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

Re: Section 1813 ROW Study Comments – Southern Ute Indian Tribe

Dear Comment Recipients:

Our firm serves as general legal counsel for the Southern Ute Indian Tribe (“Tribe”), and these comments are submitted on behalf of the Tribe in response to the notice of publication of draft report set forth at 71 Federal Register 45575 (Aug. 9, 2006). These comments supplement the preliminary statement of Clement J. Frost, Chairman of the Southern Ute Indian Tribal Council made at the public hearing held on August 24, 2006 in Denver, Colorado. In his preliminary comments, Chairman Frost complimented the Department of Energy and the Department of the Interior (“Departments”) for their hard work in producing the “Draft Report To Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study” (“Draft Report”). We reiterate the Chairman’s sentiments and submit these comments with the hope that they will lead to improvements in the quality of the report and in the usefulness of the report to Congress.

I. Overview

Recognizing the extremely broad scope of the congressional directive related to Section 1813 and the condensed time frames for generating a meaningful report, the Tribe believes that the Draft Report reflects the good faith efforts of the Departments to evaluate the status of energy rights-of-way acquisition on tribal lands, and the Tribe generally concurs in the key findings of the Draft Report. The justification for requesting the Section 1813 report centered on the claimed potential threat to national security and significant adverse impact to energy consumers occasioned by tribal negotiation practices. If the Departments had concluded that such threats and impacts existed, one can reasonably assume that Congress might rely on those findings in enacting new legislation diminishing the powers of tribes to consent to the use of their lands for

energy right-of-way purposes. Any such legislation would represent a substantial departure from longstanding law and policy reflected in treaties, statutes and regulations which recognize that tribes must consent to use of their lands for rights-of-way purposes. Accordingly, after months of review, data collection, and solicitation of public input, it is extremely important that the Departments have determined that no potential threat to national security and no material impact on energy consumers appear to exist under current law, policy, or practice. Draft Report at 4.3. The Department also found that, despite occasional difficulties, almost all negotiations between tribes and industry are completed successfully. Draft Report at 4.2. We urge the Departments to emphasize these key findings in the Executive Summary that has yet to be written.

The Introduction to the Draft Report sets the stage for the remainder of the report by discussing the general positions advanced by tribes and industry in their comments. Section 1.3 lists among common themes, "Trends toward shorter term lengths (in years) for ROWs and longer negotiation periods." Section 1.3.3 states, in part, "Industry parties generally noted that the terms of years for energy ROWs are decreasing but that the ROW negotiation times are increasing." While the case study approach employed by the Departments makes it impossible to draw final conclusions on these matters, we believe it is important for the Departments to note that there was no factual confirmation that these "trends" exist. In preparation of the Draft Report, the Departments relied heavily upon a separate analysis prepared in conjunction with this study; "Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006," Historical Research Associates, Inc. (July 7, 2006) ("HRA Report"). In tables provided by HRA for each of the case study tribes, HRA examined outcomes associated with a substantial number of major right-of-ways. See HRA Report Table 1 (Uintah and Ouray Indian Reservation); Table 2 (Southern Ute Indian Reservation); Table 3 (Morongo Indian Reservation); Table 4 (Navajo Indian Reservation). Nothing in those tables or accompanying text confirms the existence of these "trends." In fact, through consolidation of multiple rights-of-way renewals into master agreements and through tribal adoption of right-of-way procedures and rate schedules for many energy rights-of-way, we believe that the time period for obtaining tribal consent for rights-of-way has become faster and more efficient that would have been required under prior practices addressing each company right-of-way on an individual basis. Further, even as to major transmission rights-of-way, negotiations with the Southern Ute Indian Tribe in the last 15 years have tended to result in longer-term rights of way than those negotiated previously. As a matter of negotiation, consenting to longer-term rights-of-way makes it easier for tribes to obtain higher levels of compensation from industry. This trend toward longer term rights-of-way is confirmed in HRA Report Table 2. The Draft Report should state that these industry-identified "trends" were not confirmed.

Section 4.4.2 of the Draft Report, while restating the key findings about national security and consumer impacts, identifies a range of legislative options available to Congress related to acquisition of energy rights-of-way across tribal lands. The identified five options range from a no legislative action alternative to authorization for use of eminent domain. This array of options is presented with the notable absence of any recommendation from the Departments. The lack of a recommendation is striking in two respects. First, given the key findings, and the magnitude

that legislative changes would have in longstanding law and policy, it would appear logical for the Departments to recommend that Congress take no legislative action at this time. Second, Congress specifically requested “recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land.” Thus, the absence of a recommendation, coupled with the presentation of potential legislative options, undermines the significance of the key findings and, arguably, fails to satisfy Congress’ request for a recommendation. We respectfully urge the Departments to close the loop on this aspect of the Draft Report. Particularly, if a range of options remains in the final report, the Departments should clearly recommend that Congress take no legislative action at this time.

Finally, assuming that a range of legislative options may remain in the final report, we believe that Option C (“Congress could authorize the federal government to determine fair compensation.”) is incomplete in several respects. That alternative identifies only two methodologies: (i) use of the Uniform Appraisal Standards for Federal Land Acquisition, and (ii) use of BLM rental formulas. To be sure, the Departments suggest that tribal land values identified through either of these formulas could represent a baseline, with a premium added for certain tribal administrative costs, improvements to tribal infrastructure, or for the efficiencies associated with use of tribal lands. However, in this Option, the Departments fail to identify existing practices employed by the Federal Energy Regulatory Commission (“FERC”) when considering rentals for federally-licensed hydroelectric facilities located on tribal lands. As recognized in the Appendix to the Draft Report prepared by Historical Research Associates, Inc., FERC’s practices differ notably from the two methodologies mentioned in Option C, by permitting tribes to recover a portion of the business benefit conferred upon licensees for use of tribal lands. HRA Report at n. 13. Listing a separate option similar to the FERC practice could be significant because it is an existing, accepted federal practice that takes into account the unique characteristics of Indian lands, which render the “fair market value” methodologies currently referenced in Option C inapposite.

II. Specific Section-by-Section Comments.

The following comments of varying importance address particular matters as they appear chronologically in the Draft Report.

A. Part 1 -- Introduction

Section 1.2, third paragraph. The Draft Report currently states, “Given the limited time and resources available to conduct the study, as well as the confidential nature of energy ROW agreements, the Departments determined that the most feasible approach for an analysis of historic rates was to rely on case studies of energy ROWs, supplemented by voluntary surveys of tribal and energy groups.” We do not believe that the initial workplan published by the Department made any reference to “voluntary surveys.” In fact, the idea of using voluntary

surveys was raised in public scoping sessions. See, e.g., Comments of Meg Hunt, Transcript at page 22 (March 8, 2006); Comment of Jody Ericson, Transcript at page 48 (March 8, 2006).

Section 1.2, fourth paragraph. The Draft Report currently states, “After careful consideration of these comments, the Departments reaffirmed the decision to rely on case studies and voluntary survey information as the most feasible option for completing the study in the time allotted while also managing confidentiality issues.” We believe it would be more accurate to state, “After careful consideration of these comments, the Departments reaffirmed the decision to rely on case studies and also decided to rely on voluntary survey information as the most feasible option for completing the study in the time allotted while also managing confidentiality issues. However, the Departments also assured the public that voluntary survey information would need to be verified for accuracy before it would be used in the final report.”

Section 1.3, first paragraph. The last sentence of this paragraph states, “The Departments posted the transcripts of both meetings and all comments received on a website for public review (<http://1813.anl.gov>).” We believe that the transcript for the March meeting is posted, but we were unable to find the transcript for the April meeting. Please confirm or adjust accordingly.

Section 1.3.2, last paragraph. The final sentence of this section states, “Member surveys and case studies conducted by Edison Electric Institute (EEI) and Interstate Natural Gas Association of America (INGAA) provided information on the increase in prices for energy ROW renewals.” Unless otherwise true, we believe that the Departments should affirmatively state that the referenced information was not independently verified for accuracy by the Departments.

Section 1.3.3, first paragraph. The Draft Report currently states, “Industry parties generally noted that the terms of years for energy ROWs are decreasing but that the ROW negotiation times are increasing. Industry parties pointed out that shorter energy ROW terms and longer negotiation periods increase the ROW-related administrative costs to both industry and tribes.” We believe that the Departments should affirmatively state, either here or at another point in the final report, that the Departments were not able to confirm that the terms of years for ROWs are decreasing or that negotiating times are increasing. In fact, there is evidence to suggest that neither proposition is accurate. It might also be noted at some point in the report that industry frustration about the length of time to secure and energy ROWs across tribal land may be due, in part, upon federal administrative delays associated with more complex environmental and cultural resource reviews, increasing numbers of applications, and limited federal resources.

Section 1.3.6, first paragraph. The Draft Report currently states, “This trade association also noted, however, that the Administrative Procedure Act and three federal court rulings protect a timely ROW renewal applicant from actual trespass.” We believe this sentence should either be dropped from the report or should be more carefully addressed by the Departments. The cited cases, which are referenced in footnote 27, simply do not stand for the proposition quoted. Those cases deal with federal licensing matters, not tribal rights-of-way. Based on the strict statutory requirements contained in the Nonintercourse Act (25 U.S.C. 177), the Indian

Reorganization Act, and the 1948 Indian Right-of-Way Act, this industry assertion is simply wishful thinking.

Section 1.3.7 , second paragraph. The Draft Report currently states, “Tribal parties asserted that rising energy costs were not the result of increases in energy ROW fees across tribal lands.” Following that sentence, we believe it would be appropriate for the report to continue, “Among other costs of greater significance, the tribes identified: soaring energy commodity prices, executive compensation, state and local governmental taxes and franchise fees, and stockholder dividends.”

Section 2.1. Statutory Background. While we believe that Part 2 has been properly placed and provides valuable information, this section would be strengthened by an early description of the Nonintercourse Act (25 U.S.C. 177). Additionally, we believe that the Draft Report and the HRA Report fail to afford sufficient importance to the Indian Reorganization Act of 1934. Arguably, the “current phase” did not begin with the 1948 Act, but rather with the IRA. Specific quotation of 25 U.S.C. 476 should be added in the Statutory Background section or in Section 2.3 which deals with the Federal Policy of Tribal Self-Determination. In discussing the IRA, it would also be important to state the number of tribes who are organized under its provisions. Those tribes have relied upon the statutory promise that no future encumbrance to their property would be imposed without their consent. In reliance upon that promise, tribes voted to alter their traditional forms of governance.

Section 3.2.1, Emergency Authorities. This section would be strengthened with specific statutory references to the portions of the Natural Gas Policy Act and Federal Power Act that confer the emergency powers discussed. It would also be instructive to know whether those emergency powers have ever been invoked with regard to situations involving disputes about tribal ROWs.

Section 4.4.1. Options for Consideration by the Parties or the Departments. We appreciate the suggestions contained in this part and believe that further development and implementation of these proposals would be beneficial to all parties.

Section 4.4.2. Options for Consideration by Congress. Please see our previous comments in the Overview section of these comments.

Section 4.4.2.c., final discussion, subparagraph a. The Draft Report currently states, “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.” We believe this is an incorrect statement of the law and should be deleted.

Section 5.2. The Draft Report currently states, “EEI and INGAA volunteered to survey their membership for information on energy ROWs on tribal land. To the extent permitted by the availability of documents, the Departments reviewed the source documents used to compile the

survey results to assess the accuracy of survey reporting.” We strongly object to the use of unverified survey information. Use of such information deviates from the assurances made by the Departments that only verified information would be used in the report. The Departments indicate that some of the EEI survey data have been independently verified. See Draft Report at 5.5.1. However, it seems extremely odd that EEI was able to obtain information about only “seven” rights-of-way “renewed prior to 2001.” Id. In fact, if only seven rights of way prior to 2001 are reflected in EEI’s data, the information for the “Full” Data Set contained in EEI’s Table 1 is internally inaccurate (20 minus 12 equals 8; compare with Table 2 – 19 minus 12 equals 7). As reflected in the Tables generated by HRA, the case study tribes, alone, have granted and renewed scores of major rights-of-way with durations that have either remained the same or have increased during recent renewal rounds. The scarcity of data reflected in Table 1 of the Draft Report, even if that isolated data has been verified, poses a substantial risk of identifying a “trend” that simply does not exist.

Section 5.5.1, Edison Electric Institute. We also strongly object to use of the term “fair market value” by the Departments found in the text below Table 1 and contained throughout the remainder of that Section. Some other term, such as “comparative private land values” would more appropriately convey the substantive point that tribal compensation demands are considerably higher than prices paid for other lands that are subject to condemnation. That comparison, however, is something quite different than suggesting that prices received by tribes are some multiple of “fair market value,” which requires consideration of what a willing buyer and seller would pay for lands that are not subject to condemnation.

The Draft Report also states, “EEI’s May 15, 2006, report includes information it gathered in follow-up discussions with member companies. In contrast to survey data, that information was not independently assessed, but it is summarized here.” It is not clear from this discussion whether the printed EEI tables consist entirely of verified survey data or whether the tables also include unverified anecdotal information. If the remaining text in the Draft Report relies largely on anecdotal information about the length of renewal negotiations and shorter-term rights-of-way, it should be deleted from the final report.

Section 5.5.2. Interstate Natural Gas Association of America. Because of the lack of verification related to INGA survey information, we believe that all of the text up to the verified case studies referenced on page 48 of the Draft Report should be deleted.

HRA Report. We also believe that HRA has performed a remarkable service in assisting the Departments, particularly in light of the short time frames for conducting their work. We believe that, like the Draft Report, the HRA Report places insufficient emphasis on the Indian Reorganization Act and the commitments made by Congress to participating tribes. Further, we did find minor factual errors in some of the material covering the Southern Ute Indian Tribe. For example, on page 50 of the HRA Report, the authors state that the tribe assigned operation of 21 acquired wells to Red Willow and retained royalty interests in 30 other wells. In fact, tribal royalty interests have been retained by the Tribe on all wells operated by Red Willow on the

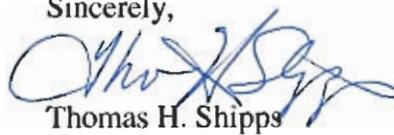
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Southern Ute Indian Reservation. Despite minor discrepancies of that nature, the HRA Report describes through example the Tribe's conscious and successful efforts to work with industry for the mutual benefit of each. Creative approaches have substantially improved the economic status of the Tribe and its members and have resulted in substantially increased energy resources for the Nation.

Conclusion

We deeply appreciate the time and effort that the Departments have directed to the 1813 ROW Study. We hope that the Tribe's participation and its comments will assist the Departments in issuance of a final report.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas H. Shipps", is written over a light blue rectangular background.

Thomas H. Shipps

cc: Clement J. Frost, Chairman
Bruce Valdez