

ARIZONA TRIBAL ENERGY ASSOCIATION

February 5, 2007

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

Re: Section 1813 Comments of the Arizona Tribal Energy Association

To Whom It May Concern:

Please accept the following comments of the Arizona Tribal Energy Association (ATEA) on the Section 1813 Draft Report issued December 21, 2006.

The ATEA is generally supportive of the draft report as modified with the following requested changes and suggested clarifications:

A. Executive Summary

Adding the following language to the Executive Summary would conform it more to the contents of the report body:

(1) The list of “common themes [that] surfaced in the course of the public discussion” should also include:

- The unique nature of tribal lands necessitates the application of something other than conventional valuation methodologies
- Tribal interdependence on energy infrastructure reliability is an important consideration for all tribal communities

The list should also be revised to read:

- Costs of energy ROW renewals are rising *amid an overall increase in delivered energy costs* (italicized text added)

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(2) Item (e) on the last page of the summary should be revised to read:

e. Authorize case-by-case *action* on tribal lands for public necessity (italicized text added).

(3) The report is inconsistent in its depiction of tribal/industry ROW negotiations. In several places, the report notes a need for transparency, “reasonable certainty,” efficient negotiation timelines and suggests the need for “model” or “standard” business practices. Where actual data is cited, however, the report concludes that the negotiation process can and has worked well within its current legal parameters. In addition, the Department’s own conclusion in both the report body and executive summary is that the current process should continue without modification. The document should be clarified to reference model practices, etc. only as process guidelines that might facilitate a particular negotiation.

(4) On or about line 38 of page viii of the executive summary, between the paragraph beginning “The present right of tribes . . .” and “The Departments find that the negotiation processes for establishing or renewing rights-of-way on tribal land . . .,” the following text should be added:

The Department presents the following key findings from its study efforts:

- The historic legal trend in support of tribal decision-making continues to date with Title V of the 2005 EPA Act
- As part of the Federal government, the Departments have a duty to ensure that management of trust assets is in accordance with the best interest of tribes and their members and includes deference to and promotion of tribal control and self-determination. Any reduction in tribal consent to energy ROWs is a reduction to tribal sovereignty and self-determination capacity.
- Historical compensation analyses must be viewed in the context within which they originally occurred due to significant differences among energy ROWs across tribal lands and their unique “trust” status.
- Case studies performed by the Departments indicate that mutually satisfactory negotiation outcomes occur more often when non-traditional compensation approaches are employed and benefits extend beyond price
- Successful negotiations result in mutually beneficial, enduring relationships, especially for tribes whose interests extend beyond those of private landowners to include community well-being and overall stability in perpetuity

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- Local governments are increasing the inclusion of “ancillary” requirements relating to aesthetics and other considerations in their own ROW negotiations, thereby increasing the costs of this access
- ROW fees imposed by tribes should be considered to be a substitute for taxes customarily assessed on “private” lands involved in similar transactions
- Any valuation “methods” applied to energy ROWs on tribal lands should be understood to establish only a baseline value in the negotiation
- The Departments saw no indication that any ROW negotiation difficulty has ever led to an adverse impact on energy supply reliability or security
- Some industry participants note that tribal ROW negotiations can be completed more efficiently than those occurring off tribal lands
- A review of FERC cases shows that energy ROWs on tribal lands only appear in less than one case per year on average, are a very small portion of total energy costs and infrastructure and are not necessarily even passed on to the consumer.
- Expiring ROWs should be recognized to have had limited terms requiring future renegotiation from their inception.

B. Report Body

(1) Section 2.2.3

This section should include specific legislative citations to the “emergency authorities of the Secretary . . . pursuant to the Natural Gas Policy Act and Federal Power Act.”

(2) Section 7.5

This section should be retitled and reworded. The section references Congressional case-by-case authority to condemn for public necessity when the report only generally discusses Congressional authority in the event of a scenario that creates concerns about energy system security and integrity. A better title would be “Congress has authority to intervene in the event of an energy right-of-way-related emergency involving tribal lands.”

The language included in the paragraph should parallel what is provided in the preceding sections of the report. As written, it is largely inconsistent with anything otherwise noted. Section 3.2.1, referenced as the basis for this section, highlights the Federal Indian law evolution of tribal consent for energy rights-of-ways, not Congressional condemnation authority. Eminent domain is discussed in Section 2.2.2 referencing Section 7 of the Natural Gas Act and Section 1221 of the EPAct yet this information is omitted from Section 7.5

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Section 2.2.3 of the report mentions the emergency authority of the Natural Gas and Federal Power Acts yet no reference to this language is included in this section. Instead, cases not previously presented and not discussed here are cited as defining Congressional authority in a “public necessity” scenario.

At a minimum, the statement beginning “[c]onsistent with this practice, Congress would be able, if it so chose, to remedy a threatened or actual energy supply interruption . . .” should be reworded to read “No additional Congressional authority is therefore needed to ensure protection of the public interest with respect to energy infrastructure on Indian lands.”

C. Additional Language

The report lacks a reference to tribal interdependence on energy infrastructure reliability despite the repeated mention of this fact at each public meeting. The report instead notes only the overall economic benefits of energy market participation. Tribal reliance on a secure energy infrastructure from a consumer perspective should be noted in both the executive summary and report body.

Thank you for the opportunity to provide these comments and for your diligent efforts in preparing such a generally thorough report.

Sincerely,

Leonard S. Gold

Leonard Gold
President