



February 1, 2007

VIA ELECTRONIC MAIL  
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: Joint Comments on Section 1813 Rights of Way Study (Issued December 21, 2006)*

Dear Sirs:

On December 22, 2006, notice was published at 71 Federal Register 77060 relating to section 1813 of the *Energy Policy Act of 2005*, Pub. L. 109-58. Section 1813 mandates a study and report to Congress on issues related to the granting, expansion and renewal of energy rights of way (ROW) on and across Indian tribal lands.

CERT and NCAI are pleased that the Departments responded favorably to many of the concerns we raised in previously submitted joint comments. As a general matter, CERT and NCAI believe the re-organized Report clearly delineates the questions presented, provides ample legal and factual background, and makes reasoned analyses. In particular, we are pleased that the Departments have made clear their findings and analysis and that in lieu of amorphous “options”, the Departments have chosen to make a recommendation to the Congress based on the record developed over the past year.

As we have done with the draft report issued in August, 2006, this letter and the accompanying comments serve as the Joint Comments of the Council of Energy Resource Tribes (CERT) and the National Congress of American Indians (NCAI) in response to the December 22, 2006, notice and accompanying report. The content of past joint comments submitted by CERT and NCAI are incorporated by reference.

Together, CERT and NCAI are comprised of and represent more than 300 Indian tribal governments, many of which are actively engaged in the exploration and development of renewable and non-renewable energy resources on tribal lands. While CERT and NCAI have maintained from the outset that the focus on Indian tribal consent in energy ROW negotiations is unwarranted, we wish to compliment the hard work and diligent efforts put forth by the Departments of Energy and Interior (Departments) in carrying out the congressional mandate contained in section 1813.

We concur with the Departments that section 1813 presents “a very broad field of study” that conceivably implicates hundreds of Indian tribes, dozens of energy firms,

thousands of rights-of-way, and potentially limitless scrutiny and analysis. <sup>1</sup> The December 21, 2006 Report (Report) narrows the scope of its study to “electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution.” <sup>2</sup>

The factual observations made by the Departments make clear that energy transportation costs are a small part of consumer energy costs and that tribal consent has had no appreciable impact on the costs or reliability of delivered energy products to American consumers. We also concur with the Report’s fundamental conclusion that “the vast majority of energy ROW negotiations are completed to mutually agreeable terms and conditions.”

Thank you for your careful consideration of our views and those of other Indian tribes and tribal organizations across the nation.

Sincerely,



CHRIS DEVERS  
Chairman  
CERT



JOE GARCIA  
President  
NCAI

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<sup>1</sup> Indeed, the December 21, 2006, Report identifies no fewer than 14 variations of the term “energy rights-of-way” including local gathering pipelines and interstate refined products pipelines. Report at 5.

<sup>2</sup> Ibid.

JOINT COMMENTS ON THE DECEMBER 21, 2006 REPORT  
ON ENERGY RIGHTS-OF-WAY ON TRIBAL LANDS

SUBMITTED BY

THE COUNCIL OF ENERGY RESOURCE TRIBES AND  
THE NATIONAL CONGRESS OF AMERICAN INDIANS

February 1, 2007

**Executive Summary.** Comment: CERT and NCAI welcome the addition of an Executive Summary and believe that it accurately describes the mandate of section 1813, and fairly encapsulates the factual and legal context of the Report. CERT and NCAI specifically welcome the inclusion of specific Departmental findings and recommendation to the Congress.

**Section 1. Introduction.** The Introduction describes the Departments' obligation to carry out the congressional mandate contained in section 1813. Comment. None.

**Section 1.1. Statutory Language of Section 1813.** Section 1.1 describes the specific issues contained in section 1813 and a brief description of the structure and layout of the Report. Comment. None.

**Section 1.2. Public and Tribal Consultation Meetings and Comments.** Section 1.2 describes the procedural methods used by the Departments to engage the tribal community, the energy industry and other interested parties and the notices, meetings, consultations, and other communications made with those communities. Comment. None.

**Section 1.3. Scope of the Section 1813 Report.** Section 1.3 notes the potentially very broad nature of a study of "energy rights of way across tribal lands" and describes why and how the Departments narrowed the scope of the study and report to focus on "electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution."<sup>3</sup> Section 1.3 also prudently advises against using the assessments and analyses in the Report in ROW situations other than electric transmission, natural gas, and oil pipelines. Comment. CERT and NCAI concur.

**Section 2. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land.**

Comment. There are many "national energy transportation policies" relevant to the discussion of energy ROW across tribal lands. The National Energy Policy (NEP)

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<sup>3</sup> December 21, 2006, Report (hereafter referred to as "Report") at 5.

issued in 2001 was the energy blueprint for the newly inaugurated Bush Administration. The NEP was a comprehensive proposal aimed at strengthening American energy security by, among other things, weaning the nation from its dependence on foreign sources of energy, increasing conservation, and stimulating domestic production.

Energy resource tribes responded favorably to the NEP and the call for increased focus on domestic production of both renewable and non-renewable energy and worked with congressional allies on a series of Indian tribal energy bills. While it is clear that the *Indian Tribal Energy Development and Self Determination Act of 2005* (Title V) is the most recent congressional pronouncement on these matters, it is also true that Title V had its legislative genesis several years before with the introduction and deliberation of the *Tribal Self Sufficiency Act* (H.R. 2412, 107<sup>th</sup> Congress) and the *Native American Energy Development and Self Determination Act of 2003* (S.522, 108<sup>th</sup> Congress). In the 5 years that these Indian tribal energy bills were being deliberated, at no time did the Congress broach the issue of tribal consent in ROW negotiations.

The enactment of Title V demonstrates that Congress not only approves of Indian tribes having a vigorous role in the negotiation and management of energy ROWs across their lands but seeks to encourage greater degrees of tribal control in these matters.<sup>4</sup>

Similarly, Congress has had ample opportunity to deliberate and amend the major Federal energy-related statutes and at each juncture has refrained from changing the Federal policy and law respecting and requiring tribal consent for purposes of energy ROW across tribal lands.

While the Departments have found that there is “*no evidence that negotiations between parties for obtaining an energy ROW on tribal land contributed to an emergency situation*” (emphasis added)<sup>5</sup> the Departments have also suggested that recourse might be had in certain “emergency authorities” (e.g. those statutes which would authorize Federal intervention in situations where failure to successfully conclude a ROW negotiation rose to the level of an “emergency situation”). These authorities are said to include certain powers delegated to the Secretary of Energy pursuant to the *Natural Gas Act* and the *Federal Power Act*.

### **Section 3. The Statutory and Regulatory Framework for Granting Expanding, or Renewing Energy ROWs on tribal land and the associated tribal sovereignty and self determination interests.**

Comment. CERT and NCAI note that the Departments recognize that inherent tribal sovereignty is “central” to any understanding of the statutory and regulatory requirement of tribal consent in granting, expanding, or renewing an energy ROW on tribal lands. Indeed, the inherent authority of an Indian tribe to define the contours and

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<sup>4</sup> “The most recent statement of national energy transportation policy specifically regarding energy ROWs on tribal lands strongly supports tribal decision-making and management of energy resources and facilities while correspondingly reducing federal oversight.” Report at 11.

<sup>5</sup> Report at 9.

terms of its relationships with other Indian tribes, non-Indian governments, commercial entities, and individuals is fundamental to the ROW debate.

The Report rightly tracks the steady evolution of Federal laws, regulations, and policies from those that rested decision-making authority with the Congress<sup>6</sup> and the Secretary of Interior<sup>7</sup> to those that required tribal involvement and consent.<sup>8</sup> As tribal membership organizations, CERT and NCAI strongly support the Federal policy of Indian tribal self determination as well as the policy and statutory progeny of that policy such as the *Indian Self Determination and Education Assistance Act of 1975*,<sup>9</sup> the *Tribal Self Governance Act of 1994*,<sup>10</sup> and the *Indian Tribal Energy Development and Self Determination Act of 2005*.<sup>11</sup>

CERT and NCAI are most pleased that President Bush is a strong supporter of these same principles, evidenced by the issuance of a Presidential proclamation on the protection of tribal sovereignty and economic development<sup>12</sup> and the importance of tribal sovereignty and self determination to successful energy development.<sup>13</sup>

Finally, CERT and NCAI are in agreement with that portion of the Report that reads in part: “[a] tribe’s determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self determination. Any reduction in the tribe’s authority to make that determination is a reduction in the tribe’s authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.”<sup>14</sup> CERT and NCAI would extend this rationale to suggest that should there be a diminution in tribal consent, the likely result would be the withdrawal by energy resource tribes across the nation of their lands and resources from the “marketplace”. Such a consequence would be a step backward for tribal energy development and the nation’s drive for energy independence.

#### **Section 4. Analysis of Historic Compensation Paid for Energy ROWs on Tribal Land.**

Comment. CERT and NCAI agree with the Departments that by definition the 4-tribe case study analyses that form the basis of section 4’s analysis and findings fall short of the “complete historical analysis” envisioned by Congress in enacting section 1813. As we have indicated before, however, a truly complete analysis would involve hundreds of Indian tribes, thousands of energy ROW, and departmental study that could last for years.

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<sup>6</sup> See generally Historical Research Associates, Inc.’s Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006 (July 7, 2006).

<sup>7</sup> Act of March 2, 1899 (30 Stat. 990).

<sup>8</sup> 25 U.S.C. §323.

<sup>9</sup> 25 U.S.C. §§450 *et seq.*

<sup>10</sup> Pub. L. 103-413, Title II.

<sup>11</sup> Pub. L. 109-58.

<sup>12</sup> Presidential Proclamation 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).

<sup>13</sup> Presidential Proclamation 7956, 70 Fed. Reg. 67635 (Nov. 7, 2005).

<sup>14</sup> Report at 19.

From our vantage, the most important aspect of section 4 is the Departments acknowledgement of the degree to which both *types* and *amounts* of compensation paid to Indian tribes over time have evolved.<sup>15</sup>

The Departments indicate that in the 1950s and 1960s compensation paid was generally on a per-rod or per acre basis. With the issuance of the 1968 regulation, compensation not less than fair market value, plus severance damages, if any, were paid. In the early 1970s, just as Federal Indian policy was shifting from a Federal-oriented to a tribal-oriented paradigm, energy ROW compensation likewise changed to annual lump[-sum payments, compensation based on throughput, with some tribes even negotiating for ownership interests in the pipelines themselves. Complementing the factual and legal arguments that weigh against any public policy change to the tribal consent-based ROW framework, the Report states that “[t]ypes of consideration have depended upon the particular tribe and companies involved in the negotiations.”<sup>16</sup>

### **Section 5. Standards and Procedures for Determining Compensation for Energy ROWs on Tribal Lands.**

Comment. CERT and NCAI concur in the core observation made by the Departments that “negotiations between the interested parties are an appropriate method for determining compensation.”<sup>17</sup> The reasons put forth by the Departments in support of this finding are crucial to any modern day discussion of energy ROW across tribal lands. The most significant is the virtual renaissance that Indian tribal governments have undergone in the past 50 years. Still reeling from the official Federal policies of termination, Indian tribes found hope and help in President Nixon’s Special Message to Congress on Indian Affairs and its legislative progeny.<sup>18</sup>

In the nearly 40-year period since Federal policy shifted, many Indian tribal governments, governance, and economies gradually underwent a rehabilitation that has resulted in strong tribal governments and vigorous tribal economies. Coincidentally, U.S. and world demand for sources of energy has skyrocketed. In addition to our own energy demands, the burgeoning industrial economies in India, China, and Southeast Asia are putting increasing stress on supplies and transportation of oil, gas and coal and the market is responding through additional exploration and transportation facilities here at home and abroad.

As a result, where energy companies once found moribund tribal entities with little or no involvement in the actual negotiation of energy ROW, now they find confident, vibrant, informed tribes that are pursuing their interests and those of their

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<sup>15</sup> In this regard the Report states that “the nature of the [ROW compensation] process has evolved significantly over time into one in which tribes are more fully involved in bilateral negotiations with energy companies and in setting the terms and conditions under which energy ROWs are authorized.” At 23.

<sup>16</sup> Report at 22.

<sup>17</sup> Report at 30.

<sup>18</sup> Id. at 8, 9, and 10.

members. Conflict, in this instance, is inevitable but through the negotiation process can be managed and resolved.<sup>19</sup>

Against this backdrop, CERT and NCAI believe there is merit in the Departments view that “the negotiation processes could benefit from mutually agreed upon practices, procedures, and actions that would better the understanding and collaboration among the parties.”<sup>20</sup>

Specifically, the practices, procedures, and actions described in the Report that we believe are worth pursuing are the following:

1. “Developing of comprehensive ROW inventories for tribal lands”,
2. “Developing model or standard business practices for energy ROW transactions”; and
3. “Broadening the scope of energy negotiations”.

## **Section 6. Issues Raised During the Study.**

### *Section 6.1 Increasing Costs of Energy ROWs and Costs to Consumers.*

Comment. For almost two years, the energy industry has made a number of assertions regarding increasing costs to ratepayers and consumers as a direct result of “unreasonable” demands by Indian tribes for energy ROW. The Departments considered these assertions as well as voluminous material provided by the industry and various industry-related associations.

The Departments were informed that “ratepayers *could be* negatively impacted”, that “consumer energy prices *could* increase”, and that tribally-levied trespass penalties “*could add* hundreds of thousands or even millions in additional costs” to the utilities and their consumers.<sup>21</sup>

The Departments found that “the total energy transportation costs are a small component of overall consumer energy costs, that as a general matter a relatively small percentage the fraction of energy transportation infrastructure is on tribal lands, and that, as of now, no difficulties associated with ROW negotiations have led to security or reliability impacts that affect consumer cost.”<sup>22</sup>

### *Section 6.2 Decreasing Energy ROW Term of Years and Increasing Negotiation Periods.*

Comment. None.

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<sup>19</sup> As the Report notes, “efforts of negotiation (sic) parties to achieve a win-win solution are enhanced with increasing amounts of transparency in the process and decreasing chances that the factors to consider during the negotiation can change unexpectedly.” At 27.

<sup>20</sup> Report at 30.

<sup>21</sup> Report at 33, emphasis added.

<sup>22</sup> Report at 36.

*Section 6.3 Uncertainty in Energy ROW Negotiations. Comment.* CERT and NCAI note that the Departments concluded that rather than ROW valuation or escalating or unreasonable compensation demands by Indian tribes, the “fundamental issue” for both the increase in negotiation periods and uncertainty in negotiations is a “negotiated climate often marked by uncertainty and a lack of shared objectives”.<sup>23</sup> The “uncertainty” that is referred to in this regard has been determined by the Department of Energy to derive from increased costs *throughout the energy industry*, needed infrastructure investment, and legal and regulatory obstacles to siting energy facilities. More to the point, the Department of Energy has not only failed to document ROW negotiations with Indian tribes as a source of uncertainty but fails to include the cost of energy ROWs on tribal lands as a future or upcoming with which to be dealt.<sup>24</sup>

*Section 6.4. Risk to Investment in Infrastructure. Comment.* None.

*Section 6.5. Differences Among Grants, Expansions, and Renewals of Rights-of-Way. Comment.* None.

**Section 7. Congressional Approaches to Address the Issue. Comment.** The 5 options put forth in section 7 are those adduced in the initial draft report. CERT and NCAI believe the factual, legal, and market observations made in the Report support no option other than Option 7.1 “No Action”, because “current policies for granting and renewing energy ROWs are, in general, working.” As we made clear above, we do believe that efforts could be made to aid the negotiating parties in cases of imperfect information, unfamiliarity with the matters presented, and / or providing unorthodox or creative ways to overcome difficulties in arriving at a completed negotiation.

## **Section 8. Recommendation of the Departments.**

*8.1 Departmental Observations. Comment.* CERT and NCAI endorse Department Observation (4) which provides “[n]egotiations between Indian tribes and energy companies for the grant, expansion, or renewal of energy rights-of-way across tribal lands have had no demonstrable effect on energy costs for consumers, energy reliability, or energy supplies to date. Therefore, broad changes to the current federal policy of self-determination and self-governance for tribes --- or the existing right of tribal consent --- are not warranted at this time.”<sup>25</sup>

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<sup>23</sup> Report at 38.

<sup>24</sup> Report at 39.

<sup>25</sup> Report at 45.