

Commentary for the Section 1813
Tribal Energy Right-Of-Way Study
Presented by
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U.S. Senator – Retired
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I am sorry I wasn't here yesterday, but I was out of the state on business. It is an honor to be here today and I would like to start by welcoming everyone to the City of Denver, sometimes called the "Mile High City", sometimes the "Queen of the Plains". It is as vibrant and as beautiful a city as there is in the United States, to my way of thinking. It has always been beautiful, but it hasn't always been "Denver", and I'd like to talk about that a little bit, before I deal with the subject at hand.

There was a time as many of the people, particularly the Indian people in the audience know, this was the land of the Arapaho, and to the north of us, the land of the Shoshone and further north, the land of the Crow and to the northeast, the land of the Lakota, and to the south the Kiowa and Apache, and to the east, the Cheyenne, the People of my father, until what was called the Sand Creek Massacre, at which time about a hundred and fifty innocent women and children, who were flying the American flag to show they were friendly, were massacred, their body parts cut off and paraded through the City of Denver on the ends of sabres and rifles, to the cheering of the multitude. They are all gone now, as you know, only the Utes remain. They were scattered to the winds, their kids too. The ones that weren't killed were put in boarding schools where their hair was cut and they were beaten for speaking their language, and all of that happened, basically because they were Indian. And, as far to the west as a good rider on a good horse could ride in a month was the land of the Ute people, all the way through what is known as Utah, the state that was named after the Ute people. They didn't know the names of Vail or Montrose or Grand Junction or any of those things, any more than the Cheyenne or Arapaho knew the name, Denver. All they knew is that their Creator put them on this land, and all those things above the land, on the land, and under the land were put there by the Creator, for their use. Must have been a pretty good life, they didn't need a government permit to build their lodge, or a government

permit to dig for water, or a government permit to hunt for their sustenance, or a government permit to collect firewood. But, the U.S. government thought they could improve on all that, and a hundred and fifty years have changed, as now there are no more Crow, or Shoshone, or Apache, or Arapaho, or Cheyenne in this state, only the few that live in the cities. Only the Utes remain, on two very small parcels in the southwest corner of the state and they worked very hard over the last century and a half to hang onto those pieces of land. None of the tribes sold their claims to land. They didn't trade it. They didn't abandon it. They lost title by adverse possession....which is a nice way of saying, at gunpoint....and under duress. It is a sad commentary to note that, in this enlightened age, America is fighting, all over the world, to ensure the rights of people and give them freedom and the chance for a lifestyle that Americans take for granted and enjoy, while at the same time the goal of some Americans is to diminish the rights of the First Americans, who as a group are still the poorest in this country.

Now, why am I telling you this, instead of dealing directly with right-of-ways? It is because, in my view, this debate shouldn't be so sterile. It shouldn't be clinical. It shouldn't be just an exchange between your experts, and our experts, and your data, and our data, or your graphs and charts, and our graphs and charts. There has got to be a human face to it. And that is the reason why tribes badly need money, it's that human face. It's the face of an Indian child without adequate nutrition. It is the face of an Indian elder without adequate medical attention. It's the faces of people, many people, who live in a environment of seventy-five percent unemployment. It is the face of an Indian mother, whose youngster commits suicide because they find themselves in a dead-end existence. That is the thing I wish people would focus on more, rather than the clinical and dry statistics that go into a study. Naked greed in our past history has been cloaked in code-words such as 'westward expansionism', 'divine right', many things of that nature, including 'manifest destiny'. You know, all those things you read that were written in history books until enlightened authors began to tell both sides of the history of the American West and the American Indians. But basically, it was because a new wave of immigrants needed resources. It is interesting, if you picked up a paper this morning, the Denver Post, I read USA Today, any paper, and you'd know at the present time there is a great national debate raging all over America about illegal immigration. I imagine there are even a few people in this room that can track at least one ancestor to an illegal immigrant. And you probably know that more illegal

immigrants crossed our borders last year alone than the number of all the Indian people in the United States. According to the Department of Labor, one out of every twenty workers in America now is an illegal immigrant....undocumented alien, I guess is the other word they use, and the Nation, as you've probably read, is divided on the issue, while there are protests and rhetoric building up on both sides of the issue. People are concerned....concerned about the potential erosion of their rights, their wealth, their lifestyles, they wonder what it is all going to mean?..., and without making a judgement decision, I can tell you right now, if you are one of those concerned people, maybe you know how Indians have felt for the past five hundred and fourteen years....and they have a right to feel that way. Is it any wonder that tribes fight so hard to hang onto what little they have left? They had everything to lose, nothing to gain, with the huge immigration growth in this Nation, and it looks to me like they are still in the process of losing.

While we're on that subject, there usually is, in Congress, when legislation moves forward, a winner and a loser, although compromises are always strived for. And it seems to me, that if this study leads to legislation, or price fixing of what transmission companies can pay a tribe for a right-of-way as some are already advocating, there's gonna be a winner and a loser. We have already heard a unified voice from all the tribes, the last time I was here, that they're not going to be the winner. So, if the tribes will not be the winners, will the consumers of Chicago or New York City be the winners? Probably not...not in my view, because to assume that the few thousand miles of pipeline that runs across postage stamp parcels of Indian reservations, compared to the tens of thousands of miles of pipelines that run across other lands in America, across non-Indian lands, would drive up the cost of heating fuel to a consumer in New York City, at best it is ludicrous and at worst it is just pure scapegoating. That leaves the pipeline companies. Would they be the winners? In my own view, I kind of doubt it, not in the long run, because just as the advocates of Section 1813 have lumped all tribes in the same category, because of one dispute, tribes would be put in the same position, they would begin to put all pipeline companies in the same category, to be viewed with suspicion and distrust. In addition, the ongoing agreements that are now up for renewal, would be in limbo, thereby putting the many good companies who have been able to work well with tribes in the same uncertain position as the few, or in this case – one company who, as I understand it, has not been able to

get an agreement with one tribe. If you believe that Indians are somehow responsible for the high cost of energy in this country, then you must also believe it was the Eskimos who were responsible for the Exxon Valdez disaster. Once again, tribes have their back to the wall, and make no mistake about it, they will fight any legislation that may result from the study of Section 1813, in the courts, the halls of Congress, and in the court of public opinion. I would wonder, as I look at the skyrocketing cost of energy in America, the cost of gasoline at the pump, and in the wake of spills like the Exxon Valdez, if the energy companies of America feel so popular that they really want that fight. The real tragedy of this whole issue was that this process of going for a legislative fix could have been avoided. Well who are the winners if the tribes, consumers, and the energy companies are losers? I'll tell you who it is. I just came from the State of Washington last night where I was interested to learn that there are still groups in Montana, Washington State, Oregon, Idaho, as well as a few others, who are non-Indian people, who cloak themselves in a veil of righteousness, patriotism, and fair play....giving themselves very patriotic names, who have publicly advocated for the dissolution and sale of all tribal lands. They have these goals as their platform, they cry discrimination because they cannot vote in tribal elections and they say their civil rights are being violated because they do not get per capita while they may live on an Indian reservation. They have pursued that agenda in Congress and the courts, but so far they have been written off as ultra-nationalistic extremists, pure and simple. In fact, before I was out of office one of these groups came to see me. I am a little short of words sometimes. I told them to get out! And, on their way out I told them to do something I know is physically and anatomically impossible. They didn't come back, but they are still out there. 1813, in my view, has handed these groups, however unintentionally, a windfall for their misguided cause. Tribes are not companies, or clubs, or municipalities. They are sovereign, and that is exactly what these groups, perhaps even a few people in this audience are out to destroy. 1813, in my view, is the equivalent of blood in the water and there is already much circling going on. There are certain principles considered inviolate to all tribes as sovereigns, and a number of tribes met just two weeks ago to flesh those out. I think they will be passing those out today to folks in this room as I understand it, but let me enumerate them, with my remaining time.

1. **Tribal Sovereignty and Consent.** The power of tribes to prevent third parties from using tribal lands without tribal consent is a critical element of tribal sovereignty that has been

established in Federal law and policy for over 200 years. The tribal consent requirement to the use of tribal lands should be honored and preserved.

2. **Conditions to Consent.** The tribal consent requirement includes the power of tribes to place conditions on the use of tribal lands, including conditions related to tribal jurisdiction, preservation of environmental and cultural resources, duration of use, and compensation.
3. **No Negative Effects.** Adherence to the tribal consent requirement has resulted in greater energy production in Indian country and lower energy costs to consumers. The tribal consent requirement for rights-of-way has not had a noticeable negative effect on the availability or cost of energy to consumers.
4. **Preservation of Tribal Jurisdiction.** No right-of-way agreement or other business arrangement that permits third-party use of tribal land should reduce the sovereign power of a tribe over its lands or the activities conducted on its lands in the absence of the specific consent of the tribe.
5. **Restricted Duration of Rights-of-Way.** Federal law and policy should not be changed to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.
6. **Negotiated Compensation.** Tribes should continue to have the right to negotiate compensation for the use of tribal land that gives tribes a fair share of the economic benefits produced by use of their lands. Such revenues sustain tribal governments and cultures.

This helps tribes address the issues of that human 'face' I spoke of earlier.

7. **National Security.** Indian nations are an integral component of energy security of the United States, not a threat to that security. History demonstrates that tribes have permitted critical energy facilities to be used pending compensation negotiations even in cases where tribal rights-of-way have expired.

8. **Industry Partnerships – Best Practices.** Federal law and policy should provide positive incentives to tribes and industry to foster partnerships and the mutual alignment of economic interests related to energy development, transmission and distribution.

Legislative remedies sought by proponents of Section 1813 fly in the face of this goal.

9. **Appropriate Deference.** As reflected in the Indian Tribal Energy Development and Self Determination Act of 2005, deference to tribal decision-making should remain a fundamental component of Federal Indian energy policy.

My staff authored the Indian Tribal Energy Development and Self Determination Act, and I introduced it two times. After I left the senate, Senator Domenici was kind enough to include it in last year's Energy Policy Act, and it passed. As was stated in principle nine, the intent of Congress was that "deference to tribal decision making should remain a fundamental component of Federal Indian Energy Policy."

And last:

10. **Allottee Experience.** The creation of a Federal administrative valuation process for fixing tribal right-of-way compensation would be an affront to tribal sovereignty and, as shown by the disastrous Federal management of Indian allottee resources, would be a mistake.

Seventy-two years ago (1934), Congress enacted the Indian Reorganization Act (25 USC 476 e) "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." In 1948, Congress reconfirmed the tribal consent requirement for rights-of-way on tribal lands. During this time, tribes have been allowed to make consent decisions and negotiate just compensation for access across their lands. Since 1934, the American Energy economy has grown to be the largest and most productive in the world, and there is no indication that the tribal consent requirement has ever inhibited that incredible growth. There are innumerable tribal rights-of-way agreements, with a vast number of

energy companies, providing a wide-range of power options, across thousands of miles of Indian land, without ill-effect on consumers. There is great potential for growth in Indian energy in conjunction with energy industry partners, which I think the vast majority of us support. Any legislation limiting sovereign power for tribes not only defeats this purpose, but is another violation of federal treaties with tribes and a breach of federal trust responsibility, leading to years of confrontational litigation. Even as a non-lawyer, the way I understand litigation, because the Department of the Interior is the trustee for Indian Tribes, they would be drawn into it, as they have been drawn in to it with this study. They didn't write this study, neither did Department of Energy, but they're up here trying to do the scoping process and trying to find out the views of people, because Congress has directed them to do it. Well as I understand it, the Department of the Interior would be obligated to defend Indian Tribes, as their trustee, in those lawsuits. So, you're tax money would probably be spent on both sides of the issue if this ever went to litigation. Confrontation is not the way to go. I just hope that we don't take America down that path again. I tell you very honestly, it is time to stop beating up on the American Indians.

Thank you.