

January 20, 2006

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Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
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VIA EMAIL: IEED@bia.edu

***Re: Energy Rights of Way on Indian Lands; Draft Comments
Regarding Congressionally Mandated Study***

The Pueblo of Jemez, of the several Pueblo Indian tribes of New Mexico, hereby submits its comments by and through undersigned counsel regarding the study on energy related rights-of-way on tribal lands as required by Section 1813 of the Energy Policy Act of 2005 (Pub. L. 109-58). Section 1813 requires the Secretaries of Interior and Energy to conduct a study of four subjects related to:

- "1. An analysis of historical rates of compensation;
- "2. Recommendations for appropriate standards to determine fair and appropriate compensation;
- "3. An assessment of tribal self-determination and sovereignty interests implicated by applications for rights-of-way on tribal land; and
- "4. An analysis of relevant national energy transportation policies."

70 Fed.Reg. 249, 77178-77179 (Dec. 29, 2005).

A. Analysis of historical rates of compensation

1. The study should include an analysis of the historic underpayments to tribes for rights of way.

2. The Act states that a National Laboratory would be contracted to carry out the study regarding the historic rates of compensation for rights of way across tribal lands. The Secretaries and the National Laboratories

should take all steps to ensure the independence and objectivity of the study contractor. Under no circumstances should the Secretaries select a contractor "with adverse economic interests to the (Tribes) undertaking this study." National Congress of American Indians, "Section 1813 of the Energy Policy Act of 2005", Resolution #TUL-05-110 (Nov. 4, 2005).

B. Tribal self-determination and sovereignty interests implicated by applications for rights-of-way on tribal land

1. The Supreme Court has held that Indian tribes have the right to exclude others from their reservations (or other "Indian country" under the tribes' jurisdiction) as an exercise of the tribes' inherent sovereignty. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Pueblo would therefore oppose any proposed regulation that would limit, curtail or deny the Pueblo the existing right to approve rights of way per 25 C.F.R. §169.3(a): "No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe."

(a) On November 4, 2005, the National Congress of American Indians passed Resolution #TUL-05-110, which states that Section 1813 – although it expressly only authorizes a study – raises "the specter of the unilateral condemnation by the United States of tribal lands for purposes of facilitating energy rights of way". The Secretary should therefore refrain from developing any regulation or policy that would permit or facilitate the non-consensual taking of Indian lands to convey rights of way to any third party for transmission of energy or for any other purposes where the affected tribe or Pueblo does not consent to the grant of such rights of way.

(b) The right to refuse to accept placement of rights of way within tribal lands is especially critical with respect to protection of cultural resources and traditional cultural properties, or "sacred sites." The study should respect the interests of tribes and Pueblos with a preservationist philosophy as regards cultural resources and acknowledge that such sites are irreplaceable and that the loss or destruction of such sites cannot be compensated for with cash or other lands.

3. The study should analyze the effect of inserting language in existing or future right of way regulations stating that tribal jurisdiction within any grant of a right of way across tribal lands shall be reserved unless ceded by the tribe in express language to that effect and as approved by the Secretary of Interior. The study should analyze the effect of inserting language in existing or future right of way regulations stating that right of way grantees are deemed to be subject to the jurisdiction of the tribe within which lands that the right of way is located.

4. The study should analyze whether establishment of a uniform standard for "fair and adequate compensation" would conflict with the rights

of tribes to establish their own laws, regulations, policies, practices and procedures in Tribal Energy Resource Agreements with the Secretary of Interior per Title V of the Act.

C. Standards to determine fair and appropriate compensation

1. With respect to consideration paid for such rights of way, the Pueblo would oppose any proposed regulation that would limit, curtail or deny the Pueblo the existing right under 25 C.F.R. §169.12 to receive more than the fair market value for a right of way across tribal lands as consideration per negotiations between the Pueblo and the right of way grantee. (“ . . . the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate.”) 25 C.F.R. §169.12. Fair market value as determined by an appraisal should remain the minimum, not the maximum, amount that may be paid as consideration for a right of way across tribal lands. “Fair and adequate” consideration for energy rights of way should be analyzed from the tribal perspective and not merely from comparison with consideration paid to private landowners in the area.

2. Section 367 of the Act requires the Secretaries of Agriculture and Interior to revise the current right of way fee schedule to reflect current market rates for lands under their respective jurisdictions. Such rates should not be automatically applied in setting rates for consideration to be paid for energy rights of way across Indian lands, which would be contrary to 25 C.F.R. §169.12.

3. The study should recognize that in some instances that Indian tribes and tribal members are custodians of cultural resources and traditional cultural properties of profound importance to current and future generations. The study should state that some values and resources are priceless and that there is no adequate compensation for their loss. The premise that securing rights of way over Indian lands is merely a question of securing a property right from the grantee is therefore erroneous in such circumstances.

D. Analysis of relevant national energy transportation policies

Section 368 of the Act requires the Secretaries of Agriculture, Commerce, Defense, Energy, and Interior to designate “energy corridors” through public lands under their respective jurisdictions within two years. The premise that the Secretaries can conduct a study purporting to analyze “relevant national energy transportation policies” by August 2006 as required by Section 1813 is flawed because the Secretaries compelled to designate energy corridors on public lands within their respective jurisdictions under Section 368 of the Act will not be done with their work until 2007.

With respect to any such energy corridor that would abut, cross or run up to tribal lands, the Secretaries should also prepare plans for alternative corridors that would not require the use of tribal lands because tribes may not wish to have such energy corridors to be located on their lands. Such alternatives could be prepared as part of the environmental analysis (per the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.*, required by required by Sec. 368(a)(2) of the Act).

Although the Secretaries are operating on a very tight timeframe, the Secretaries are still obligated to consult with affected tribes on cultural resource issues per the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, and its implementing regulations at 36 C.F.R. Part 800. In particular, the Secretaries are required to make a “reasonable and good faith effort” determine whether cultural resources are present in the area of a proposed project (in this case, the energy corridors) and whether the proposed project would have an adverse affect on such sites. *See Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (failure of Forest Service to make required effort under NHPA was compounded by concealing information on cultural resources from state historic preservation officer).

Under *Pueblo of Sandia*, the action agencies must make more than a cursory inquiry as to the existence of cultural resources in the area of a proposed project. Nothing in Section 368 of the Act absolves the Secretaries of their duties under NHPA. The Pueblo was part of a consortium of tribes that opposed a proposed powerline across the Santa Fe National Forest near Los Alamos, New Mexico on cultural resource grounds. *See All Indian Pueblo Council v. United States*, 975 F.2d 1437 (10th Cir. 1992). The Pueblo is prepared to fight any proposed energy corridor on adjacent public lands that would have an adverse impact on its cultural resources.

The Pueblo looks forward to participating on the Section 1813 process to ensure that its sovereign and territorial interests and the interests of other tribes and Pueblos affected by the study are not compromised.

Respectfully submitted,

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