

Council of Energy Resource Tribes

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May 15, 2006

Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
1849 C Street, NW – Mail Stop 2749 – MIB
Washington, D.C. 20240

Dear Sir:

Board of Directors:

Blackfeet
Cherokee Nation
Cheyenne-Arapaho
Cheyenne River Sioux
Crow
Eastern Shoshone
Fort Belknap
Fort Hall
Fort Peck
Fort Sill
Hopi
Hualapai
Iowa
Jemez Pueblo
Jicarilla Apache
Kashia Pomo
Kaibab Paiute
Lummi
Morongo
Muckleshoot
Navajo
Nez Perce
Northern Cheyenne
Northern Ute
Oglala Sioux
Ohkay Owingeh
Pawnee
Penobscot
Picuris Pueblo
Ponca
Pueblo of Laguna
Rosebud Sioux
Round Valley
Saginaw Chippewa
St. Regis Mohawk
Santa Ana Pueblo
Standing Rock Sioux
Tule River
Turtle Mountain Chippewa
Umatilla
Ute Mountain Ute
Walker River Paiute
Yakama
Zia Pueblo

On behalf of the 53 Member Tribes of the Council of Energy Resource Tribes (CERT), I submit the following comments for your review and consideration pursuant to the Federal Register Notice published on May 5, 2006, related to the study of energy rights-of-way on Indian Tribal lands which the Departments of Energy and Interior are required to conduct by section 1813 of the *Energy Policy Act of 2005* ("EPAct", Pub.L. 100-58).

After decades of passively witnessing outside interests dictate to Tribal communities the terms and circumstances of energy resource development on Tribal lands, CERT was founded in 1975 by Indian Tribes to chart a new course for the prudent, Tribally-driven development of Tribal resources.

In the 30 years since CERT was founded, far-sighted Tribal leaders have dramatically restructured the federal-Indian relationship regarding mineral development on Tribal lands and, at the same time, have forged close alliances and partnerships with private sector energy interests. The member Tribes of CERT have witnessed first-hand the fundamental truths of the Indian Self Determination policy: that vigorous Tribal governments and robust Tribal economies serve Tribal members well, produce efficient allocations of resources, and in the end help improve the material standard of living of Tribal members and local citizenry.

Accordingly, CERT's Tribal leadership has forged a dynamic three-pronged approach to achieve these goals: to help Indian Tribes effectively govern within their own lands as well as play an important role in governing America; to master the tools of modern technology and business; and to cultivate diversified economies, integrating environmental and cultural values with economic growth.

HISTORICAL BACKGROUND

CERT's comments on the 1813 study, specifically its objections, are best viewed against the backdrop of the federal-Tribal relationship and the policies of the United States toward Indian Tribes and Indians.

Canadian First Nations:

Ermieskin Cree
Louis Bull Cree
Montana Cree
Samson Cree

Executive Director:

A. David Lester

The eras of federal Indian policy are well-known and volumes have been written about each: the Treaty-making Era; Indian Removal; Westward Expansion and the Reservation System; the End of Treaty-making and the Allotment Era. Most damaging to the integrity of Indian Tribal governments, the Indian land base, and Indian people was the Allotment Era, epitomized by the *Dawes Act of 1887* whose explicit purpose was to break up the Tribal landmass, allot Tribal lands to individual Indians, and in the process encourage Indian people to become Christian farmers.

In 1887, when Congress enacted the *Dawes Act*, Tribal trust lands totaled 138 million acres. When the allotment system was abandoned in 1934 with the enactment of the *Indian Reorganization Act*, 25 U.S.C. §§ 461-479 ("IRA"), only 50 million acres remained in trust status for Tribes and individual Indians. The IRA contained new provisions to stabilize Tribal land holdings and also to provide a mechanism for the Secretary of the Interior to acquire additional trust lands for the benefit of Tribes and individual Indians to restore Tribal homelands.

Finally, the IRA provided that Indian Tribes could organize for their common welfare, adopt constitutions and bylaws, and form Tribal corporations. Congress enacted these important reforms with an eye towards establishing "machinery whereby Indian Tribes would be able to assume greater self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

During and immediately after World War II, the pendulum of federal Indian policy began to swing again, back to an emphasis on homogenizing and assimilating Indian people into mainstream American culture and society. The new policy subjected Indian people to the harshness of the Termination Era, during which the U.S. Congress formally ended the legal and political relationship it had maintained with 20 or more Indian Tribal governments with large land bases. Termination, and the tandem policy of Assimilation, proved disastrous both to the affected individual Indian people and, of course, to the Tribal governments themselves.

Federal Indian policy to encourage strong Tribal governments, however, reemerged and saw additional formalization in the late 1960's. In July, 1970, President Richard Nixon issued his now-famous "Special Message to Congress on Indian Affairs" in which he formally rejected the failed policies of Termination and Assimilation and laid the groundwork for what has become the most successful and enduring federal Indian policy ever: Indian Self Determination.

HISTORY AND IMPACT OF INDIAN ENERGY RESOURCE DEVELOPMENT

The Congress followed the lead of President Nixon and in 1975 passed the *Indian Education Assistance and Self Determination Act* (Pub.L. 93-638) the same year the energy resource Tribes created the Council of Energy Resource Tribes. Meanwhile the US energy markets were in the throes of its first energy crisis caused by the Arab Oil Embargo of 1973.

The confluence of the beginning of the era of Indian Self Determination with the energy crisis produced profound changes in Indian energy and the relationships between the three principal components of Indian energy; the Tribe, the federal trustee and the private sector energy companies. Tribes became very aware of the economic and strategic value of their resources and their lands and became determined to break the bonds of paternalism that had dominated Indian energy for decades. The Tribal leadership formed CERT for two fundamental reasons: to reestablish Tribal primacy over their energy resources; and to use their energy resources and the revenues and the energy from their development as well as the use of their lands for transportation corridors as a means for developing modern, stable self-governing Tribal economies. In short the Tribes were determined to protect, manage and develop their energy resources in ways that promoted their economic interests and conformed to each Tribe's own values and priorities.

The Tribes worked for legislative reform to bring the administration of Indian trust energy subsurface and surface resources into the era of Indian Self Determination and to end federal domination not only of decisions but of information on the quantity, quality and value of Tribal energy resources through the development of Tribal capacity to manage their own resources within the framework of the federal trust and to decide on the development of those resources through direct negotiations with energy companies. Concurrently, the Tribal leadership sought reform of the system of monitoring of energy mineral production and accounting for revenues from royalties, rentals and rights-of-way. Their cause was greatly aided by the report of the blue ribbon Linowitz Commission report that documented systemic underpayments by companies on both Tribal and federal mineral leases due to inadequate federal oversight of both production and collection of monies. The energy Tribes also sought better treatment as general purpose governments for purposes of the Internal Revenue Code.

In late 1982, the Tribes achieved all three objectives with the passage of the *Indian Mineral Development Act* of 1982, the *Federal Oil and Gas Royalty Management Act* and the *Indian Tax Status Act*. In addition the Supreme Court affirmed Tribal status as distinct political communities with inherent governmental powers in two Tribal tax cases. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, (1982), the Court affirmed the Tribes' right to tax the companies that operated within their political boundaries. Since the Jicarilla Apache Tribe is organized under the 1934 IRA the second case involved the Navajo Nation that governs without a constitution under inherent sovereignty. The Navajo Nation was imposing taxes on energy companies within its jurisdiction and Kerr-McGee took its challenge to the Supreme Court. The Court affirmed the Navajo Nation's right to tax based on its inherent sovereignty. *Kerr-McGee v. Navajo Nation*, 471 U.S. 195 (1985) In a third case brought by Cotton Petroleum against the state of New Mexico, *Cotton Petroleum Corporation et al. v. New Mexico et al.*, 490 U.S. 163 (1989) to challenge the state tax authority within Tribal political jurisdiction the Court ruled in favor of the state. The upshot is that Indian mineral production was more highly taxed than production from federal, state and privately held lands.

The energy Tribes were also greatly affected by the environmental impacts that energy mineral extraction had on their social and natural environments. Neither the Department of Interior nor the Indian Health Service in the Department of Health, Education and Welfare (now Health and Human Services) accepted a mandate for environmental protection in Indian country. States did not have jurisdiction and had no power to regulate or enforce in Indian Country. And because the environmental statutes passed silent on protecting Indian lands and communities EPA was not empowered to do so. The energy Tribes worked with Congress to include Indian provisions in major environmental statutes as they came up for reauthorization. These acts acknowledged Tribal governmental status and provided for Tribes to be treated as states in the delegation of enforcement authority. Indian Tribes developed significant environmental management and protection capacity through the EPA Indian program as a complement to EPA enforcement and some Tribes have been accorded treatment as state ("TAS") status.

The legislative acts along with the Supreme Court decisions changed the law and policy surrounding Indian energy but more importantly they changed the psychology of Indian energy. No longer would Tribes acquiesce to being dominated either by a trustee they had learned to distrust nor by companies whose economic interests were up to then framed as adverse to the Tribal interests. The Tribes embarked on efforts to upgrade the performance of their federal trustee who they felt was an important partner with them in their quest for economic and social progress as self governing Indian Tribes. Tribes also began working with industry to create a new era of partnership where in their economic interests would more closely align.

At this same time, major interstate pipelines built through Indian country in the late 1950's and 1960's with 20 year terms began to expire. These pipelines were built in the era of federal control of the resources and of the information needed for sound decisions. Tribal councils approved the rights-of-way

on the recommendations of the Department of Interior as trustee for Indian Tribal trust lands and resources. But Tribes quickly realized that their trustee used methods of valuation that ignored their strategic locations astride these major transportation corridors and thereby greatly undervalued the economic benefits that Tribal approval of a right-of-way bestowed on the value of the pipeline.

CERT worked with the Tribes and brought in new methodologies for calculating the value of Tribal rights-of-way. Through negotiations, the Tribes used these new methods and obtained fair compensation for the use of their lands to transport energy to distant markets. These new agreements based on new valuation methods were accepted by both federal and state regulators, as at that time the markets were controlled by energy monopolies under governmental regulation. Tribes did not seek to stop interstate energy commerce; rather, they sought equity in their relationship to it. They also understand the value of transmission and its importance to the generation of electric power which Indian coal supported; and they understand the value of interstate pipelines to the production and marketing of their natural and coal bed methane gas.

The energy Tribes expected to benefit from what all experts were predicting a stable and rising marketplace. But the markets collapsed in the mid 1980's driving many companies out of business and causing great disruption in the stability of the markets. The fall of the markets forced Tribes like other jurisdictions to adjust to new realities. Tribes also found that the reforms of this era did not open the doors of the world's largest energy market, America. Their entries were constrained by the Department of Interior's role in approving agreements between Tribes and industry and in conducting the environmental impact statements required by the federal environmental review process. It was determined that the Secretary's approval of Indian energy agreements to develop Indian resources constituted a significant federal action.

Meanwhile, Indian policy moved from Indian Self Determination, wherein Tribes could upon their election contract federal services and programs and operate them with Tribal employees, to a new era of Tribal Self Governance Compacts. These compacts elevated the relationship from a contractor status to a government-to-government negotiated agreement between the federal government and a Tribe for the delivery of federal services to Indians because of their status as Indians. This combined with the EPA's program of developing Tribal environmental capacity to be treated as states has had the effect of strengthening the self governing capacity of Tribes. And, they have greatly increased the governmental responsibilities of Tribes.

But the Tribal objectives were still substantially inhibited by antiquated policies. Indian energy mineral leases entered into before the *Indian Mineral Development Act of '82* are held by production without an opportunity for new economic arrangements. The intrusion of states and their political subdivisions into the Tribal tax base greatly diminishes Tribes' ability to raise revenues to fulfill their governmental obligations. The Indian Tribes' tax status is significantly less than that of states and their political subdivisions which greatly constrains the Tribes' ability to develop economic infrastructure as creatively as other governments in the US. The old monopolistic nature of the energy markets locked many Tribes out of the opportunity to follow the energy value chain and engage in value added development. Tribes have had to turn to enterprise development and in accessing full value from third party use of Indian lands and resources to support the provision of essential governmental services which for an Indian Tribe includes directly creating employment opportunities in Tribal programs and enterprises. Now that the energy markets are being restructured to allow more open competition Tribes had renewed interest in further Indian energy reform that strengthened Tribal control and increased Tribal responsibilities.

THE ENERGY POLICY ACT OF 2005

The *Energy Policy Act of 2005* (“EPAAct”, Pub.L.109-58) was signed into law by President Bush on August 8, 2005, after many years of deliberation in Congress. EPAAct is an 18-title, 1,700 page statute covering the full range of energy issues including renewable and non-renewable energy, nuclear and hydro power, research and development, tax incentives, various studies, and a number of other matters.

Title V of the EPAAct is the *Indian Tribal Energy Development and Self Determination Act* and authorizes financial incentives, technical assistance, and regulatory relief to Indian Tribes that want to develop energy resources on Tribal lands.

Philosophically, Title V is grounded in the successful federal policy of Indian Self Determination, first articulated by President Nixon in his *Special Message to Congress on Indian Affairs* in July, 1970; the *Indian Self Determination and Education Assistance Act* (1975); the *Indian Mineral Development Act* (1982); the *Federal Oil and Gas Royalty Management Act* (1982); the *Tribal Self Governance Act*; and other federal laws and policies that recognize the critical importance of Tribal authority and decision-making regarding programs, services, and the allocation of resources in Indian Tribal communities.

Title V continues this clear trend in federal Indian law and policy and stresses Tribal governmental authority because the Tribes are the local governments best capable of making decisions that affect their citizens and because the record clearly demonstrates that when Tribes make the decisions, the resulting programs and services are tailored to local conditions, are better run, and produce a more rational allocation of resources.

Title 18 of the EPAAct is the “study title” and contains a number of congressionally-mandated studies. One of those studies is included as section 1813, entitled *Indian Land Rights of Way*. The section 1813 study was included in the EPAAct in lieu of language endorsed by some in the energy sector that would have authorized federal officials to intervene in negotiations between an energy interest and an Indian Tribe and condemn Tribal lands for rights-of-way for energy purposes. The rationale put forth for such a radical change in the law was the charge that “unreasonable demands” by Indian Tribes (in particular the Navajo Nation in its negotiations with El Paso Gas Corporation) were “threatening the energy security of the United States”.

SECTION 1813 AND THE RIGHT-OF-WAY STUDY

As a threshold matter, CERT rejects the fundamental premise underlying section 1813, namely that it is appropriate for the United States to unilaterally condemn Tribal lands for energy rights-of-way purposes.

¹ Emblematic of those advocating for the repeal of the Tribal consent requirement, in the March / April 2006 issue of *Right of Way* magazine, James Powers wrote that “[T]ribes deserve fair and adequate compensation for rights of way, but they should not be allowed to hold up energy companies, and ultimately the public, for everything they can get.” In light of recent news stories (“Chevron says record profits to fuel '06 expansion plan”, *San Francisco Chronicle*, April 27, 2006; “Committees Will Probe Oil Industry Tax Records”, *Washington Post*, April 27, 2006; “Second Thoughts in Congress on Oil Tax Breaks”, *The New York Times*, April 27, 2006; “Oil Firms Cast as Villains”, *The Los Angeles Times*, April 27, 2006; and “Firms Harvesting Energy From Public Land May Owe U.S.”, *Washington Post*, May 7, 2006, CERT finds it amusing that those in and representing the industry have trained their sights on Indian Tribes—not firms and others within the industry—as the culprit for causing current high prices of energy in the United States.

At least one of the oil and gas associations advocating statutory changes to the Tribal consent requirement has complained that “energy transporting pipelines and electric transmission companies lack clear federal authority to acquire Tribal rights-of-way that can override the consent requirement or level the negotiation field.”²

Advocates for statutory change have focused their attention on the ongoing negotiations between the Navajo Nation and El Paso Gas Corporation over the renewal of a right-of-way over Navajo land. At this writing, these negotiations are ongoing.

Nonetheless, and with no firm factual foundation, Congress included section 1813 in the EAct. That section lays the groundwork for Congress to ultimately remove the requirement for Tribal consent in future rights-of-way negotiations. The language of the study follows:

(a) STUDY.

(1) In General. The Secretary and the Secretary of the Interior (referred to in this section as the “Secretaries”) shall jointly conduct a study of issues regarding energy rights-of-way on Tribal land (as defined in section 2601 of the Energy Policy Act of 1992 (as amended by section 503)) (referred to in this section as “Tribal land”).

(2) Consultation. In conducting the study under paragraph (1), the Secretaries shall consult with Indian Tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers.

(b) REPORT. Not later than 1 year after the date of enactment of this Act, the Secretaries shall submit to Congress a report on the findings of the study, including

(1) an analysis of historic rates of compensation paid for energy rights-of-way on Tribal land;

(2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian Tribes for grants, expansions, and renewals of energy rights-of-way on Tribal land;

(3) 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; and

(4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on Tribal land.

The language of subsection (b)(2) is particularly troubling in that it mandates the Report to be produced by the Departments of Energy and Interior to include “(2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian Tribes for grants, expansions, and renewals of energy rights-of-way on Tribal land.”

² See March 8, 2005, Letter from Bob Gallagher, President, New Mexico Oil and Gas Association to the Honorable Pete V. Domenici, United States Senate.

The rights-of-way study included in Title 18 was not included in Title V (the Indian title) nor in any previous version of Title V of any provision, or the EAct enacted by the 109th Congress or in any energy bill in the previous Congress, and with good reason: as explained below, it flies in the face of Indian Tribal authority and self governance; the decision-making authority Indian Tribes have had over the use and disposal of their lands; and the rightful requirement that Tribal government consent has played in Tribal land use decisions for decades.

On May 11, 2006, the Board of Directors of CERT considered and adopted the attached resolution addressing the study and report mandated by section 1813. With that resolution in mind, CERT urges that the study and subsequent report submitted to Congress be guided by in all respects by the attached "Tribal Principles to Govern the Section 1813 Right of Way Study". These principles are derived from the experience of Indian Tribal governments and their private sector partners, are reflective of the appropriate policy and legal standards governing the authority of Indian Tribal governments, and are consistent with the EAct and more specifically, the *Indian Tribal Energy Development and Self Determination Act of 2005*.

TRIBAL CONSENT IS A FUNDAMENTAL TRIBAL RIGHT

The power of Indian Tribes to prevent third parties from using Tribal lands without Tribal consent is a critical element of Tribal sovereignty that is well-established in Federal law and policy. The Tribal consent requirement to the use of Tribal lands must be honored and preserved. Accordingly, CERT opposes any change in Federal law or policy that would remove the requirement of Tribal consent over the disposition or use of their Tribal lands.

While the U.S. government has a longstanding policy of requiring Tribal consent as a condition to the Secretary granting rights-of-way over Indian lands to third parties, sadly, efforts to repeal the Tribal consent requirement in rights-of-way situations are not new.

In 1969, the House Committee on Government Operations issued a report entitled "Disposal of Rights in Indian Tribal Lands Without Tribal Consent" (H. Rpt. 91-78) that criticized the Interior Department's proposed regulation regarding rights-of-way over Tribal lands because it eliminated the requirement of Tribal consent for such grants.

The Committee concluded that "the proposal for granting rights-of-way over Tribal land without the consent of the Tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation", and further concluded that such an assertion of secretarial power --- over the objection of the relevant Tribes --- "is contrary to law, as well as to good government, and should not be entertained." Id. at 3.

With respect to rights-of-way, in 1948 Congress enacted a law that authorized the Secretary to "grant rights-of-way for all purposes ... over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian Tribes, communities, bands, or nations, or nations" 25 U.S.C. § 323. As the part of the same 1948 law, however, Congress prohibited the Secretary from granting any right-of-way over and across any land belonging to a Tribe organized under the IRA without the consent of "the proper Tribal officials." 25 U.S.C. § 324. That provision also requires, in certain circumstances, the consent of individual Indian landowners to rights-of-way across their respective lands. *Coast Indian Community v. United States*, 550 F.2d 639, 650 n.25 (Cl. Ct. 1977).

The Secretary has since promulgated regulations that go even further than the 1948 law in requiring Tribal consent. Those regulations unambiguously state that "[n]o right-of-way shall be granted over and across any Tribal land, nor shall any permission to survey be issued without the prior written consent of

the Tribe.” 25 C.F.R. § 169.3. This regulatory requirement requires the Secretary to seek the consent of *all* Indian Tribes, not just those Tribal governments organized under the IRA. Tribal consent to rights-of-way over Indian lands is a critical component to Tribal sovereignty that has its foundations in the United States’ most honorable policies toward American Indians. To weaken the Tribal consent requirement for grants of rights-of-way across Indian lands would be regress back to the flawed federal policies that gave rise to reforms like the IRA in the first place.

PRESIDENTIAL AFFIRMATIONS OF INDIAN SELF DETERMINATION

Since the late 1960s’ every Congress and President has re-affirmed the core principles of Indian Tribal self determination, Tribal decision-making, and Tribal economic growth and self-sufficiency.

Rejecting the tried, failed, and ultimately rejected policies of Termination and Assimilation, these affirmations began with President Johnson in 1968 with *American Indian – Message from the President of the United States, H. Doc. 272, 90th Cong. 2d Sess. 3-4 (1968)*, were formally expanded by President Nixon with his *Special Message to Congress on Indian Affairs*, 1970 Pub. Papers 564, 573; and continued through each and every successive President: *Annual Message to the Congress*, January 25, 1979 (Carter); *President’s Statement on Indian Policy*, 1983 Pub. Papers 96, (Reagan); *Statement by the President Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribes*, June 14, 1991 (George H.W. Bush); *Memorandum on Government-to-Government Relations With Native American Tribal Governments*, April 29, 1994, and *Executive Order 13,084 on Consultation and Coordination with Indian Tribal Governments*, May 14, 1998; and *Executive Order No. 13,175 Consultation and Coordination with Indian Tribal Governments*, November 6, 2000 (Clinton).

On April 30, 2004, President George W. Bush issued an *Executive Order on American Indian and Alaska Native Education* in which he committed the Administration “to continuing to work with these Federally recognized Tribal governments on a government-to-government basis, and supports Tribal sovereignty and self-determination”, on matters related to education. Similarly, on August 8, 2005, President Bush issued a proclamation celebrating the 35th anniversary of President Nixon’s *Special Message to Congress on Indian Affairs*, and affirmed that the Administration continues “to recognize the defining principles of Tribal sovereignty and the right to self determination.”

In addition to these Executive Orders and Presidential Proclamations, various federal agencies have issued their own “Indian Policy Statements”. Most recently, on January 20, 2006, Energy Secretary Samuel W. Bodman issued a *Memorandum for Heads of Departmental Elements*, in which he re-affirmed the department’s ongoing government-to-government relationship with Indian Tribes and specifically recognized that “the most important doctrine derived from this relationship is the trust responsibility of the United States to protect Tribal sovereignty and self-determination, Tribal lands, assets, resources and treaty and other federally recognized and reserved rights.” *Id.* At 1.

CONFLICT OF TITLE V vs. SECTION 1813

The spirit and intent of the right-of-way study contained in section 1813 could not be more at odds with the *Indian Tribal Energy Development and Self Determination Act*, enacted as Title V and the core Indian title of the EPAct. The statutory predecessors of Title V are many: the *Indian Mineral Leasing Act* (1938), the *Indian Education Assistance and Self Determination Act* (1975), the *Indian Mineral Development Act* (1982), the *Tribal Self Governance Act* (1994), the *Native American Housing Assistance and Self Determination Act* (1996), and others.

Title V creates a new “Office of Indian Energy Policy and Programs” at the U.S. Department of Energy; authorizes the Secretary of Interior to assist Tribes in enhancing their capacity to develop and manage

their energy resources; and authorizes grants, loans, and loan guarantees to Tribes for the full variety of renewable and non-renewable energy resource development. Title V's most striking feature is a new Tribal lands lease negotiation regime whereby Tribes can negotiate and enter leases, business arrangements for energy exploration, extraction, processing, or development of energy on Tribal land including rights-of-way, and can do these things without the approval of the Secretary of Interior. Freeing Tribes from direct federal control over the use of their lands and resources is directly in tune with the policies of the last 30 years to bring about a significant improvement in every aspect of life in Indian communities. Title V rests on a foundation of Tribal authority and decision-making and, quite properly, authorizes Indian Tribes to negotiate and enter leases and business arrangements as they see fit, rather than as the federal government sees fit.

Section 1813, on the other hand, posits a new legal regime under which the U.S. would involve itself not only in what has heretofore been a private negotiation between a private concern and an Indian Tribal government, but would have the federal government make decisions as to the value and use of Tribal lands.

CONCLUSION

For all of the reasons cited above, and because to do anything other than retain Tribal consent would be "contrary to law...and good government", CERT strongly urges the agencies to draft the report mandated by section 1813 in a manner consistent with the laws, regulations, and policies cited herein.

Sincerely,



Chris Devers, Chairman
Council of Energy Resource Tribes; and
Tribal Chairman, Pauma Band of Mission Indians

Council of Energy Resource Tribes
Resolution No. 06-01
Concerning the Joint Study Conducted by the Federal Departments of Energy and Interior Regarding
Rights-of-Way Across Tribal Lands for Energy Purposes

WHEREAS, the Council of Energy Resource Tribes (CERT) is a Tribal organization composed of 53 federally recognized Indian Tribes, collectively representing over one-half of all reservation lands and American Indians in the contiguous 48 states, four affiliate members of Canadian Indian First Nations and governed by a Board of Directors composed of the principal elected official of each member Tribe; and

WHEREAS, under Article III of its Articles of Incorporation the member Tribes maintain the CERT organization, among other things, to provide coordination of services, technical assistance, information and policy assessment services for the member Tribes; and

WHEREAS, on August 8, 2005, President Bush signed into law the *Energy Policy Act of 2005* (Pub. L. 109-58) which contains a stand-alone Title V, the *Indian Tribal Energy Development and Self Determination Act* to assist and encourage Indian tribes to better manage the development of energy resources on their lands;

WHEREAS, the Council of Energy Resource Tribes and hundreds of Indian tribes across the nation worked diligently to get the Congress to adopt the *Indian Tribal Energy Development and Self Determination Act* because it rests on the solid foundation of Indian Tribal Self Determination;

WHEREAS, section 1813 of the *Energy Policy Act of 2005* directs the Secretaries of Energy and Interior to "jointly conduct a study of issues regarding energy rights of way on tribal land" in consultation with Indian tribes and other parties;

WHEREAS, the Council of Energy Resource Tribes strenuously disagrees with the fundamental premise underlying section 1813, and does not believe that the unilateral condemnation by the United States of tribal lands for energy rights-of-way purposes is appropriate for any reason;

WHEREAS, American Indian tribes have a long and constructive history of working with the public and private sector in developing tribally owned energy resources;

WHEREAS, at no time in the history of the U.S. has any action by any Indian tribe undermined the flow of energy product to the American consumer;

WHEREAS, the end costs of transmission of energy product to consumers has not been shown to have fluctuated because of costs associated by ROWs on Indian lands;

WHEREAS, the power of Indian tribes to prevent third parties from using tribal lands without tribal consent is a critical element of tribal sovereignty that is well-established in Federal law and policy and the tribal consent requirement for the use of tribal lands should be honored and preserved.

NOW THEREFORE BE IT RESOLVED that the Council of Energy Resource Tribes opposes any change in Federal law or policy that would remove the requirement of tribal consent over the disposition or use of their tribal lands;

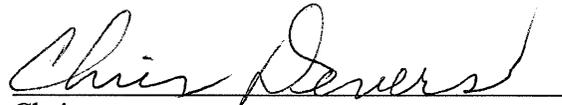
BE IT FURTHER RESOLVED that the Council of Energy Resource Tribes strongly urges the Congress to refrain from changing Federal law and policy to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.

BE IT FURTHER RESOLVED that the Council of Energy Resource Tribes urges that in lieu of command and control governmental solutions to a problem that does not exist with regard to rights-of-way across tribal lands, and consistent with the provisions of the *Indian Tribal Energy Development and Self Determination Act*, 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;

BE IT FINALLY RESOLVED that the Council of Energy Resources Tribes urges that as reflected in the *Indian Tribal Energy Development and Self Determination Act*, deference to tribal decision-making and free market principles should remain a fundamental component of Federal Indian law and policy and the nation's long-term energy plan.

CERTIFICATE

The undersigned Chairman and Secretary of the Council of Energy Resource Tribes certify that the foregoing resolution was adopted by the said Council at a meeting duly called and held on the 12th day of May 2006 at which a quorum was present.


Chairman


Asst. Secretary



Executive Committee

Chairman

Chris Devers (Pauma), Pauma
Valley, CA

Vice Chairman

Salish Kootenai, Pablo, MT

Secretary

Southern Ute, Ignacio, CO

Treasurer

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Acoma Pueblo, Acomita, NM
Chippewa Cree, Box Elder, MT
Fort Berthold, New Town, ND
Fort Mojave, Needles, CA
Osage, Pawhuska, OK

Oglala Sioux, Pine Ridge, SD
Pawnee, Pawnee, OK
Penobscot, Old Town, ME
Picuris Pueblo, Penasco, NM
Ponca, Ponca City, OK
Laguna Pueblo, Laguna, NM
Rosebud Sioux, Rosebud, SD
Round Valley, Covelo, CA
Saginaw Chippewa, Mt. Pleasant, MI
St. Regis Mohawk, Hogansburg, NY
Santa Ana Pueblo, Bernalillo, NM
Standing Rock Sioux, Fort Yates, ND
Tule River, Porterville, CA
Turtle Mountain Chippewa, Belcourt,
ND

Umatilla, Pendleton, OR
Ute Mountain Ute, Towaoc, CO
Walker River Paiute, Schurz, NV
Yakama, Toppenish, WA
Zia Pueblo, Zia Pueblo, NM

Board of Directors

Blackfeet, Browning, MT
Cherokee Nation, Tahlequah, OK
Cheyenne Arapaho, Concho, OK
Cheyenne River Sioux, Eagle Butte, SD
Crow, Crow Agency, MT
Eastern Shoshone, Fort Washakie, WY
Fort Belknap, Harlem, MT
Fort Hall, Fort Hall, ID
Fort Peck, Poplar, MT
Fort Sill, Apache, OK
The Hopi Tribe, Kykotsmovi, AZ
Hualapai, Peach Spring, AZ
Iowa, Perkins, OK
Jemez Pueblo, Jemez Pueblo, NM
Jicarilla, Dulce, NM
Kaibab Paiute, Fredonia, AZ
Lummi, Bellingham, WA
Morongo, Cabazon, CA
Muckleshoot, Auburn, WA
Navajo, Window Rock, AZ
Nez Perce, Lapwai, ID
Northern Cheyenne, Lama Deer, MT
Northern Ute, Fort Duchesne, UT
Ohkay Owingeh, San Juan Pueblo, NM

TRIBAL PRINCIPLES TO GOVERN THE SECTION 1813 RIGHTS-OF-WAY STUDY

May 15, 2006

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.
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.
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.
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.



THE WHITE HOUSE

WASHINGTON

July 8, 2005

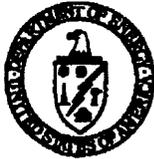
I send greetings to those celebrating the 35th anniversary of President Richard Nixon's special message to Congress on Indian Affairs.

On this day, we pay tribute to the courage and determination of Native Americans. The enduring experiences of the first people to call our country home are central to the American story. These tribal communities uphold the great traditions and values of their ancestors, and their contributions have helped shape our culture and national character. My Administration remains committed to honoring the proud legacy of Native Americans by continuing to recognize the defining principles of tribal sovereignty and the right to self-determination.

I appreciate all those who have helped foster greater understanding among all Americans and celebrate the ancient, noble, and vibrant history of American Indian and Alaska Native tribes. Your efforts reflect the spirit of our Nation and contribute to the diversity that makes our country strong.

Laura and I send our best wishes on this special occasion.

A handwritten signature in black ink, appearing to read "Barack" or similar, written in a cursive style.



The Secretary of Energy
Washington, DC 20585

January 20, 2006

MEMORANDUM FOR HEADS OF DEPARTMENTAL ELEMENTS

FROM: SAMUEL W. BODMAN *Samuel W. Bodman*
SUBJECT: DOE American Indian and Alaska Natives Tribal
Government Policy

I am committed to ensuring that the Department of Energy (DOE) meets its responsibilities to Indian Nations and works in a consistent manner with the government-to-government relationships between federally recognized tribes and the U.S. Government.

The attached American Indian and Alaska Natives Tribal Government Policy reaffirms that commitment and outlines the principles for the Department to follow. I am modifying this existing policy to provide for "periodic" summits.

I request that you be responsive to the Department's policy and look for ways to improve its implementation in order to ensure that all employees are aware of this Policy and its provisions. Tribal participation is frequently critical to DOE's decision-making processes.

If further guidance is needed, or if you have suggestions to improve the current policy, please contact Mr. Eric Ciliberti, Deputy Assistant Secretary for Intergovernmental Affairs, Office of Congressional and Intergovernmental Affairs, at (202) 586-4220.

Attachment



U.S. DEPARTMENT OF ENERGY AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY

PURPOSE

This Policy sets forth the principles to be followed by the Department of Energy (DOE) to ensure an effective implementation of a government to government relationship with American Indian and Alaska Native tribal governments. This Policy is based on the United States Constitution, treaties, Supreme Court decisions, Executive Orders, statutes, existing federal policies, tribal laws, and the dynamic political relationship between Indian nations and the Federal government.¹ The most important doctrine derived from this relationship is the trust responsibility of the United States to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federally recognized and reserved rights. This Policy provides direction to all Departmental officials, staff, and contractors regarding fulfillment of trust obligations and other responsibilities arising from Departmental actions which may potentially impact American Indian and Alaska Native traditional, cultural and religious values and practices; natural resources; treaty and other federally recognized and reserved rights.

BACKGROUND

Indian nations are sovereign with unique political and legal standing derived from a longstanding relationship as stated in the Purpose section of this document. The Indian nations retain an inherent right to self-governmental authority, and, therefore, Federal activities affecting self-governance rights and impacting upon trust resources require policy implementation in a knowledgeable and sensitive manner protective of tribal sovereignty and trust resources. The DOE released its Indian Policy in 1992 and subsequently issued DOE Order 1230.2 that established the responsibilities and roles of the DOE management in carrying out its policy. At the request of Indian nations in 1998, the Secretary of Energy agreed to revise the 1992 American Indian Policy and effect comprehensive implementation. This revision was based in part on comments from Indian nations and their leadership and replaces the 1992 Policy that is part of the 1992 Order.

DEFINITIONS

Indian Nation means any American Indian or Alaska Native Tribe, Band, Nation, Pueblo, or other organized group or community, including any Alaska Native village [as defined or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)], which is acknowledged by the Federal government to constitute a tribe with a government to government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for indigenous peoples because of their status as American Indian and Alaska Native tribes, Bands, Nations, Pueblos or communities.

American Indian and Alaska Native Tribal Government means the recognized government of an Indian nation and any affiliated or component band government of such nation that has been determined eligible for specific services by Congress or officially recognized in 25 CFR Part 83, "Indian Entities Recognized and Eligible to

Receive Services from the United States Bureau of Indian Affairs," as printed in the Federal Register.

Trust Responsibility includes, but is not limited to: promotion and protection of tribal treaty rights, federally recognized reserved rights, and other federally recognized interests of the beneficiary American Indian and Alaska Native nations; determining, documenting, notifying, and interacting with tribal governments with regard to the impact of Departmental programs, policies, and regulations to protect American Indian and Alaska Native traditional and cultural lifeways, natural resources, treaty and other federally recognized and reserved rights.

Consultation includes, but is not limited to: prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship.

Cultural Resources include, but are not limited to: archaeological materials (artifacts) and sites dating to the prehistoric, historic, and ethnohistoric periods that are located on the ground surface or are buried beneath it; natural resources, sacred objects, and sacred sites that have importance for American Indian and Alaska Native peoples; resources that the American Indian and Alaska Native nations regard as supportive to their cultural and traditional lifeways.

Treaty and Trust Resources and Resource Interests include, but are not limited to: natural and other resources specified and implicit in treaties, statutes, and agreements, or lands or other resources held in trust by the United States for the benefit of tribes or individual Indian beneficiaries, including land, water, timber, fish, plants, animals, and minerals. In many instances, Indian nations retain hunting, fishing, and gathering rights, and access to these areas and resources on lands or waters that are outside of tribally-owned lands.

POLICY PRINCIPLES

I. DOE RECOGNIZES THE FEDERAL TRUST RELATIONSHIP AND WILL FULFILL ITS TRUST RESPONSIBILITIES TO AMERICAN INDIAN AND ALASKA NATIVE NATIONS.

The DOE will be diligent in fulfilling its federal trust obligations to American Indian and Alaska Native governments in policy implementation and program management activities. The DOE will pursue actions that uphold treaty and other federally recognized and reserved rights of the Indian nations and peoples. The Department recognizes that some Tribes have treaty-protected and other federally recognized rights to resources and

resource interests located within reservation boundaries, aboriginal territories, and outside reservation and jurisdictional boundaries, and will, to the extent of its authority, protect and promote these treaty and trust resources and resource interests, and related concerns in these areas.

When internal policies, regulations, and statutes, or other barriers prohibit or hinder the DOE trust protection actions or participation in eligible program initiatives, the Secretary will direct the agency to seek corrective protection measures, and tribal government program inclusion.

The DOE is committed to protecting treaty compliance and trust interests of Indian nations during interactions with state and local governments and other stakeholders with regard to DOE actions impacting upon American Indian and Alaska Native governments and peoples. The Department will inform and educate state and local governmental entities and other stakeholders about the DOE's role and responsibilities regarding its trust relationship with Indian nations.

The DOE will seek to determine the impacts of Departmental- proposed legislation upon Indian nations, in extensive consultation and collaboration with tribes. The Secretary will implement this notice and consultation effort consistent with the intent and purpose of this Policy.

II. THE DEPARTMENT RECOGNIZES AND COMMITS TO A GOVERNMENT TO GOVERNMENT RELATIONSHIP AND WILL INSTITUTE APPROPRIATE PROTOCOLS AND PROCEDURES FOR PROGRAM AND POLICY IMPLEMENTATION.

The DOE recognizes Tribal governments as sovereign entities with primary authority and responsibility for the protection of the health, safety and welfare of their citizens. The Department will recognize the right of each Indian nation to set its own priorities and goals in developing, protecting, and managing its natural and cultural resources. This recognition includes separate and distinct authorities that are independent of state governments.

The Department, in keeping with the principle of self-governance, recognizes American Indian and Alaska Native governments as necessary and appropriate non-Federal parties in the federal decision-making process regarding actions potentially impacting Indian country energy resources, environments, and the health and welfare of the citizens of Indian nations. The DOE will establish protocols for communication between tribal leaders, the Secretary, and federal officials. The DOE will ensure consistent application of program and policy implementation with Indian nations through periodic review, assessment, and collaboration with tribal representatives to audit protocol systems. Principles of consistent policy implementation will be tempered with consideration of the diverse cultures and ideals of the Indian nations.

III. THE DEPARTMENT WILL ESTABLISH MECHANISMS FOR OUTREACH, NOTICE, AND CONSULTATION, AND ENSURE INTEGRATION OF INDIAN NATIONS INTO DECISION-MAKING PROCESSES.

To ensure protection and exercise of tribal treaty and other federally recognized rights, the DOE will implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes, including appropriate fiscal year budget matters. This effort will include timely notice to all potentially impacted Indian nations in the early planning stages of the decision-making process, including predraft consultation, in the development of regulatory policies on matters that significantly or uniquely affect their communities. As appropriate, the DOE will provide delivery of technical and financial assistance related to DOE-initiated regulatory policy, identifying programmatic impacts, and determining the significance of the impact. The DOE will continue to conduct a dialogue with Indian nations for long and short term decision-making when DOE actions impact Indian nations. The DOE will comply with the Consultation and Coordination With Indian Tribal Governments Executive Order 13084, May 14, 1998, and the Government to Government Relations With Native American Tribal Governments Executive Memorandum, April 29, 1994.

The DOE will implement permanent workshops and programs for field and headquarters staff on American Indian and Alaska Native cultural awareness and tribal governance.

Due to the nature of the trust responsibility to tribal governments, performance reviews of consultation activities will be conducted, in collaboration with tribal governments.

IV. DEPARTMENT-WIDE COMPLIANCE WITH APPLICABLE FEDERAL CULTURAL RESOURCE PROTECTION AND OTHER LAWS AND EXECUTIVE ORDERS WILL ASSIST IN PRESERVATION AND PROTECTION OF HISTORIC AND CULTURAL SITES AND TRADITIONAL RELIGIOUS PRACTICES.

The Department will consult with any American Indian or Alaska Native tribal government with regard to any property to which that tribe attaches religious or cultural importance which might be affected by a DOE action. With regard to actions by DOE in areas not under DOE control or when an action of another federal agency takes place on DOE land, DOE will consult with tribes in accordance with this Policy. Such consultation will include tribal involvement in identifying and evaluating cultural resources including traditional cultural properties; facilitating tribal involvement in determining and managing adverse effects; collaboration in the development and signing of memoranda of understanding with DOE, when appropriate.

Departmental consultation will include the prompt exchange of information regarding identification, evaluation and protection of cultural resources. To the extent allowed by law, consultation will defer to tribal policies on confidentiality and management of cultural resources. Consultation will include matters regarding location and management methodology; repatriation and other disposition of objects and human remains; access to

sacred areas and traditional resources located on DOE lands, consistent with safety and national security considerations; and cultural resources impact assessment of potential loss to tribal communities.

The DOE will comply with current and forthcoming cultural resource protection laws and Executive Orders including Native American Graves Protection and Repatriation Act; Archaeological Resources Protection Act; American Indian Religious Freedom Act; National Historic Preservation Act; National Environmental Policy Act; Freedom of Information Act; Privacy Act; Indian Sacred Sites Executive Order 13007, May 24, 1996; Consultation and Coordination With Indian Tribal Governments Executive Order 13084, May 14, 1998; Government to Government Relations With Native American Tribal Governments Executive Memorandum, April 29, 1994; Tribal Colleges and Universities Executive Order 13021; Executive Order 12898 on Environmental Justice.

V. THE DEPARTMENT WILL INITIATE A COORDINATED DEPARTMENT-WIDE EFFORT FOR TECHNICAL ASSISTANCE, BUSINESS AND ECONOMIC SELF-DETERMINATION DEVELOPMENT OPPORTUNITIES, EDUCATION, AND TRAINING PROGRAMS.

The Department will implement a consistent national outreach and communication effort to inform tribal leaders and tribal program officials about access to internships and scholarships; availability of technical assistance and training opportunities; conventional and renewable energy development programs; related tribal business and individual member business enterprise, service-provider, and contracting opportunities.

The DOE recognizes the need for direct funding and technical assistance from applicable DOE-sponsored programs within the Department and the National Laboratories which deal with regulation, energy planning, and development of energy resources on tribal lands and Alaska Native site-controlled and trust lands.

The Department will provide information and outreach programs to tribal and individual member businesses on opportunities to participate, compete, and participate in renewable and conventional energy generation, transmission, distribution, marketing and energy services, grants, and contracts. The Department will assist in development of balanced, sustainable, and viable American Indian and Alaska Native communities by continuing to implement Title XXVI, Indian Energy Resources, of the National Energy Policy Act that provides for the promotion of resource development and energy integration.

The Secretary will create programs that encourage and support the establishment of federal, private, tribal and intertribal partnerships. The Department will provide assistance and coordinate with other federal agencies in the development of energy-related projects.

VI. THE SECRETARY OF ENERGY WILL CONDUCT PERIODIC SUMMITS WITH TRIBAL LEADERS FOR PERFORMANCE REVIEW OF POLICY IMPLEMENTATION AND ISSUE RESOLUTION.

The Secretary will engage tribal leaders in periodic dialogue, to discuss the Department's implementation of the American Indian and Alaska Native Policy. The dialogue will provide an opportunity for tribal leaders to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

VII. THE DEPARTMENT WILL WORK WITH OTHER FEDERAL AGENCIES, AND STATE AGENCIES, THAT HAVE RELATED RESPONSIBILITIES AND RELATIONSHIPS TO OUR RESPECTIVE ORGANIZATIONS AS THEY RELATE TO TRIBAL MATTERS.

The DOE will seek and promote cooperation with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The DOE will encourage early communication and cooperation among all governmental and non-federal parties regarding actions potentially affecting Indian nations. The DOE will promote interagency and interdepartmental coordination and cooperation to assist tribal governments in resolving issues requiring mutual effort.

January 2006

¹ This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights. Nothing herein shall be interpreted as amending or changing current DOE orders and guidance regarding classified information, including need to know.