

LAW OFFICES
**SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP**
1425 K STREET, NW, SUITE 600
WASHINGTON, DC 20005
TEL (202) 682-0240 | FAX (202) 682-
0249
WWW.SONOSKY.COM

MARVIN J. SONOSKY (1909-1997)
HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R. PERRY
LLOYD BENTON MILLER
DOUGLAS B. L. ENDRESON
DONALD J. SIMON
MYRA M. MUNSON (AK)*
ANNE D. NOTO
MARY J. PAVEL
DAVID C. MIELKE
JAMES E. GLAZE
GARY F. BROWNELL (NM)*
COLIN C. HAMPSON
DOUGLAS W. WOLF
RICHARD D. MONKMAN (AK)*

February 5, 2007
By: Hand Delivery

MARISSA K. FLANNERY (AK)*
MELANIE B. OSBORNE (AK)*
WILLIAM F. STEPHENS
ADDIE C. ROLNICK
JENNIFER J. THOMAS (CA)*
KATHERINE E. MORGAN
CAROLE A. HOLLEY (AK)*

OF COUNSEL
ARTHUR LAZARUS, JR.
ROGER W. DUBROCK (AK)*
KAY E. MAASEN GOUWENS (AK)*
MATTHEW S. JAFFE
AARON M. SCHUTT (AK)*

*NOT ADMITTED IN DC

Mr. Darryl Francois
Attention: Section 1813 ROW Study
Room 20-South Interior Building
1951 Constitution Avenue, NW
Washington, D.C 20245

**Re: Comments on Final Draft Report to Congress: Energy Policy Act of
2005, Section 1813, Indian Land Rights-of-Way Study**

Dear Mr. Francois:

On behalf of the Pueblo of Isleta and the Pueblo of Zia, we submit the following comments on the Final Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study. We first set forth specific comments on the methodology, then we address the Departments' ultimate conclusions and recommendations, the four statutory study areas, and several additional issues raised during the study process.

I. Methodology

The Departments state in the final draft that they "reaffirmed their decision to rely on voluntary case studies and survey information as the most feasible option," despite tribal objections. Report at 4. As we stated previously, a case study approach –

especially one relying on voluntarily submitted case studies – risks highlighting extreme or aberrant examples while under-emphasizing the majority of rights-of-way, which are not the subject of contention or dispute. Furthermore, focusing on case studies of current energy rights-of-way completely fails to capture the historic under-compensation that tribes have faced for rights-of-way across their land. The Departments admit as much, *id.*, but are apparently unconcerned that one of the statutorily mandated study areas (historic rates of compensation) is not adequately covered by the study.

Moreover, as we stated in our September 1 comments, at p. 14, the Departments' approach placed an enormous financial burden on tribes, many of which lack significant financial resources. In order to present information to be considered in the study, tribes were required to do most of the work and provide their own financial and historical data. Tribes were also responsible for providing any economic analyses and comparisons of compensation received for rights-of-way. In order to do this, several tribes used their own funds to hire economists and prepared detailed case studies. This should have been the Departments responsibility, especially since the Interior Department had or should have had the relevant information. Indeed, were it not for the comprehensive analyses provided by the Southern Ute Tribe, the Ute Tribe of the Uintah and Ouray Reservation, the Navajo Nation and the Morongo Band of Mission Indians, the Departments would have had very little data from which to draw any conclusions whatsoever. Unfortunately, hiring an economist and preparing a detailed case study was not financially feasible for the vast majority of tribes. The Department's approach therefore necessarily excluded the experiences of the most economically disadvantaged tribes.

We do note, however, that the significant differences between the first draft and the final draft demonstrate that the Departments carefully reviewed and incorporated the comments received from tribes. In fact, the outcome of the Section 1813 study is quite different from what the Departments originally proposed, which was to contract the entire study out to an energy industry contractor. As the final draft shows, the Departments instead responded to widespread tribal interest by accepting several sets of written comments, convening general consultation meetings, holding individual government-to-government consultation sessions and releasing a preliminary draft for review and comment. Although the study process had several significant flaws, it is important to note that the consultation process was not merely a formal exercise in this instance and, in fact, the Department made several major changes in its recommendation based on comments and information received during the study.

II. The Departments' Conclusions and Recommendations

The Report sets forth two recommendations. Most importantly, the final draft sets forth a clear recommendation first that Congress make no change to current law, which requires tribal approval of any new or renewed right-of-way on tribal land. Specifically, the Report states that “[v]aluation of energy rights-of-way on tribal lands should continue to be based upon terms negotiated between the parties.” Report at 46. This recommendation is clearly supported by all the data, comments and information gathered

during the study. Energy industry comments, by contrast, contained mere conjectural and speculative predictions about conceivable future problems with no empirical foundation.

The second recommendation is that Congress address any “failure of negotiations regarding the grant, expansion, or renewal of an energy right-of-way” that has “a significant regional or national effect on the supply, price or reliability of energy resources” through case-by-case legislation. *Id.* at 46. There is no basis for this recommendation, as no evidence was put forth concerning any “failure of negotiations,” let alone one with any significant effect on either energy prices or supplies. Finally, as discussed in more detail below, the authority of Congress to take tribal land – even on a case-by-case basis – is strictly circumscribed.

III. Statutory Study Areas

A. Tribal Sovereignty and Self-Determination Interests

In Section 1813, Congress directed the Departments to provide “an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land.” We note that the final draft contains a more in-depth discussion of tribal sovereignty than the Departments’ first draft did, and it is more central to the Report. For example, the Executive Summary states:

The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of consent. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others. A tribe’s authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty – the right to govern its people, resources, and lands.

The present right of tribes to govern their members and territories flows from a historical and preexisting independence and right to self-government that has survived, albeit in diminished form, through centuries of contact with other cultures and civilizations. Most treaties include clauses intended to preserve this right of self-governance, at least with regard to tribes’ internal affairs. The implication of 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.

Executive Summary at viii. The Departments correctly conclude that “[a]ny reduction in the tribe’s authority to make that determination [of whether to consent to a right-of-way] 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.” Report at

19. The Departmental Analysis also makes clear that an understanding of tribal sovereignty must form the baseline for any further analysis. *Id.* at 17-18. However, this discussion still falls short of what is required.

Tribes' inherent sovereignty and the concomitant right to exclude non-members from tribal land is not rooted in the 1948 right-of-way statutes or in any right-of-way statute or regulation that existed before 1948, as the Report seems to suggest. Rather, tribes retain aspects of the complete sovereignty they exercised as governments prior to the arrival of Europeans, and decisions of the Supreme Court have recognized this sovereignty – of which a central component is control over a land base and the power to exclude others from that land – since the early 1800s. *See, e.g., Johnson v. McIntosh*, 21 U.S. 543, 568 (1823). That case recognized that tribes have historically possessed legal title to those lands habitually possessed and occupied by them. Consequently, bilateral treaties and agreements between the United States and tribes were legally necessary to accomplish the extinguishment of that title and the opening of Indian lands to non-Indian settlement. By these treaties and agreements, the tribes commonly reserved their governmental authority and ownership of part of their aboriginal land base, which were in turn guaranteed to them by the United States.¹ The title to this reserved land was ordinarily held in trust by the United States for the benefit of the Indians.

The Supreme Court established and discussed these principles in the two historic Cherokee cases, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that it lacked original jurisdiction over a suit filed by the Nation to enjoin enforcement of the state statutes because the Nation was not a “foreign state” within the meaning of that term in Article III of the Constitution. In *Cherokee Nation*, Chief Justice John Marshall described the Federal-Indian relationship as “perhaps unlike that of any other two people in existence” and “marked by peculiar and cardinal distinctions which exist nowhere else.” *Id.* at 16. The Court agreed with the Cherokee Nation’s contention that it was a “state” because it was “a distinct political society . . . capable of managing its own affairs and governing itself.” *Id.* But it held that Indian tribes were not “foreign states,” but rather were subject to the protection of the United States and might “more correctly, perhaps, be denominated domestic dependent nations.” *Id.* at 17.

In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court invalidated the Georgia statutes because the treaties with the Cherokees and the Federal Trade and Intercourse Acts² protected tribal communities as “having territorial boundaries, within which their authority [of self-government] is exclusive. . . .” *Id.* at 557. Chief Justice Marshall in *Worcester* meticulously analyzed the treaties with the

¹ *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) (“treaty was not a grant of rights to the Indians, but a grant of rights from them, - a reservation of those [rights] not granted”).

² Act of July 22, 1790, 1 Stat. 137, 139; Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, § 2, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143, codified at 25 U.S.C. § 177.

Cherokee and emphasized that their right “to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States.” *Id.* at 557. The Court also analyzed federal statutes, the Trade and Intercourse Acts³ – which protected Indian land occupancy – as providing an additional source for the immunity of the Cherokees from state jurisdiction.

The 1948 consent statute is more accurately described as an expression of this longstanding doctrine, a statutory acknowledgement of tribes’ inherent sovereignty. To make this clear, the discussion of sovereignty should not be conflated with the discussion of the statutory and regulatory framework. Instead, the core discussion of tribal sovereignty, which is contained in Section 3.2.2 of the Report, should be expanded and should form the basis for the discussion of this study area. This would better answer the question Congress asked.

Furthermore, by making the discussion of tribal sovereignty a core component of the Report, it would become clear that – for every option that is suggested – the consequence for tribal sovereignty must be carefully considered. The widespread response by tribes to Section 1813 and their willingness to invest time, thought, energy and financial resources into the study process clearly shows how important the tribal consent requirement is to tribal sovereignty. Certainly, the ability of tribes to give or withhold consent for energy rights-of-way across their land is critical. But even tribes with little stake in the energy right-of-way discussion are invested in the outcome of this study because of its potential impact on tribal sovereignty in other contexts. The ripple effects of any Congressional incursion onto tribal sovereignty would extend far beyond the energy context. The consequences of a departure from the status quo would be much more far-reaching than the Report acknowledges. The Report should address these potential consequences for each option suggested and recommendation made.

The Report’s discussion of the regulatory history is also seriously incomplete. First, the 1948 Act and the regulations issued by Interior to implement it require tribal consent for all energy rights-of-way on tribal land, reflecting Congressional and administrative determinations that consent is necessary. The Report incorrectly states that the statute and regulations together “empower the Secretary to require tribal consent for a tribe organized under the tribal organization statutes and . . . vest the Secretary with the discretion” to require consent from others. The statutes and regulations read together impose a legal requirement, not a discretionary authority, on the Secretary.

Second, the Report states incorrectly that Interior did not require consent for rights-of-way from tribes prior to 1948. In reality, the 1948 Act and the 1951 regulations were the culmination of gradually increased recognition by the Interior Department of the consent requirement over prior decades. In 1938, Interior regulations required that applications be presented to the tribal council of any tribe organized under the Indian Reorganization Act of 1934 and strongly recommended that significant rights-of-way be

³ Codified today as 25 U.S.C. § 177.

presented to the council in all cases. During this period, the Department's practice was in fact to obtain tribal consent in virtually all cases. Thus, although tribal consent was not expressly required in Department regulations before 1948 and 1951, it has been an implied requirement and a recognized practice within the Department at least since passage of the Indian Reorganization Act, and the roots of the consent requirement extend even further in history.

The broad federal policy against alienation of tribal lands without tribal consent was present long before the regulations existed, and the development of the regulations over time reflects gradually stronger administrative statements of this existing policy. The statutes and regulations that existed before the 1948 Act must be read against the backdrop of this broad policy. For example, in *Southern Pac. Trans. Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983), *cert. denied* 464 U.S. 960 (1983), a railroad company challenged the Secretary's decision to require tribal consent under an 1899 statute allowing right-of-ways over Indian lands for railroads. The court "reject[ed] [the] characterization of 1899 Act as a grant to railroad companies of the power of eminent domain," holding instead that the Act was intended at least in part to "preserv[e] and protect[] Indian interests," a purpose which was consistent with the Secretary's decision to require tribal consent under that Act. In so holding, the court recognized that the right of the tribes to give or withhold consent was well established and recognized by the Secretary even where it was not yet expressly required by law.

B. Historic Rates of Compensation

Despite the evidence presented and comments provided by tribes at every stage of this study, the Departments still fail to conclude that tribes have historically been under-compensated for energy rights-of-way over tribal land. In fact, the Report fails to conclude anything about historic rates of compensation, focusing instead on present-day methods for determining compensation. Tribes provided substantial evidence of shockingly low rates of compensation for energy rights-of-way in the decades before tribes assumed substantial control over the negotiation process (which for most tribes has only been in the past 20-30 years), and none of this information was disputed by energy companies. Despite this, the Departments never reach even a qualified conclusion that tribes have been historically under-compensated. In order to provide as complete answer as possible to the questions posed by Congress, the Report should clearly state this conclusion.⁴

Significantly, most of this under-compensation occurred in an era when the BIA was responsible for representing tribal interests in negotiations. For example, the Northern Ute Tribe received \$378 in 1980 for a 50-year easement over 3.78 acres of land

⁴ A clear conclusion regarding historic rates is also important because past under-compensation is relevant to industry claims that rates are "high" or "increasing." The Departments recognize this in later discussion. *E.g.*, Report at 33. That discussion, however, is incomplete because the Report lacks a conclusion regarding historic under-compensation.

after the BIA appraised the land at less than fair market value. Report at 34. During the 1950s and 1960s, the BIA generally appraised rights-of-way on the Southern Ute Reservation, some with perpetual terms, by calculating only surface damage fees on a per-rod basis. *Id.* at 35. In 1961, Western Slope Gas Company paid \$1 per rod for a 50-year, 50-mile right-of-way across the Reservation. *Id.* at 36. The report on historic compensation prepared by Historical Research Associates contains additional examples like these from the four tribes that volunteered to serve as case studies. HRA Report at 26-28, 51, 83-84, 144.

Tribes provided a number of other examples in their comments of severe under-compensation where the BIA or another federal agency had granted rights for minimal value. For example, the BIA granted a right-of-way to Arizona Public Service across the Navajo Reservation in 1955 for minimal compensation.⁵ Before the Santa Ana Pueblo employed its own attorneys, the BIA negotiated rights-of-way across the Pueblo's land for pennies an acre.⁶ The BIA also granted an electric distribution line at the Pueblo of Laguna for \$1.00 and granted several other rights-of-way for very little compensation.⁷ The Jicarilla Apache Tribe provided information about several oil and gas pipelines granted by the BIA prior to the 1970s for \$1.00 to \$1.20 per rod and \$10 per acre for pasture damage.⁸ On the Hopi Reservation, where 29 percent of residents lack electricity, the BIA granted a 25-year, 50-mile right-of-way for only \$755 for an electric transmission line that did not serve Hopi residents.⁹ The Organized Village of Kake in Alaska reported that the BIA granted a right-of-way over 18 percent of its small reserved trust lands for no compensation at all.¹⁰

When other Interior agencies sought rights-of-way across tribal land, tribes received even less where BIA was responsible for setting compensation. The Tohono O'odham Nation received considerably less than the appraised value for rights-of-way granted by the BIA to the Central Arizona Project and the Western Area Power Administration (WAPA).¹¹ WAPA also obtained from the BIA several perpetual rights-of-way across the Navajo Reservation for minimal compensation.¹²

The BIA is undoubtedly reluctant to highlight its role in under-compensating tribes because tribes' accounts raise serious questions about whether the Bureau was

⁵ Case Study: APS 69 KV "Southern NN Border to Tuba City" electric power line 1-2.

⁶ May 14 Comments of the Pueblo of Santa Ana, 3-4.

⁷ May 15 Comments of the Pueblo of Laguna, 2 and Attach. 1. The Pueblo also noted in its comments that the \$1.00 right-of-way expired in 2002, but the Pueblo elected not to impose sanctions and "instead willingly worked in earnest" to negotiate the right-of-way, which was used to supply service to Pueblo residents.

⁸ Position Paper of the Jicarilla Apache Nation on DOI/DOE Study of Energy Rights of Way on Tribal Land (May 12, 2006), 15-17.

⁹ May 15 Comments of the Hopi Tribe, 3.

¹⁰ May 1 Comments of the Organized Village of Kake, 1.

¹¹ May 15 Comments of the San Xavier District of the Tohono O'odham Nation, 1-2.

¹² Narrative History for Western Area Power Administration (submitted with May 15 comments of the Navajo Nation), 1-2.

fulfilling its trust responsibility when it negotiated such low rates and because the United States may be liable to tribes for these failures. *Cf.* Report at 18. Nevertheless, it is essential that this history be acknowledged on the record so that Congress will be fully informed. The effort by some energy industry representatives to eliminate the tribal consent requirement would, among other consequences, return tribes to the era of BIA-driven negotiations. The evidence gathered during the study regarding historical rates of compensation – even if incomplete – strongly counsels against such a policy reversal. The Report must therefore acknowledge these findings clearly.

C. Analysis of Relevant National Energy Transportation Policies

As the Report recognizes, Title V is the main relevant authority, and it “strongly supports tribal decision-making and management of energy resources and facilities while correspondingly reducing federal oversight.” Report at 11. The Departments also correctly note that Section 368 and Section 1221 do nothing to change the framework for tribal rights-of-way. *Id.*

The Report also discusses several peripherally-related energy policies, including the Administration’s National Energy Policy (NEP). None of these other policies directly bear on tribes, and they definitely do not highlight tribes as a problem – the Report should be clearer that this is so. While it is true that the NEP favors expanding infrastructure and reducing congestion, it is equally true that the NEP does not focus on or even mention tribes as contributing factors to instability or congestion.

The report suggests that emergency authorities of the Secretary of Energy pursuant to the Natural Gas Policy Act and the Federal Power Act could be used to mandate transfers of energy supplies in the event of a national emergency, and that these authorities could apply to tribal lands. Report at 9-10. The report does not identify these emergency authorities in any detail, and we believe they do not authorize rights-of-way over tribal land. The Departments simply conclude that “these generally applicable statutes could apply to tribes.” *Id.* It is apparent from the draft that the Departments view the existence of such authority as helpful to tribes. In the Departments’ view, these authorities relieve tribes from being forced into “the untenable position of having to prove a negative, i.e., that no tribe will ever use its consent authority” to create an emergency situation. Report at 10. However, the claim that either statute implicitly grants some emergency authority to grant a right-of-way over Indian tribal lands is highly questionable and unsupported.

As we stated in our September 1 comments, we are unaware of any provision in either statute granting any federal agency the power to condemn tribal lands. In fact, the general condemnation authority in the Federal Power Act has been held not to authorize condemnation of lands owned by the United States in trust for tribes. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 111-14 (1960); *Escondido Mut. Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786 n.239 (1984); *Pend Oreille Public Utility District No. 1*, 28 F.3d at 1548, 1551-42 (relying on *Tuscarora* and

Escondido to hold that a FERC licensee under the Federal Power Act may not condemn tribal lands held in trust by the United States and located on an Indian reservation). Nor does the Natural Gas Act authorize condemnation of lands held in trust for tribes by the United States. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 883-84 (10th Cir. 1974) (“the power of eminent domain afforded holders of certificates of public convenience and necessity under Section 7(h) of the Natural Gas Act does not extend to lands owned by the United States”). Furthermore, Congressional taking of tribal property requires clear evidence that Congress expressly intended to abrogate Indian treaty or property rights. These statutes lack the requisite intent. The Departments’ summary conclusion that these authorities apply to tribes is likely incorrect and should be deleted.

Finally, the Report makes only a passing reference to the serious lack of utility service on reservations. As we stated in our January 20 comments, pp. 12-19, the goal of energy transportation infrastructure is to provide consumers with access to energy. It is therefore very significant that many reservations residents still lack access to basic utilities that people in other parts of the country take for granted. Likewise, any discussion of consumer rights and consumer costs – which the energy industry comments discussed at length – is incomplete without acknowledging the high costs paid by many reservation residents for power, largely because of a lack of transportation infrastructure. Yet, many energy companies continue to seek to place transmission lines across reservations lands without supplying power to the residents who live right next to the line. Any discussion of national energy transportation policies must take this serious issue of access into account.

D. Standards and Procedures for Determining Compensation for Energy ROWs on Tribal Land

In Section 5.1, the Report outlines several possible methods of determining compensation, including fair market value as measured by comparisons to nearby land and by the land’s existing use, valuation methods used by municipalities, such as linear foot valuation and franchise fees, net benefits calculations used by FERC, the BLM compensation schedule, and build-around costs. The Report also describes industry pressure to create an “objective, consistent, transparent, and uniform standard,” *id.* at 25, and tribes’ concern that proposals to use standard market valuation methods were “disingenuous,” *id.* at 26, and did not take into account the uniqueness of tribal land.

The Report then concludes that “negotiations between the interested parties are an appropriate method for determining compensation.” Report at 30. This conclusion recognizes that costs may increase because compensation for past rights-of-way was inadequate when tribes may not have been very involved in day-to-day decision-making regarding leases and rights-of-way. Today, the Report notes, many tribes manage their own land “for the general well-being of their members. But, unlike federal local and state governments, tribes cannot rely primarily on taxation . . . and must capture the associated costs of running a tribal government . . . from ROW fees [and other activities]. ROW fees therefore are akin to tax rates on assessed real estate by local government to

fund budgets to provide local services.” *Id.* While the Departments note that negotiations “could benefit from mutually agreed upon practices, procedures, and actions,” they do not suggest that a unilateral system of compensation of any kind be imposed on tribes. *Id.* We agree with this conclusion.

IV. Options for Congress

The Report has eliminated the suggestion that Congress could authorize blanket condemnation of tribal lands or elimination the tribal consent requirement entirely. We strongly support this change, as there was absolutely no evidence of a need for such a step. More importantly, the decision to include a general condemnation option in the prior draft report was legally unsound. Congressional legislation authorizing non-specific condemnation of tribal land would be contrary to Supreme Court precedent and all self-determination and energy transportation policies discussed in the Report. The trust responsibility limits the constitutional power of Congress over tribes and their property. Federal legislation affecting Indians must be “‘tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535,555 (1974)). The suggestion of unbounded Congressional authority in the last draft was simply wrong, and the Departments wisely revised the Report to eliminate it.

Case-by-case condemnation is still set forth as an option, however. As we have repeatedly stated, any action by Congress to override tribal consent power is a serious incursion onto the sovereignty of all tribes, even if it is done on a case-by-case basis. Unsurprisingly, the Report points to no examples in recent history where Congress has appropriated tribal land in this manner. Indeed, the Supreme Court has set a very high standard for Congressional taking of tribal property. First, as set forth above, any condemnation of tribal lands for an energy right-of-way would be unlikely to be “‘tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” Second, in *United States v. Dion*, 476 U.S. 734, 739-40 (1986), the Supreme Court stated that there must be “‘clear evidence that Congress actually considered” any conflict between Indian property rights and its intended action “and chose to resolve that conflict by abrogating” the Indian rights. General authorizations to take land and/or appropriations have specifically been held not to authorize the taking of tribal property by several court of appeals decisions. *United States v. Pend Oreille County Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1548 (9th Cir. 1994) (FERC licensee not allowed to “condemn tribal lands embraced in a reservation under the [Federal] Power Act or any other federal statute”); *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir. 1976); *Bear v. United States*, 611 F. Supp. 589, 598-600 (D. Neb. 1985), *aff’d*, 810 F.2d 153 (8th Cir. 1987).

The Departments also suggest as an option that Congress could require binding valuation. Report at 44. As we have stated before, and as the Departments themselves found, requiring binding valuation is not different from authorizing condemnation, as it

removes a tribe's ultimate authority to consent. This should not be suggested as a separate option when, in reality, it is not.

The Departments suggest that Congress could authorize the federal government to determine fair and appropriate compensation "for *all* energy ROWs across tribal land." Report at 43. We continue to believe that no standard formula or methodology is appropriate, as the Departments themselves concluded. First, tribal lands have a unique historic, cultural and religious significance that cannot be reflected by a standardized valuation formula. Second, different circumstances require different valuation methods. Comments submitted by tribes and case studies relied upon in the report demonstrate that tribes and energy companies typically use a much broader range of methods for determining fair and appropriate compensation. In fact, the Departments specifically found that no single standard could capture the varying circumstances of energy rights-of-way on tribal land. Report at 30. Economics literature also supports use of a wide variety of approaches to valuation. For these reasons, we believe the report should not suggest that any federal entity could determine "fair an appropriate compensation" on a blanket basis.

V. Other Issues Raised During the Study

In Section 6, the Departments respond specifically to issues raised by energy companies during the study. Although it goes beyond the questions posed by Congress, this discussion is essential because it directly addresses the core allegations made by industry groups concerning the relationship between right-of-way costs and consumer energy costs, increasingly long negotiation periods, decreasing terms and risks to infrastructure investment. The Departments' findings refute the basic premise advanced by industry groups that the tribal consent requirement was somehow responsible for these difficulties and uncertainties by demonstrating that there is no evidentiary basis for this allegation.

With regard to costs, the Departments correctly found that "total energy transportation costs are a small component of overall consumer energy costs . . . [and] no difficulties associated with right-of-way negotiations have led to security or reliability impacts that affect consumer cost." Report at 36. With regard to the industry's request that condemnation be available for renewals, the Departments find as follows:

Companies continue to make significant investments in energy transmission systems over time and in many cases still have significant under-appreciated investments in infrastructure when the renewal of an energy ROW is due. However, this situation is a result of a full and open prior contract negotiation that the company should have anticipated when it entered into the initial contract and made additional and subsequent investments.

Report at 42. To be sure, the Report acknowledges that energy companies face uncertainty, *id.* at 41, and that negotiations “may lead to a decision to ‘build around’ a reservation,” *id.* at 40, but the Departments’ overall analysis correctly views these “problems” as part of the negotiation process and finds that they must be addressed by a “shared solution,” *id.* at 26, not unilateral action imposed on tribes to benefit energy companies.

In several places, the Report discusses concerns stated by industry groups that companies have no incentive to invest in infrastructure if they cannot be absolutely certain that they will be granted a perpetual right-of-way. *E.g.*, Report at 41-42. The Departments correctly point out that this risk has always been a known factor in negotiations for rights-of-way, p. 42, and that depreciation of infrastructure is a normal part of business decisions for energy companies and for many other entities – not a consequence of tribal actions. Report at 39. The Departments also correctly point out that the Energy Policy Act of 2005 contained new provisions designed to help energy companies recover the value of their infrastructure investments. Specifically, the following provisions make it easier for energy companies to recover investments:

- **Transmission Property Depreciation (§ 1308).** The Act shortens the previous 20-year recovery period for assets used in the transmission and distribution of electricity for sale to 15 years. This shortened recovery period applies generally to transmission and distribution property that is placed in service after April 11, 2005.
- **5-Year Net Operating Loss Carryback (§ 1311).** The Act allows an elective five-year carryback of net operating losses for certain electric companies of up to 20% of the cost of electric transmission capital and pollution control expenses paid or incurred in 2003-2005. To qualify, transmission property must be used by the taxpayer in transmission at 69 or more kilovolts of electricity for sale.
- **Deduction for Capacity-Increasing Refinery Investments (§ 1312).** The Act allows an election to currently deduct 50% of the cost of certain capacity-increasing refinery investments, generally effective for property the original use of which commences with the taxpayer and that is placed in service after the date of enactment and before 2012. The remaining 50% is recovered over a 10-year period using MACRS.
- **Natural Gas Gathering Lines (§ 1325).** Prior to the Act, it was unclear whether natural gas gathering lines had a 15-year or a seven-year recovery period under MACRS. The ambiguity has been litigated on three different occasions, with appellate courts reversing lower court holdings that expenses associated with gathering lines should be recovered over 15 years. The Act resolves this ambiguity by treating natural gas gathering lines as seven-year property. The provision is effective for property subject to an acquisition contract after April 11, 2005.

- **Natural Gas Distribution Line Depreciation (§ 1326).** The Act shortens the recovery period for depreciation deductions on natural gas distribution lines from 20 to 15 years. The provision is generally effective for property placed in service after April 11, 2005 and before January 1, 2011.

We recommend that the Report specifically cite these provisions.

Finally, we suggest that this section address one additional issue raised by the study – the uniqueness of tribal land. As discussed in our May comments (pp. 13-15) and our September comments (pp. 4-5), tribal lands have a unique historic, cultural and religious significance that cannot be reflected by a standardized valuation formula. For many tribes, reservations encompass homelands on which the tribe has lived for centuries and irreplaceable sacred sites that are essential to the tribe's religious ceremonies. The Pueblo of Isleta and the Pueblo of Zia are no exception. Pueblo homelands encompass a great many sacred sites. Moreover, the location of most of these sites is unknown to the public because such ceremonial knowledge is carefully guarded by Pueblo people. It is therefore essential that tribes actively participate in and exercise ultimate authority over the decision of whether and where to site rights-of-way. If the law were changed to empower the federal government to condemn tribal lands for an energy right-of-way, a tribe would lose its inherent rights to protect these sacred sites – as well as natural resources, wildlife and communal resources within or adjacent to the right-of-way.

Sincerely,



Reid Peyton Chambers

David C. Mielke

Addie C. Rolnick

*Attorneys for the Pueblo of Isleta
and the Pueblo of Zia*

Copies to:

James E. Cason, Associate Deputy Secretary
U.S. Department of the Interior

Kevin M. Kolevar, Director
Office of Electricity and Energy Reliability

Mr. Robert Middleton, Executive Director
BIA Office of Energy Resource Development

Mr. Marshall Whinton, Deputy Director of Permitting, Siting and Analysis
Office of Electricity and Energy Reliability