

February 5, 2007

VIA email to: IEED@bia.edu

Re: Comments on Draft Report to Congress, Energy Policy Act of 2005,  
Section 1813, Indian Land Rights-of-Way Study (December 21, 2006)

The Interstate Natural Gas Association of America (INGAA) submits the following comments on the U.S. Department of Energy (DOE) and U.S. Department of the Interior (DOI) Draft Report to Congress required by section 1813 of the Energy Policy Act of 2005. INGAA is a national, non-profit trade association that represents virtually all of the interstate natural gas transmission companies operating in the United States and the interprovincial pipelines operating in Canada as well as natural gas companies in Mexico. INGAA's United States members, which account for over 90 percent of all natural gas transported and sold in commerce, are regulated by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act, 15 U.S.C. §§717-717w.

INGAA thanks the agencies for their diligent work to comply with the mandates of section 1813 and appreciates the difficulties posed by the tasks Congress asked of it, especially within the tight timeframes set by the Energy Policy Act of 2005.

DOE and DOI (Departments), however, continue to seriously underestimate the problems associated with negotiating renewal and new energy rights-of way across tribal lands. INGAA asks the Departments to clarify and/ or correct several issues before making their final report and recommendations to Congress.

#### A. Tribal Sovereignty Is Not Absolute

The Draft Report properly recognizes that “the United States Constitution empowers Congress to strike a balance between tribal sovereignty and the greater national interest. In some cases, this may mean the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty” (section 8.1 at 45). But the Departments do not mention this finding until Sec. 8.1, pg. 45, under “Departmental Observations.” This obscures this fundamental legal and policy holding, reducing it to an afterthought. Accordingly, this finding should be moved to the Report's Executive Summary and supporting analysis should be presented in Section 2 of the Report. The Departments should provide Congress with their analysis of when “the responsibility to the general American populace to provide reliable and affordable energy resources outweighs tribal sovereignty.”

INGAA reiterates its September comments that the Departments misstate the nature of the relationship between tribes and the federal government. Neither a tribe's sovereignty nor the corresponding authority of “self-determination” as granted by Congress is unfettered. The Supreme Court has repeatedly recognized that Congress has “plenary and exclusive authority” over Indian affairs (*See United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463,

470 (1979). Courts have upheld broad congressional authority to impose federal policy directly on tribes without their consent. (INGAA Comments, dated 9-3-06, at 2).

The Draft Report should cite and explain this well-established statutory and decisional law regarding Congressional plenary authority over Indian affairs. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.”) (Internal citations omitted). Given Congress’ plenary power over tribes, Congress may strike any balance it chooses between tribal sovereignty and the greater national interest in reliable and affordable energy. Congress asked the Departments to recommend “appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way (ROWs) on tribal land” (section 1.1 at 1). The Departments’ recommendations will help Congress exercise its plenary authority in the realm of energy policy and tribal authority.

The Report should specify where Congress has and should exercise its plenary authority over tribes. As the Fair Access to Energy Coalition (FAIR) previously commented, Congress has enacted statutes such as the Indian Mineral Development Act and the Indian Gaming Regulatory Act which require modest limitations on tribal sovereignty to enhance the contracting parties’ economic relationship. These and other examples should be included to demonstrate how tribal sovereignty can be (and has been) curtailed in furtherance of important national policies.

The Departments correctly state that “Congress has legislated extensively in regard to Indian property, providing for the grant of leases and rights-of-way and even disposal of Indian property without consent” (section 3.3. at 18), referencing Cohen’s Handbook of Federal Indian Law. The Departments’ comment supports INGAA’s position that tribal sovereignty is not absolute, particularly in light of competing national security and energy independence interests.

#### B. The Departments Misread EPLA 2005 To Hold That Tribal Sovereignty In Every Case Trumps All Other Interests

INGAA agrees with FAIR’s position that the Departments narrowly and erroneously interpret the Energy Policy Act of 2005 as favoring tribal sovereignty over the interests of the American public. Specifically, INGAA endorses FAIR’s position that the Draft Report appropriately expands the discussion of the Administration’s energy policy. It ends, however, with a finding that these policies essentially favor Indian tribes and tribal sovereignty interests over all other interests, including the interests of Native Americans in reliable, affordable sources of energy. The Departments’ conclusion that tribal sovereignty must, in every case, trump all other considerations is contrary to Administration policies that are designed to improve national energy independence, reliability and access for *all* Americans, not only Indian tribes. The Administration’s goal of establishing “dependable, affordable and environmentally sound production and distribution of energy” is thwarted when tribal sovereignty is elevated above all else.

### C. The Departments Should Define “Failure” Of Negotiations

The Departments acknowledge that a back-stop method is necessary to encourage timely negotiation of energy rights-of-way by suggesting that Congress act “in the event that a failure of negotiations regarding the grant, expansion, or renewal of an energy right-of-way has a significant regional or national effect on the supply, price, or reliability of energy resources...” (section 8.2 at 46). The Departments, however, do not define “failure” or “significant.” INGAA asks the Departments to define failure to read: “Failure occurs whenever a [right-of-way] agreement expires without a new one in place.”

All parties enter into negotiations with the hope of success. But often negotiations fail due to impasse or unequal bargaining power. In the latter instance, negotiations may conclude only because one party relents in the face of overwhelming bargaining power held by the other party. This should not be termed a “successful” negotiation – only a concluded negotiation. The Departments should encourage Congress to act through national legislation, not just on a case-by-case basis. Legislation should provide the tribes with a fair and just return while providing the interstate natural gas pipeline industry with the ability to deliver needed natural gas to consumers at reasonable costs.

### D. The Departments Fail To Recognize Risks Associated with Failure to Negotiate Future Rights-of-Way

In their section 6 discussion, Issues Raised During the Study, the Departments fail to emphasize the future risk of increased costs to customers and new infrastructure development if there is a failure to negotiate renewal and new energy rights-of-way.

First, the Departments misrepresent the impact of cost paid by customers. Because the Departments have admittedly not performed a cost-benefit analysis, the Departments cannot know what the costs to customers are. INGAA acknowledges that while, at present time, the portion of the price paid by homeowners attributable to pipeline transportation right-of-ways is a small percentage of the total cost paid, the Departments fail to accurately characterize the total cost impact due to increased costs and delays in infrastructure development resulting from delayed or failed negotiations. INGAA recognizes that energy providers should expect to pay prices that reflect changes in the economic value of land, after rights-of-way leases expire. The Departments, however, are unfounded when they assert that energy providers should have anticipated that the long and broadly applicable fair market value approach would drastically transform into current right-of-way practices. Transmission providers would not have invested billions of dollars in infrastructure across tribal land had they believed that the rights-of-way would not be renewed based on the fair market value of those rights-of-way.

Second, the Departments also underestimate the long-term costs if negotiations are unsuccessful. INGAA acknowledges that while many rights-of-way are renegotiated, the fact that a renegotiation occurs does not make it “successful.” As noted above, the negotiating environment between tribes and industry has deteriorated to the point that too

often industry is left with a bad choice: pay the tribes rates based on the cost of relocating the infrastructure off tribal lands (build-around costs) or costs unrelated to the fair market value of the land or simply abandoning the infrastructure. This, in turn, will lead to both higher costs to consumers, threaten timely infrastructure development, and will discourage transmission providers from locating in the future across tribal lands.

The Departments should emphasize that 90 percent of outstanding renewals for companies are yet to occur (section 6.5 at 41), and that current policies are not equipped to deal with the many renewals in the coming years if even half of the negotiations are delayed or fail. Case-by-case legislation, therefore, is not an efficient manner to address this growing problem.

The Departments' statement in section 6, that "as of now, no difficulties associated with [rights-of-way] negotiations have led to security or reliability impacts that affect consumer costs" (section 6.1.3 at 36), misrepresents the larger risk of failed negotiations. The discussion in the body of the document overshadows the Departments' important observation to Congress at the end of the report that "future unresolved conflicts over energy rights-of-way across tribal land could have a significant regional or national effect on the availability, reliability, or consumer costs of energy resources" (section 8.1 at 45). This observation should be fully discussed in the body of section 6. The Departments should indicate that there are indeed costs and consequences to increasing difficulty in negotiating energy rights-of-way across tribal lands.

The Departments also rightly observe that "Failure to secure tribal consent for the siting of an energy right-of-way on tribal lands, especially in geographically constrained areas, could result in a heightened regional or national energy concern" (section 8.1. at 45). Again, this observation should be discussed more prominently in the body of the report.

Despite these important observations, the Departments do not offer a solution or recommendation that provides an objective, consistent, transparent and uniform standard for "determining fair and appropriate compensation" across tribal lands. The Departments do not suggest a standard to ensure the construction and continued operation of necessary natural gas transportation infrastructure, and to ensure fair and reasonable natural gas transportation costs.

Finally, INGAA agrees with FAIR that the Departments should recommend to Congress that tribes should be required to keep an inventory of all rights-of-way agreements, with re-inventory every three years, and specify a federal agency to be named as arbitrator in the event of an impasse. INGAA notes that the Bonneville Power Administration has existing rights-of-way where a panel of arbitrators helps resolve compensation impasses (section 9.5.1).

#### E. The Draft Report Disregards And Misrepresents INGAA's Data

INGAA has several concerns regarding representation of INGAA's data in the Draft Report to Congress. The report continues to glaze over INGAA's concerns, namely that

negotiations are taking longer to negotiate and result in right-of-way fees that do not reflect fair market value, briefly mentioning them in section 6, before burying them at the back of the report.

Moreover, the Departments' language confuses the reader and devalues INGAA's information. The Departments were able to verify INGAA's main findings confirming an increase in historical rights-of-way fees. These findings are vaguely referenced in the body of the report, simply stating that "INGAA conducted member surveys and provided case studies including data showing increased fees for energy [rights-of-way] renewals" (section 6.1.1 at 33). This finding is not mentioned again until section 9.4.2.

INGAA asks that the following information be moved from the back of the report to section 6.1.1 in order to highlight historical trends, one of the key purposes of the report to Congress: "The verification of the relevant documents confirmed the following findings that INGAA included in its report:

- All respondents that provided data indicated that they were paying compensation in excess of market value;
- In addition to the per-rod [right-of-way] payment, many companies contributed to tribes in various forms (scholarships, recreational funds, etc.);
- The average term of years for initial and renewed [rights-of-way] was 20 years; and
- Two respondents reported [rights-of-way] negotiations taking at least two years, some others reported significantly longer periods, and one reported negotiations taking more than 10 years."

(section 9.4.2 at 62).

Second, INGAA asks that the Departments correct section 9.4.2 to clarify that the above-mentioned facts were indeed verified. Confirmation of these findings is challenged in the Draft Report in section 9.4.2 where the Departments state, "It was also not feasible to verify the accuracy or completeness of the source documents" (section 9.4.2 at 62). On the contrary, the Departments were able to verify several rights-of-way thus giving them the ability to state only sentences later that "verification of the relevant documents confirmed" the facts listed above. The Departments' statements stand in conflict, confuse the reader, and therefore should be corrected.

Third, the Departments also state that "INGAA included the following comment, which was not verified through source documents, in its May 15, 2006 submission: tribes generally began negotiations by requesting terms of less than 20 years and that few respondents were satisfied that the negotiations" (section 9.4.2 at 63). The Departments should qualify this sentence to read that satisfaction levels with the negotiation process could not be verified in that satisfaction levels would not be listed in source documents such as easement documents. The Departments chose to discount documentation of satisfaction levels through an INGAA member survey.

Fourth, despite survey information on “20 energy ROWs on tribal land involving 15 different tribes in 11 states,” (section 9.4.2 at 61), the Departments’ case-study approach and limited scope of rights-of-way renewed only within the last five years severely limits the discussion on historical rights-of-ways, and disqualifies helpful and verifiable information obtained through the survey. The Departments’ own study parameters do not permit completion of a primary task to Congress, “an analysis of historic rates of compensation paid for energy [rights-of-way] on tribal lands” (section 1.1. at 1). While the Departments mention their refinement and limitations in scope at the beginning of the report, they should restate them here, or better yet, expand the scope to include the verifiable information.

#### F. Conclusion

INGAA respectfully requests that the Report to Congress be modified as described above.

Respectfully submitted,

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