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

[IEED@bia.edu](mailto:IEED@bia.edu)

Re: Section 1813 ROW Study Comments – Southern Ute Indian Tribe

Dear Comment Recipients:

Our firm serves as general legal counsel for the Southern Ute Indian Tribe (“Tribe”), and these comments are submitted on behalf of the Tribe in response to the notice of publication of draft report set forth at 71 Federal Register 77060 (Dec. 22, 2006). These comments supplement previous comments and materials provided by the Tribe to the Department of the Interior and the Department of Energy and specifically address the “Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study” (Dec. 21, 2006) (“Draft Report”).

In directing the Departments to prepare a report about the status of energy rights-of-ways on tribal lands, Congress cast a very large net. The sheer volume of such rights-of-way is enormous. The statutory and policy underpinnings that define how such rights-of-way may be obtained implicate cornerstones of Federal Indian law and tribal sovereignty. The Departments were required to evaluate complex relationships and make determinations about the effect of existing practices upon the national energy markets and policies. Given the magnitude of the exercise and the short time allotted for its completion, we believe the Draft Report presents Congress with a reasonable analysis and thoughtful recommendations.

The Tribe supports the Departments’ key findings. First, the current system of negotiation between tribes and energy industry representatives generally results in the issuance of rights-of-way needed for energy pipelines and transmission facilities crossing tribal lands. Second, although the compensation for rights-of-way crossing tribal lands has escalated over several decades, those costs are an insignificant component of the energy costs borne by energy

consumers. Third, in seeking increasing compensation for such rights-of-way, tribes are not only acting in conformity with existing law, they are also utilizing those funds to support economic development in Indian country and to meet the expanding fiscal needs of tribal governments.

The Tribe also supports the Departments' basic recommendations. In that regard, the Departments recommend that the valuation of energy rights-of-way for compensation purposes continue to be based upon negotiation. In the event that failed negotiations implicate a significant regional or national effect on energy supply, price, or reliability, Congress could address such situations on a case-by-case approach rather than through a broad reduction of tribal sovereignty.

We also have some specific comments about aspects of the report. In the Executive Summary, the Departments identify several themes that surfaced in the extensive public discussions regarding this subject. Among those themes, the Departments identified "Trends toward shorter term lengths (in years) for energy ROWs and longer negotiation periods . . . ." Again, in Section 6.2.2, the Departments state, "There is basic agreement that negotiations are taking longer and that the term of the agreement is shorter." We question the accuracy of this "trend," and given the methodologies employed by the Departments, we respectfully suggest that the Departments lack the empirical evidence needed to reach these findings.

As to the duration of energy rights-of-way, the Tribe's experience is not consistent with the "trend." To be sure, in the early to mid 1900s, it was not unusual to see perpetual rights-of-way or rights-of-way of extended duration for certain purposes. Rights-of-way for electric transmission lines, for example, might be for 50-year terms and contain renewal options. In support of the "trend," under current practices, it is probable that durations of such length would generally not be given. However, we believe that the duration of rights-of-way for major transmission facilities is seldom less than the estimated project life of such facilities. Recent grants for major facilities by the Tribe have often included terms of 20-25 years. Additionally, when mutual interests have been established through business partnerships or unique compensation, the duration of rights-of-way have included perpetual terms or, in the case of one master agreement affecting hundreds of rights-of-way, a 42-year term with a right of renewal. We would appreciate the Draft Report, Section 6.2.2 noting that the "trend" is not universal.

With regard to the length of negotiations, the Tribe also questions the "trend" to longer periods. Like a number of other tribes, our Tribe has developed compensation policies or master agreements that govern smaller facilities, such as pipeline laterals and electric distribution facilities. The compensation policies are tied to land classification. These published policies, which have been accepted by affected companies, have eliminated the need for extended negotiation. Hundreds of such rights-of-way are granted annually. Delays in securing grants to rights-of-way, when they occur, seldom involve compensation negotiations. In fact, the major cause for delays involves administrative backlogs in federal agency review and processing. In the absence of increased funding and technical support for realty services within the Bureau of Indian Affairs, the "trend" may, in fact, materialize or get worse.

On another matter, the Tribe believes that there has been inadequate emphasis placed on the historic and continuing importance of the Indian Reorganization Act of 1934 (IRA) as it relates

to the granting of tribal rights-of-way. Section 3.2.3 mentions the IRA, but does not provide direct citation to the statutory language applicable to tribes organized under its provisions. Specifically, Section 16 of the IRA (25 U.S.C. 476) provides in part:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . . .

The Draft Report describes the significance of the 1948 Act and its implementing regulations in mandating tribal consent to rights-of-way. Independently of the 1948 Act, however, the IRA imposes a separate tribal consent requirement. We believe the Draft Report would be strengthened by explicit reference to Section 16, together with a summary computation of the number of federally recognized tribes organized under its provisions.

In conclusion, throughout the process of preparing the Draft Report, the Departments took great pains to solicit comment from the public, including tribes and industry. The Tribe greatly appreciates the opportunity to participate in this process, and we commend the Departments for seeking tribal input on these important issues.

Sincerely,



Thomas H. Shipp

Cc: Clement J. Frost, Chairman  
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