



PUEBLO OF LAGUNA

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Via Electronic Mail
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Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

RE: Comments on the Section 1813 Draft Report

Dear Sir/Madam:

On behalf of the Pueblo of Laguna, a federally-recognized Indian tribe located in the State of New Mexico, I hereby submit the following written comments concerning the Department of Interior and Department of Energy's (Departments) draft report based on its study of energy rights of way (ROW) on Indian lands.¹

Overall, the Pueblo are appreciative of the Departments' efforts resulting in findings that are supportive of tribal sovereignty and self-determination. The Pueblo believe that the study is generally an accurate characterization of the current status of negotiations of ROW on Indian lands. However, we have some concerns and several suggestions which we believe will significantly improve the report.

I. The Final Report Should Clearly Set Forth Findings from the Study

The Pueblo believe that the final report submitted to Congress should include a "Findings" section and/or an "Executive Summary" that specifically sets forth the Departments' findings under the study. In the draft report, the Departments fail to summarize formal conclusions but several consistent and declaratory statements were made throughout the draft report, including:

- Reducing a tribe's determination of whether to consent to an energy ROW across its land would reduce the tribe's authority and control over its land and resources as well as diminish tribal sovereignty and abilities for self-determination.
- Past and current policies put in place by Congress and the executive branch strongly support tribal decision-making regarding energy ROWs on tribal lands.
- There is no evidence that tribal consent would be an issue in an emergency situation involving national transmission of energy.

¹ The Indian Energy Rights of Way Study was mandated by the Energy Policy Act of 2005, Public Law 109-58, Title XVIII, Section 1813 (referred to as the "Section 1813 Study").

- Open negotiation processes enable tribes to determine the terms for access to tribal lands and resources and is consistent with long-standing expressions of tribal sovereignty and self-determination in the federal-tribal relationship.
- Most energy ROW negotiations are completed successfully.
- The issue of negotiating energy ROWs on tribal land does not appear to be a consequential issue for the nation or consumers in general.
- Energy ROW negotiations do not get stalled on valuation issues when there is a successful relationship between the tribe and the company.
- Difficulties in ROW negotiations are unlikely to lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas.

We believe that these statements should be specifically set forth in the beginning of the final report, as part of an executive summary or findings section. However, we are concerned that such a section was not included as part of the draft report and made available for public comment. We strongly suggest that the Departments consider releasing a draft of an "Executive Summary" and make it available for comment before issuing a final report.

Finally, the report should provide an overall finding that no action is required of Congress because no problem(s) of national concern exist that would require legislative action. Minor problems cited in the draft report can be addressed best by the Departments, tribes and the industry.

II. Reconsider the Legislative Options Set Forth in the Draft Report

Based on the draft report's failure to find that a serious problem exists with energy ROWs on Indian lands and in light of the findings cited under Section I above, the Pueblo strongly recommend that the Departments reconsider the legislative "options" it presents to Congress in the final report. The legislative options set forth in the draft report are not supported by the findings made in the draft. While we acknowledge that the draft report has found that some minor problems exist in negotiating ROWs on Indian lands, we believe that none of those problems are serious enough to warrant legislative change that would impact *all* tribes and disregards the ability of individual tribes to develop good working relationships with companies. Instead, the Departments' should recommend that Congress permit the Departments, tribes, and the industry to work cooperatively to correct some of those problems before going as far as implementing a legislative "fix".

The Departments have not been presented with any significant information indicating that legislative options are warranted and, at best, only the first two options suggested in the draft report are supported by the study. The first option, which suggests that Congress do nothing or leave the process as-is, is the only option wholly supported by the study. The Pueblo strongly recommend that no options be included in the final report, and this option is consistent with that recommendation. Although the study found that there were no *major* problems, the parties may come to agree that there are some difficulties in negotiating ROWs from party to party but this is better left to the parties and the Departments to address before Congress is encouraged to take action. The second option, suggesting that Congress provide a legislative clarification that tribal consent is a right enjoyed by *every* tribe in the United States, including non-IRA and OIWA tribes, is also supported by the study. Current laws, regulations and policies discussed in the

draft support tribal consent for IRA tribes, but this should extend to all tribes. However, the Pueblo must re-iterate that legislative options are not necessary *at this time*.

The third option, authorizing the federal government to determine fair compensation, is not consistent with the draft report's finding of tribal sovereignty and self-determination, which is fully supported by current law and policy as found in the study. The fourth option, which specifically authorizes the condemnation of tribal lands for public necessity, is also inconsistent with the study's finding of strong support for tribal decision-making. Condemnation is an unnecessarily extreme option, particularly in light of the fact that the draft report found that tribal consent is not an issue in an emergency situation and that no major problems exist. Furthermore, Congress recognized that the condemnation of tribal lands is discriminatory and blatantly unfair to tribes in repealing the Pueblo Lands Condemnation Act of 1924 ("Act"). That Act enabled the government to condemn vast amounts of Pueblo lands for public purposes (e.g. interstate highway, power rights-of-way, etc.). However, it was subsequently repealed by Congress after a successful challenge led by the Pueblo of Laguna. Furthermore, in repealing the Act, Congress recognized the Pueblos' ability to negotiate ROWs on tribal lands in a fair and just manner.

Because of the reasons discussed, the Pueblo strongly recommend that the Departments not provide a list of options available to Congress for a legislative fix in the final report.

III. The Current State of the Law Does Not Support Options or Recommendations which Remove or Limit Tribal Consent

From the 1930's forward, the trend in Federal Indian law and policy has been in support of tribal consent and toward self-determination, beginning with the Indian Reorganization Act of 1934, the Rights of Way Act of 1948, and followed in the 1970's by Indian Self-Determination and Education Assistance Act.

Reversing this principle embodied in these statutes, and depriving or limiting tribes of their right to consent to ROWs on Indian lands, would be contrary to the federal policies that acknowledge tribal sovereignty and self determination. Indeed, in the Energy Policy Act of 2005, Congress adopted provisions that authorize tribes to enter into energy agreements without the Secretarial consent that is currently required, thus *increasing* tribal self-determination in this area.² Reversing this policy just one year later would totally undermine the ability of tribes to successfully negotiate those agreements in which right-of-way issues are involved. As a result, the Pueblo are opposed to the grant of any additional authority to the Department that would increase its responsibility for granting tribal ROWs which are now negotiated by tribes. Historically, tribal ROW's have been undervalued because of actions that the BIA has taken in the past. More recently, tribes have been responsible for developing valuations which are fair to the parties, but which are also in line with the actual market value of the ROW in question. The Pueblo are therefore opposed to increasing any Departmental authority over tribal ROWs.

IV. The Final Report Should Also Consider the Department's Responsibilities

In addition to the concerns raised above, the draft report failed to consider whether the Department of Interior has complied with its statutory and regulatory duties to adequately appraise, manage and oversee ROWs in the past and whether it has maintained proper records. The draft report further fails to mention the vast amount of lost revenues that tribes suffered when disadvantageous deals were struck between the Department and energy companies *before* tribal consent was ever required. Furthermore, the federal trust

² Tribal Energy Resource Agreements (TERAs), Energy Policy Act of 2005, Title V, §503, *codified at* 25 U.S.C. §3504 (2006).

responsibility owed to tribes is completely omitted by the study and draft report. This should have been a core component of the study and included in the final report.

The Pueblo encourage the Departments to consider this oversight in developing the final report and recommendations it makes to Congress.

V. Conclusions

The Pueblo acknowledges that the industry has made significant investments by placing ROWs on Indian lands, including Pueblo lands. However, both tribes and the industry have a valid interest in working together cooperatively rather than relying on Congress or the federal government to authorize consent, determine fair compensation or institute binding valuation. The draft report makes several findings in support of tribal consent, sovereignty and self-determination. However, the legislative options proposed in the draft are not supported and should therefore be reconsidered by the Departments.

The Pueblo further recommend that the final report consider rights of way as binding contracts that are best addressed by the parties themselves. The study fails to consider the fact that each tribe and negotiation is different because of the fact that each tribe is unique and has its own cultures and traditions. While a company may negotiate with one tribe, it must recognize the fact that the next tribe has a different governing structure, priorities, obligations to its membership, and experience in negotiating rights of way. In addition, for a number of different reasons, Indian lands are vastly different from non-Indian lands. As a result, any attempt to compare Indian land values to non-Indian land values is unrealistic, and patently unfair to the individual tribes. It is possible to address these issues through means other than legislative options.

Finally, the final report must re-iterate the tribes' rights as property owners. One of the basic fundamental rights as a United States citizen is the right to own property, as stated under the Fifth Amendment in the Constitution of the United States. Similarly, such rights of tribes, as sovereign governments, must be recognized in this study. This would incorporate considerations of sacred sites, burial sites, and cultural uses, which have not yet been made in the draft report.

Thank you for allowing the Pueblo an opportunity to submit comments on the Departments' draft report on energy ROWs on Indian lands. The results of this study could greatly impact Indian Country and is of great concern to the Pueblo. Please contact either myself, at (505) 552-6654, or Aurene Martin of Holland & Knight, LLP, at (202) 955-3000, if you need any additional information.

Sincerely,

PUEBLO OF LAGUNA

Nirgal Siow 1st Lt. Gov.

for Roland E. Johnson
Governor

Enclosures

cc: Senator Pete Domenici
Senator Jeff Bingaman
Representative Steve Pearce

**Representative Heather Wilson
Representative Tom Udall
Jim Hooper, Pueblo of Laguna Chief of Operations
Aurene M. Martin, Holland & Knight LLP
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