



PUEBLO OF LAGUNA

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Office of:

The Governor
The Secretary
The Treasurer

February 5, 2007

Via Electronic Mail
ieed@bia.edu

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: Pueblo of Laguna's Comments on the Second Section 1813 Draft Report

Dear Sir/Madam:

Pursuant to 71 Fed. Reg. 77060 (Dec. 22, 2006), the Pueblo of Laguna, a federally-recognized Indian tribe located in the State of New Mexico, hereby submit the following written comments regarding the second draft report on the Indian energy rights of way study, as mandated by the Energy Policy Act of 2005 ("Act"), Pub.L. 109-58, Title XVIII, Section 1813 ("Section 1813 Study"). On December 22nd, the Department of Interior and the Department of Energy (Departments) released the highly-anticipated second Section 1813 draft report on energy rights of way (ROW) on Indian lands. Because the Pueblo believe it is important to be actively engaged in matters and decisions that would impact our lands, we have participated in all of the public meetings held regarding the study and submitted numerous written comments throughout the Section 1813 process, including comments dated January 20, 2006; May 1, 2006; and September 1, 2006.

I. The Pueblo Generally Support the Second Draft

We have carefully reviewed the second draft report and believe that it has reached accurate conclusions regarding Congress's concerns - there is no evidence that tribal consent endangers national energy security or causes any demonstrable harm to energy consumers through increased rates. We are also satisfied to see that the Departments have heeded to the requests of the Pueblo, as well as other tribes and tribal organizations, in including an Executive Summary that sets forth an overview of the statutory requirements, an overview of the process to date, the Department's directive from Congress, and a brief overview of the findings reached in the course of the study. The Pueblo supports the Departments' finding that the negotiation process should include mutually-agreed upon practices, procedures, and actions that would better the understanding and collaboration in the process. We believe that the development of comprehensive rights of way inventories and model or standard business practices would greatly enhance the negotiation process for all parties involved. However, we strongly encourage the Departments to emphasize the importance of tribal consultation and participation in the development of such inventories and model practices.

Furthermore, we support the Departments' finding that no change is necessary, and only in limited circumstances would Congress (and not the parties or the Departments) be authorized to consider condemnation as an option of last-resort.

II. The Pueblo's Section-by-Section Comments

The Pueblo hereby make the following general comments regarding each section of the second draft:

Section 1: Scope of the Study

The Pueblo believe that the statutory language and scope setting out the guidelines for the Departments' study is necessary to set the scene for how the study proceeded. Tribes and the industry were invited to participate in the scoping sessions. However, while we understand that "tribal land" is defined under the Act as including trust or restricted fee land but not tribal fee lands, individual allotments or individual fee lands, it was encouraging to see that the Departments specifically recognize the fact that ROWs and negotiations often impact other landholders, including individual allottees. It is also important that the Departments continue to acknowledge in the final report to Congress the fact that the use of case studies did not serve as a comprehensive historic review of compensation paid.

Section 2: National Energy Transportation Policies Support Tribal Sovereignty

In comments dated September 1, 2006, the Pueblo encouraged the Departments to consider the importance Congress placed on tribal self-determination and Indian energy development in Title V of the same Act calling for the Section 1813 Study. While the Industry argues that the need to strengthen domestic energy sources has resulted in the need to expand and construct infrastructure to address aging systems, Congress addressed energy issues on tribal lands through Title V and chose not to condemn tribal lands for this limited purpose. Furthermore, limiting consent or changing ROW renewals runs contrary to Title V.

The Pueblo believe that it is important to ensure that a thorough review of past and current policies is included in the final report, as it has been included in the second draft. Although transmission may be constrained due to limited access, we believe that the only way to address this problem is through increased incentives, not through the forced relinquishment of lands. Furthermore, it is important to stress the fact that in an actual state of emergency, the Natural Gas Policy Act and Federal Power Act could apply to tribes to address any difficulties.

In reviewing policies specific to tribal ROWs, the second draft finds that Section 503 strongly supports tribal decision-making and management of energy resources and facilities, and reduced federal oversight. It also tries to assist tribes in the overall development of energy resources and furthers Indian self-determination. These are points that cannot be denied in the final report to Congress. Contrary to any arguments raised by the Industry, the provisions under Section 503 further support tribal management of energy ROWs and do not repeal existing authorities for energy ROWs. Based on an overall review of national policies, including Title V, the Pueblo strongly encourage the Departments to continue to conclude that unique laws apply to tribal lands - including tribal consent.

Section 3: Tribal Sovereignty Demands Tribal Consent

The second draft report acknowledges tribal self-determination and the fact that tribal consent is consistent with sovereign authority. We believe that tribal sovereignty is central to understanding the statutory and regulatory requirement of tribal consent because sovereignty enables a government to define its relationship with other governments. But beyond that, consent and the right to negotiate for meaningful compensation are absolutely necessary for tribes to enter agreements with the industry. The Pueblo, like other tribes, must provide services to our members such as education, healthcare, law enforcement and protection, and emergency response, among other basic governmental services. Despite the existence of high-pressure interstate gas lines owned by El Paso Natural gas and Transwestern Pipeline as well as major interstate transportation routes, including Interstate 40 and the Burlington Northern and Santa Fe railroad lines, which travel approximately 40 miles through our reservation, we lack the ability to impose taxes that would enable us to provide those services to our members. Therefore, we, like so many other tribes, need the ability to negotiate fair compensation from the energy ROWs that traverse our lands. Furthermore, the statutory and regulatory framework encourages tribal economic development. The second draft rightly acknowledges that any reduction in the ability to make such a 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." See *Second Draft Report*, 19 (December 21, 2006).

Section 4: Historic Compensation Paid

Although the Pueblo repeatedly noted its disagreement with the Departments' use of a case study approach to conduct an analysis of historic compensation paid for ROWs on Indian lands, we can understand the Departments' reasoning. Therefore, it is important that the final report include the disclaimer noted in the second draft – recognizing that the case studies were used to provide a snapshot "that may not fully represent the context within which an energy right of way was granted, renewed, or expanded." *Id.* at 20. Although the case studies show general trends in the negotiation and management processes, changes in the amount and types of compensation, and the role of tribal consent in the negotiation process, this is not the case for every tribe. However, the case studies are accurate in showing that the nature of the process has evolved significantly over time and tribes are now more fully involved in bilateral negotiations.

Section 5: Standards and Procedures for Determining Compensation

In the second draft, the Departments correctly conclude that negotiations are an appropriate method for determining compensation because of self-governance. Furthermore, the responsibilities of tribes command the need for compensation in lieu of taxes. The Pueblo concur with the Department's determination that the negotiation process could benefit from mutually-agreed upon practices, procedures, and actions to better the understanding and collaboration among parties by developing comprehensive ROW inventories for tribal lands; developing model or standard business practices for energy ROW transactions to help normalize and guide negotiations, including information on when negotiations start, basis, and dispute resolution; and by broadening the scope of energy ROW negotiations. The Pueblo believe that such comprehensive information should be developed by information gathered from all interested parties, and led by a joint workgroup developed by CERT or NCAI and industry representatives. We believe that this would serve as a reference available to better understand the process and *reasons why* the process must be inclusive of tribes and tribal consent.

Section 6: The Department Accurately Addresses Issues Raised During the Study

The Pueblo appreciates the Departments' thorough review of all of the issues raised during the study and its development of comments and/or responses to those issues. One issue involved the increasing costs of energy ROWs and the cost to consumers. However, the Departments rightly conclude that energy ROWs on Indian lands is a very small cost and there is no evidence showing that ROW negotiations have had an adverse impact on the reliability or security of energy supplies. Second, decreasing energy ROW terms and increasing negotiation periods may nominally impact the consumer, but the Departments note that there are a number of factors explaining why there is an increase in overall costs that result in the need for comprehensive information on energy ROWs to help reduce negotiation periods. Third, uncertainty in negotiations may exist, but the Departments acknowledge that most ROW negotiations are completed to mutually agreeable terms and conditions. Fourth, tribes have incentives to enter into productive relationships with energy companies, so mutual interests exist for both tribes and the industry. And, although concerns over uncertainty for investments in infrastructure were raised, the Departments noted that contracts were entered into with the full knowledge, by both parties, that the contract was for a fixed term and with the realization that they would eventually have to be renewed at some point. This satisfies some of the concerns we raised in our comments dated September 1, 2006, noting that ROWs are binding contracts based on negotiation and mutual agreement. As such, the Departments correctly point out that such contracts could have included clauses or required negotiation for renewal *before* any additional investments are made. More specifically, the second draft states that "[c]ompanies can not expect that terms of contracts would remain static over time or would remain the same for contract renewals." *Id.*

Sections 7 & 8: "Approaches" v. Final Recommendations

In Section 7, the Departments note that Congress could take several different approaches to address the issue of energy ROWs on Indian lands before concluding under Section 8 that no action is necessary, except where an impasse in negotiations occurs in which case Congress should authorize case-by-case determinations to condemn tribal lands. The Pueblo believe this is the right conclusion reached based upon all of the information presented in the course of the study. However, the options or "approaches" are not warranted. Therefore, we believe that the Departments should clarify this as only "options" that the Department *initially* considered but *no longer believe are appropriate* based on a full assessment of the current situation, applicable law, and federal policy. Neither authorizing the federal government to determine "fair and appropriate" compensation nor binding valuation is supported by the study. Allowing a mutually-approved third party, with no right to an appeal; an arbitrator selected by Congress, with no administrative appeal; or a federal entity to determine just compensation simply is not necessary and should not be presented in the final report as an "approach" for Congress to consider.

The Pueblo strongly encourage the Departments, and Congress, to allow ROW negotiations to continue, as-is, except in those extreme circumstances. We believe that if best-practices are used to negotiate in good faith, the parties can avoid this situation.

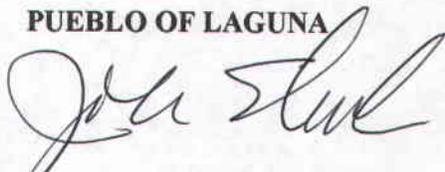
III. Conclusion

Overall, we believe that the second draft report fairly reviews the issue of ROWs on Indian lands and has taken into consideration all comments from both sides. Any last minute arguments raised by the industry that would invariably alter the Departments' findings should be presented to all interested parties before any significant changes are made to the final report.

The Pueblo appreciates all of the time and energy the Departments have expended in making sure that this study is conducted in a fair and appropriate manner. If you have any questions, please feel free to contact me directly at (505) 552-6654, or our Washington, DC counsel, Kimberlee M. Dunlop, at (202) 862-5966.

Sincerely,

PUEBLO OF LAGUNA



John E. Antonio
Governor

cc: Senator Jeff Bingaman
Senator Pete Domenici
Rep. Steve Pearce
Rep. Tom Udall
Rep. Heather Wilson
Kimberlee M. Dunlop, Holland & Knight
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