

PUEBLO OF SANTA ANA

May 15, 2006

Via e-mail: IEED@bia.edu

Section 1813 Right-of-Way Study
Office of Energy and Economic Development
1849 C Street, N.W.
Mail Stop 2749-MIB
Washington, D.C. 20240

Re: Comments of the Pueblo of Santa Ana on Section 1813 Study of "Energy Rights-of-Way on Tribal Land"

Dear Study Team:

We are writing on behalf of the Pueblo of Santa Ana ("Santa Ana"), a federally recognized Pueblo Indian tribe situated in Sandoval County, New Mexico, to submit comments on the study mandated by Section 1813 of the Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XVIII, 119 Stat. 594, 1127-28 ("the Act"). That section directed the Secretaries of Energy and the Interior to conduct a study, by one year from the date of enactment of the Act, that examines (1) "historic rates of compensation paid for energy rights-of-way on tribal land," (2) "appropriate standards for determining fair and appropriate compensation" for such rights-of-way, (3) "tribal self-determination and sovereignty interests implicated by applications" for such rights-of-way, and (4) "relevant national energy transportation policies" relative to such rights-of-way. Santa Ana is gravely concerned that the requirement for this study was inserted into the Act in response to the urging of El Paso Corporation ("El Paso") and the New Mexico Oil and Gas Association ("NMOGA") that Congress consider an amendment to the Act that would have allowed the Secretary of the Interior to grant pipeline and power line rights-of-way over tribal lands without tribal consent—in effect, creating a federal power of condemnation of tribal lands for the benefit of private petrochemical and power companies. While the bill's main sponsor, Sen. Pete Domenici of New Mexico, was unwilling to accept that proposal, his willingness to insert Section 1813 has created an unavoidable implication that the study might be the prelude—and the justification—for such a measure down the road. It is well known that El Paso and NMOGA decided to push for their proposed amendment to the Act because of El Paso's inability to reach a negotiated agreement with the Navajo Nation for a renewal of the rights-of-way for El Paso's 900 miles of pipeline on Navajo lands—essentially because El Paso has been unwilling to pay the Nation's price. Santa Ana wishes to express in the most emphatic terms its strong disagreement with the proposition that is implicit in Section 1813, that the status of current law, that requires tribal consent for a grant of any right-of-way across tribal lands, poses any kind of jeopardy to any legitimate "national energy policy," or that a few instances of hard

bargaining by tribes in major right-of-way transactions constitute grounds for reexamining the entire status of rights-of-way over tribal lands. Especially in these times of record energy prices and even higher energy company profits, and given the shoddy history of the United States' rapacious treatment of tribes and their lands and natural resources, it is at least mildly embarrassing that Congress would commandeer the resources of two executive agencies to conduct a study to see if tribes are being unfair in demanding what they consider to be reasonable compensation for the use of their lands, merely because one of the largest natural gas companies in the country (which reported profits in the first quarter of this year more than triple the level of a year ago) is feeling inconvenienced by its dealings with the Navajo (whose widespread poverty and lack of ordinary services and infrastructure is well documented). Nonetheless, our substantive comments follow.

1. **Historic Rates of Compensation for Energy Rights of Way On Tribal Lands**

Santa Ana is troubled that Interior has apparently decided not to do what the language of Section 1813 seems to call for, which is an examination of compensation paid for all energy rights of way granted on tribal lands, or at least of those exceeding some minimum size, but rather has decided to do selected "case studies," without explaining the methodology for selecting the cases or establishing that the methodology would meet any statistically sound standards. Whatever the selected cases might suggest, this approach is bound to be vulnerable to criticism by those on one side of this issue or the other, and may thus cause this portion of the study to be disregarded altogether by those for whom it is being performed (*i.e.*, Congress). We believe that a systematic study would demonstrate that, as has been true at Santa Ana, for most of the near-century that tribes have been seeing energy rights-of-way laid across their lands, those easements have been approved by the Bureau of Indian Affairs ("BIA") for relatively trivial levels of compensation,¹ and that only in recent years, when tribes have finally had the resources available to them to negotiate the deals themselves, have the levels of compensation begun to reflect the real value of these transactions. Indeed, we believe that the complaints of the companies, if they have any, are not that current right-of-way transactions with tribes are not fair, but just that the companies had it so much easier in the old days, when the Bureau would simply rubber stamp their applications, and send the tribe a form approval resolution for signature. We would note that the BIA's performance in this area has, on at least one occasion, been found by a federal court to constitute a breach of the government's trust responsibility to the tribe involved. *Coast Indian Community v. United States*, 213 Ct.Cl. 129, 550 F. 2d 639 (1977).

¹Though it did not directly involve a right-of-way, one is reminded of the huge Peabody coal lease that the Secretary approved in the mid-1960s between the Navajo and Hopi Tribes and what became Peabody Coal Co., for a 25 cent/ton royalty, less than the company was paying to the union pension fund.

Santa Ana has undertaken a review of pipeline and power line rights-of-way granted across its lands in the past half century, and while there is nothing scientific about this review, we believe that some of the results may be of interest. Santa Ana would first note that until the late 1970s, it had no regular legal counsel or other persons in a position to advise it on right-of-way matters, and few or no resources with which to retain such persons. It was thus virtually fully reliant on the personnel of the Bureau of Indian Affairs ("BIA") to advise it with respect to leases and rights-of-way of tribal lands. Santa Ana believes that as a direct result of that situation, rights-of-way on its lands granted before the late 1970s were approved for minimal compensation; since then, aided by competent counsel and other advisors, and with a more highly trained tribal staff, the Pueblo has been in a position to negotiate compensation arrangements more accurately reflecting the value that Santa Ana attaches to its lands, and the damage that these rights-of-way cause to Santa Ana's lands and its cultural and environmental resources. A few examples will reflect this. (Because some of this information remains confidential, we are setting forth compensation figures in terms of dollars per acre per year.)

- A. In 1953, the Bureau of Indian Affairs ("BIA") approved a 115 kV power line right-of-way over tribal land, for a 50-year term, for total compensation amounting to \$.33/acre/year. In 2003, the same right-of-way was renewed, for a 41-year term, for compensation that works out to about \$2709/acre/year. The land on which the power line is situated is now highly valuable commercial property, on which the Santa Ana Golf Club is situated.
- B. In 1979, Santa Ana agreed to a right-of-way for a new 345 kV power line over its lands, for a 50-year term, for compensation of about \$62.77/acre/year. In 1994, the company sought to renegotiate that right-of-way, to add an additional corridor for a new 115 kV line parallel to the existing line, and to renew the right-of-way for an existing 46 kV line on tribal land. Those negotiations resulted in a new 50-year right-of-way being granted, for compensation that works out to about \$774/acre/year.
- C. In 1960, the BIA obtained Santa Ana's approval for a right-of-way grant for a 3-inch gas line, for a 20-year term from 1957, and required no compensation whatever. That easement was renewed in 1977, for another 20-year term, for compensation amounting to about \$83.70/acre/year. (We believe the easement was renewed again in 1997, but we have been unable to locate the file.)
- D. In 1984, Santa Ana negotiated a right-of-way agreement for a 12-inch natural gas pipeline, for a 20-year term, for compensation amounting to about \$356.42/acre/year. The agreement included terms for an automatic renewal for an additional 20-year term, based on inflation. The renewal occurred in 2004, for compensation that came to approximately \$697.56/acre/year.

- E. In 1957, the BIA obtained Santa Ana's consent to a 60-foot-wide, 20-year right-of-way for a 16-inch oil or petroleum products pipeline, for compensation that amounted to about \$2.63/acre/year. In 1977 the company sought to renew the right-of-way for approximately twice the level of compensation, but the Pueblo insisted on negotiating a more reasonable figure. Finally, in 1980, the company agreed to compensation for a new 20-year term that worked out to approximately \$118.45/ acre/year. In 1997, the company agreed to a further renewal, for 10 years, for compensation amounting to approximately \$876.15/acre/year.
- F. In 1980, Santa Ana negotiated a 20-year right-of-way for a 30-inch gas pipeline for compensation amounting to \$143.65/acre/year. That agreement contained a provision for an automatic renewal for an additional 20-year term, for compensation based on the rate of inflation. The renewal, granted in 2000, was for compensation amounting to \$271.66/acre/year.
- G. In 1972, the BIA obtained Santa Ana's consent to a 50-year right-of-way for a gas pipeline across Santa Ana land. We have been unable to locate the file of that grant, but believe it was for a relatively small amount. In 1980, the company proposed to install a second, larger line in the same easement. Santa Ana negotiated a new agreement by which the company relinquished the former right-of-way, and paid compensation for a new 20-year term amounting to approximately \$121.57/acre/year. In 1995, the company sought permission to install a third pipeline. The Pueblo negotiated a new 20-year renewal of the entire easement, for compensation amounting to approximately \$609.43/acre/year.

These cases show, first, as suggested above, that in the early days, the BIA approved easements for pennies per acre per year. That was beginning to change in the mid-1970s, and as Santa Ana began handling the negotiations itself, by 1980, the per-acre-per-year compensation levels began to climb, though not precipitously. By the 1990s they had reached the level of \$600 to \$800/acre/year, which, as will be shown, is in line with real estate values in this area. The two anomalous figures that show up in this list—the 2003 renewal of a power line easement for \$2709/acre/year, and the 2000 renewal of a pipeline easement for \$272/acre/year, are explainable: the power line was a highly visible intrusion in the midst of a highly successful golf course, which warranted a higher than usual level of compensation. The pipeline renewal was pursuant to a formula that had been agreed to 20 years earlier. Importantly, the area around Santa Ana has been the scene of extraordinary development in the past 20 years, as the City of Rio Rancho, its growth fueled by the expansion of the huge Intel plant there, has pushed right to Santa Ana's borders. Land that was worth \$5000/acre 20 years ago today goes for \$75,000/acre and more. Annual lease rates are generally considered reasonable when they approximate about 10% of land's fair market value; Santa Ana submits that easement compensation that amounts to 1% to 3% of fair market value annually is by no means out of line, and in fact is probably substantially below what it reasonably might be.

In short, Santa Ana believes that the facts presented here show that negotiations for rights-of-way between wealthy energy companies and tribes not threatened with condemnation can and do yield fair and reasonable transactions, that cannot be said to reflect overreaching on the part of tribes. And notably, there has been no application for an energy right-of-way or renewal of any such right-of-way at Santa Ana that was not resolved satisfactorily among the parties within a reasonable time.

2. Standards for Compensation for Energy Rights-of-Way on Tribal Lands

The second point to be addressed by this study is one of the more troubling, because it strongly implies that rather than allow tribes to negotiate directly with private companies seeking to utilize their lands for profit-making activities, and to reach agreement on appropriate compensation, with the BIA merely checking to make sure that the result is at least consistent with fair market value, the United States should set the level of compensation according to someone's idea of an objective standard. This proposition runs roughshod over fundamental notions of tribal sovereignty and self-determination, and ignores the myriad individual factors that make each right-of-way application, and each negotiation, different. The only appropriate procedure for determining fair compensation for a particular right-of-way transaction on tribal land has to involve consultation with the tribe involved, and deferring to the tribe's concerns as to cultural and environmental issues, safety issues, alternative uses of the land, and what the deal is worth to the tribe, among others. (Safety and environmental concerns are not mere abstractions: just a few years ago, a petroleum pipeline sprang a leak on Santa Ana land, causing several thousand gallons of oil to spew all across the surface. The leak was ultimately cleaned up, but the prospect of other such events, especially considering the age of many of the facilities currently in place, must be viewed as real. Of even greater concern is the possibility of an event such as occurred several years ago in the southeastern portion of the state, when a leaking natural gas pipeline exploded, killing several members of a family picnicking nearby. Compensation levels must, to some extent, at least, take the possibility of such events into account.) But if consultation with the tribe, and deferring to its views, is—as it must be—the appropriate procedure, there can be no applicable objective standards. Each situation will have to be dealt with on its individual merits, and is best left to individual negotiations.

3. Tribal Self-Determination and Sovereignty Interests Affected by Energy Right-of-Way on Tribal Lands

We do not believe that there are any tribal self determination or sovereignty interests that are “implicated” by applications for grants or renewals of energy rights-of-way on tribal lands, as long as each tribe continues to have full authority to act on such applications in accordance with its own sense of its values, needs and prerogatives. The suggestion that the Secretary of the Interior ought to have some authority to override tribal prerogatives in order to secure a grant or renewal of a right-of-way for a private energy company, to spare that company the inconvenience of having to meet the tribe's requirements, however, profoundly implicates tribal

sovereignty and self-determination interests, in ways that are directly contrary to well established federal law and policy. The origin and current manifestations of that law and policy are well discussed in other comments that have been and will be submitted to the study, and we will not repeat them here. We would especially endorse, and adopt, the very able discussion set forth in the letter dated January 20, 2006, from Reid Chambers and others, on behalf of the Pueblo of Isleta, *et al.*, at pages 3 through 11. We would further note that although the requirement of tribal consent to rights-of-way, at least as to tribes that are not organized under the Indian Reorganization Act, such as Santa Ana, is only a matter of Interior Department regulation, not statute, we believe that it is now so firmly embedded in federal Indian law as to make any suggestion that it should be repealed or qualified look like an act of expropriation. Indeed, we have no doubt that any proposal by the Department to modify the rule would be challenged in court, and delayed for years, at least. If the Secretary could somehow survive the litigation gauntlet, and succeed in giving himself the power to condemn tribal lands for rights-of-way for the benefit of private energy companies, even if only under limited circumstances, moreover, there is little doubt that any attempt by the Secretary to exercise that power would be met with breach of trust litigation that would very likely further tie up the easements for years more, or perhaps indefinitely.

In short, the current state of the law, in which tribes effectively retain full authority over dispositions of any interests in their lands, is fully consistent with federal law and policy regarding tribal sovereignty and self-determination. Any intrusion of unilateral federal authority into that area, to spare energy companies the expense of having to meet tribal requirements, would raise major issues of federal law, and would run directly against the current of unvarying federal support for tribal self-determination.

4. Relevant National Energy Transportation Policies

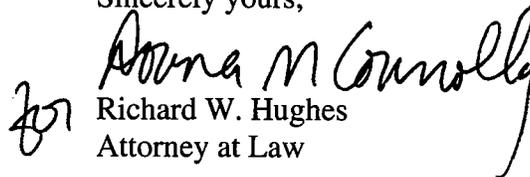
The fourth item to be considered by the study is puzzling, as it is very unclear what “national energy transportation policies” there are, if any, that relate in any relevant way to the topic of rights-of way on tribal land. No doubt, of course, the energy companies and their various lobbying groups will regale the study with horror stories of tribes wielding arbitrary and unreasonable power, threatening to rip out pipelines and power lines if their demands are not met, and thus jeopardizing the very integrity of our interstate pipeline and power line system and thus our national security, but any such rhetoric is nonsense. Tribes have no reason to force companies to pull out their pipelines or power lines, or otherwise to impede the flow of petroleum products, natural gas or electricity across their lands, because they recognize that those facilities can benefit them through well-crafted right-of-way transactions. But because tribes typically do not receive services from these facilities (*see* the Chambers letter of January 20, 2006, at pages 12 though 19, for an excellent survey showing the extraordinary extent to which tribal members are left out of the distribution of energy and telecommunications resources, not to mention such basics as water and sewer services), the primary benefit that they stand to gain from these facilities is the compensation payable for the right of the companies to

use tribal lands to support their highly profitable operations. Thus, notwithstanding the bluster from the energy companies, this whole issue is simply about money, not any threat to national energy security, and we are unaware of any national energy policy that favors protecting the riches of the oil and natural gas pipeline companies and power generators, at the expense of some of the poorest members of our society. Indeed, the bedrock national policy in favor of Indian tribal sovereignty and self determination, and the fiduciary responsibility of the United States to assure that tribes receive maximum return from the utilization of their resources, should strongly militate against any concern for the bulging bank accounts of the energy companies in their right-of-way negotiations with the tribes.

But if one were determined to find some relevant national energy transportation policy bearing on the issue of rights-of-way over tribal lands, one might start with the Energy Policy Act of 2005 itself. That Act, whose stated intent was to map the way to a secure and prosperous future for America's energy resources and infrastructure, contains within it an important substantive provision that must be viewed as setting forth an important statement of how Indian tribes are to be involved in helping to serve the nation's energy security. Title V of the Act, in a provision now codified at 25 U.S.C. § 3504, provides a means by which tribes may acquire significantly increased control over their lands and resources, and reach a point at which they can negotiate and enter into certain leases and rights-of-way involving energy resources with no federal oversight whatever. We suggest that this provision fully responds to point four of the study, in that it demonstrates that Congress believes that in many situations, at least, tribes should have full and untrammled ability to dispose of their lands and resources, or not to do so, as they see fit, and on such terms as they deem appropriate. We submit that the clear purpose of that provision cannot be reconciled with its opposite—the conferral on the Secretary of a power unilaterally to condemn tribal lands, without the consent of and against the wishes of the tribe, for the benefit of an energy company.

That concludes our comments. We hope that they have been helpful. Should you have any questions concerning any of the foregoing, please do not hesitate to call the undersigned.

Sincerely yours,


Richard W. Hughes
Attorney at Law

xc: Hon. Leonard Armijo, Governor
Lt. Gov. Bruce Sanchez