



THE TULALIP TRIBES

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The Tulalip Tribes are the successors
in interest to the Snohomish,
Snoqualmie and Skykomish tribes
and other tribes and band signatory
to the Treaty of Point Elliot.

August 23, 2006

U.S. Department of Justice
U.S. Department of Interior

Re: Energy Policy Act of 2005, P.L. 109-58-Section 1813

Dear Madam/Sir:

The Tulalip Tribes of Washington is a federally recognized Indian tribal government and the beneficiary of the Treaty of Point Elliott which in 1855, reserved lands to the Tulalip people for their exclusive use. The Tulalip Tribes occupies and governs the twenty-two thousand acre Tulalip Indian Reservation located in Washington State.

Today federal and tribal law require consent of the Tribes before a right-of-way may be obtained across Tulalip lands. See: 25 U.S.C. §324, 25 C.F.R. §169.3(a).

Numerous rights-of-way have been granted by the Tulalip Tribes across tribal lands, recently and in the past, for energy, communication, transportation, and other purposes. State and local governments and private parties have obtained these rights. In modern times the Tribes has always found fair market value for these rights by the use of competent appraisers and by careful bargaining. The Tribes is aware of no reason for changing the present system of tribal consent.

The Tribes in modern times has no experience with a situation in which a right-of-way was sought from the Tribes and was, after appraisal and bargaining, not granted. The Tribes has, however, taken steps to preserve tribal jurisdiction over any easements or rights-of-way granted.

From the experience of the tribal leaders who have negotiated rights of way the Tribes has obtained the following understand of rights-of-way through tribal lands:

1. The costs associated with the procurement and purchase of rights-of-way are a very small portion of any project, tribal or non-tribal.
2. Tribal lands are a very small percentage of the lands in Washington State and, therefore, tribal lands, and rights-of-way across them, do not impede any projects – energy or non-energy, in Washington State.
3. Other than the cost of a right-of-way, there are no adverse consequences to any project of tribal control of Indian lands within Washington State.
4. On a small, and developing, reservation like Tulalip it is necessary to maintain a reasonable, “business” relationship with surrounding jurisdictions and major private employers in the region; simply because the tribal government and its plans for development can be impeded if a good working relationship is not maintained. Thus, the Tribes, for example recently traded lands and rights-of-way with a bordering municipal jurisdiction in order for both tribal and non-tribal governments to reasonably proceed with business and transportation development plans.

Please allow this letter to serve as written comments on the “Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study” issued on August 8, 2006, by the U.S. Department of Energy and U.S. Department of Interior.

- ❖ The time to review and comment on the study is insufficient.
- ❖ The Draft Report is slanted toward the Energy Industry- Examples:
 - A review of the table of contents shows “Issues Raised in Scoping the Study” contains detailed review of issues raised by industry but buries or minimizes issues raised by tribes such as:
 - Historical undervaluation of Indian rights-of-way
 - Tribal Treaties impacting rights-of-way
 - Environmental concerns
 - Impacts of rows on Indian culture and reservations
 - Rows as tribal revenue sources.
 - Statutory Background leaves out all but a brief mention of treaties, which are legal documents directly impacting federal authorities.
 - General use of the case study methodology which was not favored by tribes.

- Rather than following the plain language of §1813 and making recommendations, which would have to have been consistent with the Department's federal trust responsibility, the Departments chose to describe "options" which, if chosen, would be breaches of the trust responsibility.
- Lack of sufficient information on energy industry profits as impacting costs to consumers – lack of analysis of how industry rates are set to recover these costs and when costs are passed along to bottom line of industry profits.
- ❖ Any analysis of statutory and regulatory foundations of the law of rights-of-way must include a discussion of treaties (an explanation of which were included in the comments of tribes) and the context those treaties place on legal structures.
- ❖ 1.3.3 Describes concerns over increasing negotiation periods. There is no description of the BIA's role in, or responsibility for, negotiation problems.
- ❖ 1.3.4 Describes a lack of uniform and measurable standard for valuing rights-of-way – the description of the unique nature of various tribal lands is wholly inadequate.
- ❖ 1.3.5 Describes tribes discouraging investment in facilities – this is each tribe's choice and tribes know how to discourage or encourage industries by partnerships or developing good business climates.
- ❖ 1.3.6. The potential for "curtailing" facilities in trespass should be deleted from the report as it has not happened and numerous cases of trespass and eventual settlement of the issue are on record.
- ❖ 1.3.7. Cost to Consumers should have the last paragraph regarding possible increases in costs due to potential trespass damages deleted as totally unsubstantiated.
- ❖ 1.3.8 Standards for Valuing – Why describe in detail the issue of standards when the record is replete with tribal comments that tribal lands are not comparable to lands not subject to treaties and tribal law, and are not even comparable to other tribal lands. Tribes are governments and not private citizens – These points are not given enough weight.
- ❖ 2.4. "The Issue of Consent and Implication for Tribal Sovereignty" – The real issue in this report is whether the "risk" of tribal sovereignty and self

determination is an acceptable risk based on the benefits tribal sovereignty and self determination. Clearly Self determination is a chosen federal policy.

- ❖ 3.2.1 Emergency Authorities – What are these “authorities” and do tribes agree that they are appropriate back-stops?
- ❖ 3.2.2. “Executive Branch Policies” fails to mention DOE Tribal Policy, FERC Tribal Policy and Interior failures of tribal policies such as Cobell litigation.
- ❖ 4.1 Value Methods – fails to mention treaties.
- ❖ 4.2 Summary of Comments – The statement “Tribal parties rejected those principles as inappropriate for tribal lands” should go on to describe why this is so or it is not a fair summary
 - Possible Constitutional analysis: Just compensation in U.S. Constitution applies to “private lands” other applications to Indian or government lands?
 - The sentence “Industry parties frequently commented, however that current valuation of many energy ROWs on tribal lands far exceeds the market values of those lands and appears to include the added value of the energy development.” Should be followed up with statement that is clear there is no “market value” of the lands because the lands are legally inalienable.
- ❖ Key conclusions in the report (and perhaps the only ones??)are found at the very end of 4.2 and 4.3 and should be highlighted at the start of the report.
- ❖ 4.4 “Options” – the Departments should follow the law making “recommendations” with full consideration of their trust responsibilities and the record before them. Options that are breaches of federal trust or of treaties should be clearly labeled as such. Many of the “options” described could be titled “An Act to Breach of Indian Treaties for the Benefit of Energy Companies” While Congress may have plenary power, whether exercise of this power is the right thing to do based on all laws and federal policies should be a conclusion of the report.
- ❖ There are no options or recommendations which are directed at improving BIA real property processes.
- ❖ 5.1 Should mention and describe conclusions in the previous report to congress and Cobell case special master report which are both excellent background.

- ❖ Factual statements of case studies are not useful without context or value judgment conclusions based on context.

Because the present statutory and regulatory system for providing rights-of-way across Indian trust lands on the Tulalip Reservation works quite well for all parties while maintaining tribal sovereign control of Tulalip territory, the Tulalip Tribes urges that no changes in the present matrix of law and regulation be enacted. Until a real problem is defined, and none has been defined at this time, Congress should take no action to amend the present federal statutes governing rights-of-way across Indian lands.

Sincerely yours,


Stanley G. Jones, Sr., Chairman
THE TULALIP TRIBES