162 F. Supp 108, 110-111 (D. Mont. 1958).

¹²² *United States v. 5,677 Acres of Land*, 162 F. Supp. 108, 110-111 (D. Mont. 1958).

Id. As set forth below, this entire paragraph is both inaccurate and misleading in several respects, and should be deleted so that the Departments do not mislead Congress as to the state of the law.

First, while it is true that the Supreme Court has held that Congress possesses plenary power over Indian affairs, the Supreme Court has also held that this power is limited by the United States' trust responsibility to Indian tribes and their property. The Supreme Court has reviewed federal legislation affecting Indians to ensure it is "tied rationally to the fulfillment of Congress' unique obligations toward the Indians." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 77, 85 (1977); *Morton v. Mancari*, 417 U.S. 535, 555 (1974). A statute generally eliminating the right of tribes to consent to rights-of-way over their lands would not meet this standard, as we discussed in our January comments (pp. 6-7).

Second, it is inaccurate and misleading to tell Congress that an appropriations act or some general condemnation authority "may furnish authority for taking" tribal reservation lands. Report at 31. To support that incorrect statement, the Report relies on what it says are "[n]umerous district court decisions prior to the Indian Civil Rights Act and the Indian Self-Determination Act." The Report then cites two such district court decisions in 1958. Two district court decisions is hardly "numerous," and the Report entirely ignores the holdings of the Supreme Court and federal courts of appeals since 1958 setting forth a far higher standard for determining whether Congress has authorized the taking of Indian property, and reaching conclusions contrary to the 1958 district court decisions.

In *United States v. Dion*, 476 U.S. 734, 739-40 (1986), the Supreme Court stated that there must be "clear evidence that Congress actually considered" any conflict between Indian property rights and its intended action "and chose to resolve that conflict by abrogating" the Indian rights. An appropriation or generalized authority for a federal agency to take lands cannot be clear evidence that Congress actually considered conflicts between a public objective and the rights of a particular tribe to specific property. General authorizations to take land and/or appropriations have specifically been held not to authorize the taking of tribal property by several court of appeals decisions. *United States v. Pend Oreille County Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1548 (9th Cir. 1994) (FERC licensee not allowed to "condemn tribal lands embraced in a reservation under the [Federal] Power Act or any other federal statute"); *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir. 1976); *Bear v. United States*, 611 F. Supp. 589, 598-600 (D. Neb. 1985), *aff'd*, 810 F.2d 153 (8th Cir. 1987). These more recent decisions of higher courts are clearly entitled to greater weight than the two clearly aberrant district court decisions – both nearly five decades old – relied on by the Report for its erroneous legal contention.

The fourth option set forth in the Report (option (d)) is for Congress to require the parties to accept binding valuation set by a third party. The Report suggests that this third party could be a Congressionally-chosen arbitrator, an arbitrator selected by the parties, or a federal entity

tasked with determining value. A binding determination of value by a third party is no different from condemnation. The Report should not obscure this by presenting binding valuation as an option that is different (and impliedly less severe) than outright condemnation.

In presenting these options to Congress, the Departments note only that “[s]ome of these options would involve major changes to the long-standing relationship between 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.” Report at 28. This is a serious understatement of the degree to which any change in the consent rule would completely undermine the sovereignty of tribes over their land bases. Given the Report’s conclusion that there is no problem warranting any change in the law, there is no basis for including this option in the Report.

The third option suggested by the Report (option (c)) is for Congress to authorize the executive branch to make an initial determination of fair market value for every energy right-of-way on tribal land based on some standardized formula or set of guidelines and regulations. This option would still require final approval by both the tribe and the energy company involved in the negotiation, ensuring that it remains a negotiated agreement, rather than unilateral condemnation. However, it is flawed in several ways.

First, relying on a federal entity to set compensation for energy rights-of-way across tribal lands is a policy that has been tried and has failed. With respect to the BIA, the Report completely ignores tribes’ claim – well documented in a great number of comments and case studies, *see* discussion in Section II. D. – that the BIA consistently undervalued energy rights-of-way on tribal land, resulting in decades in which tribes received little or no compensation for the incursions made by energy companies onto their lands. There is no basis for supposing that the BIA or any other federal entity would perform better in this respect in the future than BIA did in the past. Additionally, the Report clearly states that the variation and uncertainty associated with negotiations over energy rights-of-way has no discernible effect on consumers and poses no threat of disrupting the nation’s energy supply. This option thus appears to suggest that Congress throw money at a problem that does not exist.

Another flaw in this option is the extraordinarily narrow scope of suggested valuation methods. Comments submitted by tribes and case studies relied upon in the Report demonstrate that tribes and energy companies typically use a much broader range of methods for determining fair and appropriate compensation. In fact, economics literature supports a wide variety of approaches to valuation, including calculations based on: the cost of replacing land taken, recovery of governmental costs, compensation for the foregone opportunity to use the land for another purpose, throughput value, a percentage of the cost of building around the reservation, alternative opportunity costs, a percentage of the value of the energy product transported, and a sharing of the net benefits.⁸ Another accepted definition of appropriate compensation in this context is what a willing selling and a willing buyer would agree to when neither is under

⁸ May 15 Northern Ute Comments, 102-04.

compulsion – which is the amount produced by bilateral negotiations.⁹ Tribes have also looked at the proportionate value of the tribal land relative to the value of an entire line project and analyzed comparable market sales of rights-of-way to determine appropriate compensation.¹⁰ Finally, tribes and energy companies have explored creative arrangements involving non-monetary compensation, such as granting rights-of-way in exchange for providing utility service to the tribe, HRA Report at 85, or employment opportunities for tribal members, *id.* at 122.

Rather than addressing these possible methods, several pages of the Report are devoted to the BLM standards for valuing federal land, a system that is completely inapplicable to tribal land, *see* section II. A. and our May comments (pp. 15-16). Any comprehensive discussion of valuation methodology should consider and analyze these various methods for valuing rights-of-way. More basically, because different valuation methods are appropriate to different circumstances, no standard method or formula should be suggested.

D. Section 5 – Analysis of Negotiations and Compensation Paid for Energy ROWs on Tribal Land

Section 1813 required the Departments to provide “an analysis of historic rates of compensation paid for energy rights-of-way on tribal lands.” Pub. L. No. 109-58, tit. XVIII, 119 Stat. 594, 1127-28. In order to answer this question, a complete history of compensation for at least every presently-existing right-of-way should have been compiled. The Departments readily admit that a “complete historical analysis of energy ROW compensation on tribal lands was not possible because of the number of energy ROWs on tribal lands and the diffuse locations of ROW records.” Report at 32. Rather than doing this, the Departments elected to examine voluntary case studies of past and present right-of-way compensation, then declined to conclude from the material submitted that tribes were historically grossly under-compensated, even though the information provided clearly supported this conclusion.

The case study process was seriously flawed in several respects. As we stated in our January (pp. 21-22) and May (pp. 4-6) comments, the case study method employed by the Departments is entirely inadequate to answer the questions posed by Congress. As Mr. Middleton of the Interior Department stated at the April 20 public meeting, there are tens of thousands of energy rights-of-way across tribal land. The compensation for each of these is the product of unique cultural, geographic, economic and historical factors. The sheer number and diversity of circumstances make it impossible to draw generalized conclusions from a few or even few hundred case studies, as the Report appears to acknowledge. Report at 2. Instead, as noted, a comprehensive inventory should have been taken of all existing rights-of-way over tribal land for energy purposes.

At minimum, a comprehensive study should have included a complete present and historical analysis of all existing energy rights-of-way across tribal land. The Interior Department, as the trustee for tribes and as the entity responsible for actually negotiating these

⁹ *Id.* at 98-99.

¹⁰ May 15 Comments of the Confederated Tribes of the Warm Springs Reservation of Oregon, 7-8.

rights-of-way for most tribes prior to the last few decades, should be in possession of the full and complete records needed to provide at least an analysis of historic rates of compensation. If the Department was in fact unable to locate this information in the time available, it should have sought additional time to complete a comprehensive study. Instead, the Departments have prepared a study that relies on only a very partial and unrepresentative sampling of the relevant data. This decision compromises the integrity of the Report, and fails to provide the statutorily-required analysis of historic rates of compensation, which we discuss below.

A case study approach also presents the danger that extreme examples will be used to guide policy. The Report acknowledges that “the case study approach may tend to focus on the more complicated or contentious examples of energy right-of-way negotiations.” Report at 2. This is especially true here because the case studies used were selected based on examples volunteered by tribes and energy companies, both of which have possible incentives to select examples that will support their respective policy positions.

The Report also analyzes survey information submitted by two energy trade associations – Edison Electric Institute (EEI) and the Interstate Natural Gas Association of America (INGAA). Report at 44-49. These were informal surveys of the associations’ member companies involving a very small number of rights-of-way (19 and 20 respectively) and concentrating only on recent renewals. No useful conclusions about compensation can be drawn from such a small sample, as EEI itself admitted in its May comments.¹¹ Certainly, no useful analysis of historic rates of compensation can be drawn from surveys that completely ignore past compensation, as the trade associations’ do.

Even given the limitations on the Departments’ methodology, tribes provided substantial evidence of shockingly low rates of compensation for energy rights-of-way, usually as a result of BIA appraisals, in the decades before tribes assumed substantial control over the negotiation process (which for most tribes has only been in the past 20-30 years). For example, the Northern Ute Tribe received \$378 in 1980 for a 50-year easement over 3.78 acres of land after the BIA appraised the land at less than fair market value. Report at 34. During the 1950s and 1960s, the BIA generally appraised rights-of-way on the Southern Ute Reservation, some with perpetual terms, by calculating only surface damage fees on a per-rod basis. *Id.* at 35. In 1961, Western Slope Gas Company paid \$1 per rod for a 50-year, 50-mile right-of-way across the Reservation. *Id.* at 36. The report on historic compensation prepared by Historical Research Associates contains additional examples like these from the four tribes that volunteered to serve as case studies. HRA Report at 26-28, 51, 83-84, 144.

Tribes provided even more accounts in their comments of severe under-compensation where the BIA or another federal agency had granted rights for minimal value. For example, the BIA granted a right-of-way to Arizona Public Service across the Navajo Reservation in 1955 for minimal compensation.¹² Before the Santa Ana Pueblo employed its own attorneys, the BIA negotiated rights-of-way across the Pueblo’s land for pennies an acre.¹³ The BIA also granted an

¹¹ EEI Data and Comments, 3-4, 9-10.

¹² Case Study: APS 69 KV “Southern NN Border to Tuba City” electric power line 1-2.

¹³ May 14 Comments of the Pueblo of Santa Ana, 3-4.

electric distribution line at the Pueblo of Laguna for \$1.00 and granted several other rights-of-way for very little compensation.¹⁴ The Jicarilla Apache Tribe provided information about several oil and gas pipelines granted by the BIA prior to the 1970s for \$1.00 to \$1.20 per rod and \$10 per acre for pasture damage.¹⁵ On the Hopi Reservation, where 29 percent of residents lack electricity, the BIA granted a 25-year, 50-mile right-of-way for only \$755 for an electric transmission line that did not serve Hopi residents.¹⁶ The Organized Village of Kake in Alaska reported that the BIA granted a right-of-way over 18 percent of its small reserved trust lands for no compensation at all.¹⁷

When other Interior agencies sought rights-of-way across tribal land, tribes received even less. The Tohono O'odham Nation received considerably less than the appraised value for rights-of-way granted by the BIA to the Central Arizona Project and the Western Area Power Administration (WAPA).¹⁸ WAPA also obtained from the BIA several perpetual rights-of-way across the Navajo Reservation for minimal compensation.¹⁹

This information was not disputed by energy companies. Despite all this information, the Departments never reach even a qualified conclusion that tribes have been historically under-compensated. At a minimum, the Report should clearly state this conclusion.

Beside the simple fact that the Report should analyze historic compensation because Congress so directed, the issue of historic rates of compensation is significant for several reasons. First, if past compensation was inadequate, it would underscore the importance of the present-day tribal consent requirement, which, by guaranteeing tribes decision-making power over the disposition of their lands, protects against that kind of under-compensation occurring in the future. Second, if in fact an Indian tribe subsidized the use of tribal land by energy companies under a prior agreement, this is unquestionably a legitimate factor for a tribe to consider in setting the compensation it seeks for renewing such a right-of-way. Third, if past compensation was inadequate, but that which is now paid for energy rights-of-way negotiated bilaterally between tribes and energy companies is not inadequate, this would provide a powerful endorsement of the current process.

III. The Departments' process in preparing the Report was seriously flawed

In addition to its flawed case study approach, the Departments process in preparing the Report had serious deficiencies.

¹⁴ May 15 Comments of the Pueblo of Laguna, 2 and Attach. 1. The Pueblo also noted in its comments that the \$1.00 right-of-way expired in 2002, but the Pueblo elected not to impose sanctions and "instead willingly worked in earnest" to negotiate the right-of-way, which was used to supply service to Pueblo residents.

¹⁵ Position Paper of the Jicarilla Apache Nation on DOI/DOE Study of Energy Rights of Way on Tribal Land (May 12, 2006), 15-17.

¹⁶ May 15 Comments of the Hopi Tribe, 3.

¹⁷ May 1 Comments of the Organized Village of Kake, 1.

¹⁸ May 15 Comments of the San Xavier District of the Tohono O'odham Nation, 1-2.

¹⁹ Narrative History for Western Area Power Administration (submitted with May 15 comments of the Navajo Nation), 1-2.

First, the Departments' approach placed an enormous financial burden on tribes, many of which lack significant financial resources. In order to present information to be considered in the study, tribes were required to do most of the work and provide their own financial and historical data. Tribes were also responsible for providing any economic analyses or rate comparisons. In order to do this, several tribes used their own funds to hire economists and prepare detailed case studies. Indeed, were it not for the comprehensive analyses provided by the Southern Ute Tribe, the Ute Tribe of the Uintah and Ouray Reservation, the Navajo Nation and the Morongo Band of Mission Indians, the Departments would have had very little data from which to draw any conclusions whatsoever. Unfortunately, hiring an economist and preparing a detailed case study was not financially feasible for the majority of tribes. The Department's approach therefore necessarily excludes the experiences of the most economically disadvantaged tribes.

Second, the time allotted for tribes to review and comment on the draft Report was grossly inadequate. The draft was not released until August 9, leaving little more than two weeks before tribal consultation meetings were held August 24-30. The Departments required written comments to be submitted by September 1, two days after the last consultation. This extremely compressed timeline is especially inadequate because the Report overlooks important tribal concerns and fails to reflect the data provided in several significant ways. Many tribes have been involved in the study process since December 2005. These tribes took the Departments at their word, spending time and money to open their records for examination and provide specific evidence for use in the study, all of which is part of the record. The draft Report does not fully reflect this record, yet tribes have had very little time to prepare comments in response to it.

Sincerely,



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