



# New Mexico Oil & Gas Association

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## STATEMENT OF BOB GALLAGHER, PRESIDENT NEW MEXICO OIL AND GAS ASSOCIATION SECTION 1813 ENERGY RIGHTS OF WAY ON TRIBAL LANDS HEARING DENVER, COLORADO APRIL 18, 2006

The New Mexico Oil and Gas Association was formed in 1929. Oil and natural gas exploration and production make up an important industry in New Mexico. An estimated 70% of homes in New Mexico are heated by natural gas. The industry directly employs more than 12,200 wage and salary workers in the state. These are well-paid jobs; New Mexico's natural resource and mining jobs pay 24.9 percent more than those in construction, 44.7 percent more than manufacturing and 56.6 percent more than finance. Source: Crossroads, Economic Trends in the Desert Southwest, Issue 1 2005, Federal Reserve Bank of Dallas.

Oil and natural gas are important to the state's finances as well. In 2000, for example, the oil and gas industry paid \$165.1 million to the state government in severance taxes, \$169.5 million in emergency school taxes, and \$34.6 million in conservation, equipment and other taxes. The combined \$369.2 million was 10.9 percent of state government revenues. In addition are various gross receipts, ad valorem and corporate taxes paid either to the state or other levels of government. Source: Crossroads, Economic Trends in the Desert Southwest, Issue 1 2005, Federal Reserve Bank of Dallas.

New Mexico ranks No. 5 in oil reserves, behind the federal offshore, Texas, Alaska and California. It is No. 4 in natural gas reserves, behind Texas, the federal offshore and Wyoming. The eastern part of the state—home to the Permian Basin—has 98.7 percent of the state's oil reserves, while the San Juan Basin in the west has 80 percent of the state's natural gas reserves. Source: Crossroads, Economic Trends in the Desert Southwest, Issue 1 2005, Federal Reserve Bank of Dallas.

The subject matter of this study is not just an issue that effects only one company or is localized to just one area. It is a real problem that has been growing over the last 20 years and is being experienced industry wide. Unreasonable tribal demands affect not only companies and consumers across the board but our vital national energy infrastructure across the country.

The New Mexico Oil and Gas Association (NMOGA) supports the existence of Native American governments and tribal sovereignty within our federal system and our many members value their relationship with the tribal governments and tribal communities where they do business. Our members also, however, have a responsibility to their customers to secure reliable transportation at a reasonable cost for the energy those customers need. We also recognize the critical need for a reliable, secure and cost-effective national energy transportation infrastructure. Nationwide energy transportation networks are increasingly important, as our energy distribution systems have facilitated the development of nationwide markets for natural gas, electric power, and other energy commodities. Our ability to move energy efficiently is essential to our national energy security. We now call your attention to the serious problems posed by the present law applicable to rights-of-way across tribal lands and call on both Departments to report back to Congress a recommendation for a public policy outcome and standard that is certain, objective, consistent, transparent, accountable and uniform for valuing rights-of-way across tribal lands.

The Tribal Consent Requirement Impedes Energy Transportation:

Under the General Right of Way Act of 1948, 25 U.S.C. §§ 322-325, Congress provided that certain Indian tribes, Pueblos, and other Native American groups must consent to the grant of rights-of-way across tribal trust or restricted lands before the Secretary of the Interior may issue a right-of-way grant across those lands. A copy of pertinent portions of the 1948 Act, that includes our proposed revision to include a new Section 324a, is attached as Appendix A. By regulation, the Department of the Interior broadened the consent requirement to apply to all federally recognized tribes. Recently, the Department and various Indian tribes or groups have interpreted the consent requirement to justify a tribe's imposing virtually any condition on the grant of tribal consent. In practice, those conditions have included:

1. Compensation averaging over ten times, and sometimes over one hundred times, that paid for rights-of-way across comparable private or federal lands.
2. Demands calculated based on what the tribe perceives it would cost the company to build new facilities around tribal lands, less some small percentage.
3. Utilizing the consent requirement to extract harsh concessions, including the forced sale of a company's assets tied to expiring rights-of-way at distress sales prices, because those rights-of-way cannot be renewed without tribal consent.

The imposition or negotiation of such conditions at the time of the original right-of-way application presents an impediment to the national movement of energy products to consumers and, when applied to local rights-of-way, hinders delivery of retail gas and electricity to tribal members. When rights-of-way are not perpetual and come up for renewal, tribes have utilized the consent requirement to impose particularly unreasonable conditions on right-of-way holders. This has led to an untenable

situation regarding the price of rights-of-way. In one instance compensation for tribal rights-of-way has risen 2000%.

Other alternatives, like building around tribal lands, are not desirable solutions. That additional construction would be uneconomic and wasteful, and increasing the length of rights-of-way increases the environmental concerns and costs. Moreover, the present structure motivates tribes to erect hurdles to their own tribal economic development, by putting the focus on short-term economic gain from signing compensation for consent to a grant or renewal, in lieu of developing needed infrastructure.

Particularly in the circumstance of renewals, the current situation gives tribes unreasonable bargaining power. To provide needed service, a right-of-way holder invests significant resources in developing the pipeline, transmission, or related facilities in the right-of-way. As a consequence, the Native American group is in the driver's seat in the negotiation of renewal conditions to the point where the tribe can impose conditions that are not always reasonable, whether in the context of demanding inflated compensation or other terms. Tribes have required inflated compensation on renewal of an existing easement dozens or hundreds of times the values paid for rights-of-way, or even for full ownership, across comparable private, federal, and state-owned lands. Inflated compensation leads to increased prices to consumers of the transported commodity, as right-of-way holders seek to pass on the consideration paid to their end users, including residential customers, small businesses, and the other industries that power the economic engine of this Nation. That cost is likely a factor in the lack of utility service to some reservation areas, and that hinders tribal economic development. The unlevel playing field is compounded because Congress has not delegated to the energy transportation industries a right of condemnation or eminent domain over tribal trust lands or tribal lands subject to restrictions on alienation. Given the importance to our country of an efficient and effective energy delivery system, this situation is not in the public's interest, nor in the best long-term interests of the tribes.

It is hard to imagine that Congress in 1948 intended the tribal consent requirement to justify unreasonable conditions on the grant of consent. A change of the status quo is necessary for the efficient and cost-effective operation of energy transportation or transmission infrastructure -natural gas pipelines, oil or liquids lines, and electric transmission and distribution lines. We do not seek condemnation authority; however, we imperatively need a solution to this issue.

#### The Federal-Tribal Relationship and Rights-of-Way Across Tribal Lands:

Some tribes have suggested that any change to the current consent requirement would violate the trust responsibilities of the federal government and the sovereignty of the tribes. A standard that provides certainty and finality in a transparent process does not violate the federal government's trust responsibilities nor would it violate any of the sovereign rights the tribes maintain.

The record in these proceedings needs to be clear that it is correct to say that a standard could be recommended by the Departments in this study process, adopted by Congress, and that such actions by both Departments and the Congress would be entirely consistent with historic concepts of the federal trust responsibility to tribes. In the early 1800s, Chief Justice John Marshall and the Supreme Court began to define the scope of tribal sovereignty and the relationship of Indian tribes to the federal government. In three key opinions, the Court described the relationship between the United States and Indian tribes as akin to that of a guardian-ward or trustee beneficiary. With respect to tribal lands, the Supreme Court held that tribes' powers to sell or grant rights with respect to tribal lands is subject to the supervision and control of the federal government. Congress has power under the "Indian commerce" clause of the Constitution, Article I, Section 8, and its plenary power over tribes, to insure that tribal land holdings are not impediments to the accomplishment of federal energy policies. In fact, many historic tribal treaties specified that tribes would not oppose works of utility or necessity permitted by the laws of the United States.

Congress has not previously provided clear authority to address this situation. While Congress has expressly invested interstate natural gas companies having certificates of public convenience and necessity issued under the Natural Gas Act, as amended, generally with condemnation powers over private lands, those power do not expressly extend to tribal lands. As prior versions of the Energy Policy Act of 2003 reflected, there is no federal eminent domain authority for electric transmission lines, and there is also no general, federal eminent domain authority for intrastate gas or oil pipelines and gathering lines. Consequently, 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. This situation is exists no where else in the United States of America except on tribal land.

We respectfully call on the Department's of Energy and of The Interior to recommend to Congress that it make reasonable use of its Congressional authority to insure that tribal lands are not an impediment to energy transportation, while guaranteeing the tribes receive fair and reasonable compensation and other reasonable terms for the use of their lands.

In the area of nationwide energy infrastructure, given the important federal interests at stake, the need for a stable, reliable, secure and cost-effective nationwide energy infrastructure outweighs the interests of Indian tribes in extracting unreasonable conditions to the renewal of existing rights-of-way. The main focus of the 1813 study is to aid Congress. The two departments should recommend to Congress options for creating a process that provides certainty. The eventual answer may be found in the Executive Branch with FERC as a final decision-maker or through mediation or binding arbitration conducted by the Interior, Energy or Justice Departments. The ultimate solution may be with the Judicial Branch's federal court system. These are the items that the Section 1813 study's authors should concentrate on because they deal with the real possibility of future solutions.

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On behalf of NMOGA's members, I appreciate your thoughtful consideration of these remarks and recommendations as the study moves forward.

Sincerely,

*Bob Gallagher*

Bob Gallagher  
President