

February 1, 2007

Office of Indian Energy and Economic Development
Attention: Section 1813 ROW Study
Room 20 – South Interior Building
1951 Constitution Avenue, NW
Washington, DC 20245.

Re: Comments on Section 1813 Rights of Way Study (Issued December 21, 2006)

Dear Sirs:

This letter provides the comments of the Confederated Tribes of the Colville Reservation (“Colville Tribe”) on the draft study and report (“Report”) to Congress on issues related to rights-of-way (“ROW”) on and across Indian lands. *See* 71 Fed. Reg. 77060 (Dec. 22, 2006). Section 1813 of the Energy Policy Act of 2005, Pub. L. 109-58, requires the Departments of Energy and the Interior (collectively the “Departments”) to jointly prepare the Report. The previous comments submitted by the Colville Tribe are hereby incorporated by reference.

Background on the Colville Tribes

The Colville Tribe is located in north central Washington State and the Colville Reservation comprises over 1.4 million acres of trust and allotted lands. Although now considered a single Indian tribe, the Confederated Tribes of the Colville Reservation is a confederation of 12 smaller aboriginal tribes and bands from across eastern and north central Washington as well as what is now British Columbia, Idaho and Oregon. The majority of our tribal members live on the reservation.

The Colville Reservation encompasses diverse terrain that includes timber, mineral, and other energy resources. The Colville Tribe, together with its corporate entity, the Colville Tribal Enterprise Corporation, employs over 2,000 people, many of whom are non-Indians. The Colville Tribe recently established a department to coordinate the Tribe’s development and exploration of energy resources and projects on the Tribe’s lands. Accordingly, the ROW study is of great interest to the Colville Tribe as it continues to explore energy and other economic development opportunities.

Summary of Comments on the Draft Report

Although the Colville Tribe has maintained from the outset that the focus on Indian tribal consent in energy ROW negotiations is unwarranted, we wish to compliment the hard work and diligent efforts put forth by Departments in carrying out the congressional mandate contained in section 1813.

The Colville Tribe concurs with the Departments that section 1813 presents “a very broad field of study” that conceivably implicates hundreds of Indian tribes, dozens of energy firms, thousands of rights-of-way, and potentially limitless scrutiny and analysis.¹ The Report narrows the scope of its study to “electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution.”

The Colville Tribe is pleased that the Departments have responded favorably to the many concerns we raised in previously submitted comments. As a general matter, the Colville Tribe believes the reorganized Report clearly delineates the questions presented, provides ample legal and factual background, and makes reasoned analyses. In particular, the Colville Tribe is pleased that the Departments have clarified their findings and analysis. Instead of providing amorphous “options,” the Departments have made recommendations to the Congress based on the record developed over the past year. This is a positive development.

The factual observations made by the Departments make clear—as we have maintained—that energy transportation costs are a small part of consumer energy costs and that tribal consent has had no appreciable impact on the costs or reliability of delivered energy products to American consumers. We also concur with the Report’s fundamental conclusion that “the vast majority of energy ROW negotiations are completed to mutually agreeable terms and conditions.”

Thank you for your careful consideration of our views and those of Indian tribes across the nation.

Sincerely,

MICHAEL E. MARCHAND
Chairman

¹ Indeed, the December 21, 2006, Report identifies no fewer than 14 variations of the term “energy rights-of-way” including local gathering pipelines and interstate refined products pipelines. Report at 5.

COMMENTS ON THE DECEMBER 21, 2006 REPORT
ON ENERGY RIGHTS-OF-WAY ON TRIBAL LANDS

SUBMITTED BY

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

February 5, 2007

Executive Summary. The Colville Tribe welcomes the addition of an Executive Summary and believes that it accurately describes the mandate of section 1813 and fairly captures the factual and legal context of the Report. The Colville Tribe specifically welcomes the inclusion of specific Departmental findings and recommendations to the Congress.

Section 1. Introduction. The Introduction describes the Departments' obligation to carry out the congressional mandate contained in section 1813.

Comment. None.

Section 1.1. Statutory Language of Section 1813. Section 1.1 describes the specific issues contained in section 1813 and a brief description of the structure and layout of the Report.

Comment. None.

Section 1.2. Public and Tribal Consultation Meetings and Comments. Section 1.2 describes the procedural methods used by the Departments to engage the tribal community, the energy industry and other interested parties and the notices, meetings, consultations, and other communications made with those communities.

Comment. None.

Section 1.3. Scope of the Section 1813 Report. Section 1.3 notes the potentially very broad nature of a study of "energy rights of way across tribal lands" and describes why and how the Departments narrowed the scope of the study and report to focus on "electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution." Report at 5. Section 1.3 also prudently advises against using the assessments and analyses in the Report in ROW situations other than electric transmission, natural gas, and oil pipelines.

Comment. The Colville Tribe concurs.

Section 2. National Energy Transportation Policies Related to Grants, Expansions, and Renewals of Energy ROWs on Tribal Land.

Comment. There are many “national energy transportation policies” relevant to the discussion of energy ROW across tribal lands. The National Energy Policy (“NEP”) issued in 2001 was the energy blueprint for the newly inaugurated Bush Administration. The NEP was a comprehensive proposal aimed at strengthening American energy security by, among other things, weaning the nation from its dependence on foreign sources of energy, increasing conservation, and stimulating domestic production.

Energy resource tribes responded favorably to the NEP and the call for increased focus on domestic production of both renewable and non-renewable energy and worked with congressional allies on a series of Indian tribal energy bills. While it is clear that the *Indian Tribal Energy Development and Self Determination Act of 2005* (Title V) is the most recent congressional pronouncement on these matters, it is also true that Title V had its legislative genesis several years before with the introduction and deliberation of the *Tribal Self Sufficiency Act* (H.R. 2412, 107th Congress) and the *Native American Energy Development and Self Determination Act of 2003* (S.522, 108th Congress). In the 5 years that these Indian tribal energy bills were being deliberated, at no time did the Congress broach the issue of tribal consent in ROW negotiations.

The enactment of Title V demonstrates that Congress not only approves of Indian tribes having a vigorous role in the negotiation and management of energy ROWs across their lands but seeks to encourage greater degrees of tribal control in these matters.²

Similarly, Congress has had ample opportunity to deliberate and amend the major Federal energy-related statutes and at each juncture has refrained from changing the Federal policy and law respecting and requiring tribal consent for purposes of energy ROW across tribal lands. While the Departments have found that there is “*no evidence that negotiations between parties for obtaining an energy ROW on tribal land contributed to an emergency situation*” (emphasis added)³ the Departments have also suggested that recourse might be had in certain “emergency authorities” (*e.g.*, those statutes which would authorize Federal intervention in situations where failure to successfully conclude a ROW negotiation rose to the level of an “emergency situation”). These authorities are said to include certain powers delegated to the Secretary of Energy pursuant to the *Natural Gas Act* and the *Federal Power Act*.

² “The most recent statement of national energy transportation policy specifically regarding energy ROWs on tribal lands strongly supports tribal decision-making and management of energy resources and facilities while correspondingly reducing federal oversight.” Report at 11.

³ Report at 9.

Section 3. The Statutory and Regulatory Framework for Granting Expanding, or Renewing Energy ROWs on tribal land and the associated tribal sovereignty and self determination interests.

Comment. The Colville Tribe notes that the Departments recognize that inherent tribal sovereignty is “central” to any understanding of the statutory and regulatory requirement of tribal consent in granting, expanding, or renewing an energy ROW on tribal lands. Indeed, the inherent authority of an Indian tribe to define the contours and terms of its relationships with other Indian tribes, non-Indian governments, commercial entities, and individuals is fundamental to the ROW debate.

The Report rightly tracks the steady evolution of Federal laws, regulations, and policies from those that rested decision-making authority with the Congress⁴ and the Secretary of Interior⁵ to those that required tribal involvement and consent.⁶ The Colville Tribe strongly supports the Federal policy of Indian tribal self determination as well as the policy and statutory progeny of that policy such as the *Indian Self Determination and Education Assistance Act of 1975*, the *Tribal Self Governance Act*, and the *Indian Tribal Energy Development and Self Determination Act*.

The Tribe is most pleased that President Bush is a strong supporter of these same principles, evidenced by the issuance of a Presidential proclamation on the protection of tribal sovereignty and economic development⁷ and the importance of tribal sovereignty and self determination to successful energy development.

Finally, The Colville Tribe is in agreement with that portion of the Report that reads in part: “[a] tribe’s determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self determination. Any reduction in the tribe’s authority to make that determination is a reduction in the tribe’s authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.”⁸ The Tribe would extend this rationale to suggest that should there be a diminution in tribal consent, the likely result would be the withdrawal by energy resource tribes across the nation of their lands and resources from the “marketplace.” Such a consequence would be a step backward for tribal energy development and the nation’s drive for energy independence.

⁴ See generally Historical Research Associates, Inc.’s Historic Rates of Compensation for Rights-of-Way Crossing Indian Lands, 1948-2006 (July 7, 2006).

⁵ Act of March 2, 1899 (30 Stat. 990).

⁶ 25 U.S.C. §323.

⁷ Presidential Proclamation 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).

⁸ Report at 19.

Section 4. Analysis of Historic Compensation Paid for Energy ROWs on Tribal Land.

Comment. The Colville Tribe agrees with the Departments that by definition the four-tribe case study analyses that form the basis of section 4's analysis and findings falls short of the "complete historical analysis" envisioned by Congress in enacting section 1813. As we have indicated before, however, a truly complete analysis would involve hundreds of Indian tribes, thousands of energy ROW, and departmental study that could last for years.

From our vantage, the most important aspect of section 4 is the degree to which both *types* and *amounts* of compensation paid to Indian tribes over time have evolved.⁹

The Departments indicate that in the 1950s and 1960s compensation paid was generally on a per-rod or per acre basis. With the issuance of the 1968 regulation, compensation not less than fair market value, plus severance damages, if any, were paid. In the early 1970s, just as Federal Indian policy was shifting from a Federal-oriented to a tribal-oriented paradigm, energy ROW compensation likewise changed to annual lump-sum payments, compensation based on throughput, and some tribes even negotiating for ownership interests in the pipelines themselves. Complementing the factual and legal arguments that weigh against any public policy change to the tribal consent-based ROW framework, the Report states that "[t]ypes of consideration have depended upon the particular tribe and companies involved in the negotiations."¹⁰

Section 5. Standards and Procedures for Determining Compensation for Energy ROWs on Tribal Lands.

Comment. The Colville Tribe concurs in the core observation made by the Departments that "negotiations between the interested parties are an appropriate method for determining compensation."¹¹ The reasons put forth by the Departments in support of this finding are crucial to any modern day discussion of energy ROW across tribal lands. The most significant is the virtual renaissance that Indian tribal governments have undergone in the past 50 years. Still reeling from the official Federal policies of termination, Indian tribes found hope and help in President Nixon's Special Message to Congress on Indian Affairs and its legislative progeny.¹²

In the nearly 40-year period since Federal policy shifted, many Indian tribal governments, governance, and economies gradually underwent a rehabilitation that has resulted in strong tribal governments and vigorous tribal economies. Coincidentally, U.S. and world demand for sources of energy has skyrocketed. In addition to our own energy demands, the burgeoning industrial economies in India, China, and Southeast Asia are putting increasing stress on supplies and transportation of oil, gas and coal and the markets is responding through additional exploration and transportation facilities here at home and abroad.

⁹ In this regard the Report states that "the nature of the [ROW compensation] process has evolved significantly over time into one in which tribes are more fully involved in bilateral negotiations with energy companies and in setting the terms and conditions under which energy ROWs are authorized." At 23.

¹⁰ Report at 22.

¹¹ Report at 30.

¹² Id. Footnotes 8, 9, and 10.

As a result, where energy companies once found moribund tribal entities with little or no involvement in the actual negotiation of energy ROW, now they find confident, vibrant, informed tribes that are pursuing their interests and those of their members. Conflict, in this instance, is inevitable but through the negotiation process can be managed and resolved.¹³

Against this backdrop, the Colville Tribe believes that there is merit in the Departments' view that "the negotiation processes could benefit from mutually agreed upon practices, procedures, and actions that would better the understanding and collaboration among the parties."¹⁴

Specifically, the practices, procedures, and actions described in the Report that we believe are worth pursuing are the following:

1. Developing of comprehensive ROW inventories for tribal lands,
2. Developing model or standard business practices for energy ROW transactions; and
3. Broadening the scope of energy negotiations;

Section 6. Issues Raised During the Study.

Section 6.1 Increasing Costs of Energy ROWs and Costs to Consumers.

Comment. For almost two years, the energy industry has made a number of assertions regarding increasing costs to ratepayers and consumers as a direct result of "unreasonable" demands by Indian tribes for energy ROW. The Departments considered these assertions as well as voluminous material provided by the industry and various industry-related associations.

The Departments were informed that "ratepayers *could be* negatively impacted", that "consumer energy prices *could* increase", and that tribally-levied trespass penalties "*could add* hundreds of thousands or even millions in additional costs" to the utilities and their consumers.¹⁵

The Departments found that "the total energy transportation costs are a small component of overall consumer energy costs, that as a general matter a relatively small percentage the fraction of energy transportation infrastructure is on tribal lands, and that, as of now, no difficulties associated with ROW negotiations have led to security or reliability impacts that affect consumer cost."¹⁶

¹³ As the Report notes, "efforts of negotiation (sic) parties to achieve a win-win solution are enhanced with increasing amounts of transparency in the process and decreasing chances that the factors to consider during the negotiation can change unexpectedly." At 27.

¹⁴ Report at 30.

¹⁵ Report at 33, emphasis added.

¹⁶ Report at 36.

Section 6.2 Decreasing Energy ROW Term of Years and Increasing Negotiation Periods.

Comment. None.

Section 6.3 Uncertainty in Energy ROW Negotiations.

Comment. The Colville Tribe notes that the Departments concluded that rather than ROW valuation or escalating or unreasonable compensation demands by Indian tribes, the “fundamental issue” for both the increase in negotiation periods and uncertainty in negotiations, is a “negotiated climate often marked by uncertainty and a lack of shared objectives.”¹⁷ The “uncertainty” that is referred to in this regard has been determined by the Department of Energy to derive from increased costs throughout the energy industry, needed infrastructure investment, and legal and regulatory obstacles to siting energy facilities. More to the point, the Department of Energy has not only failed to document ROW negotiations with Indian tribes as source of uncertainty but fails to include the cost of energy ROWs on tribal lands as a future or upcoming issue to be dealt with.¹⁸

Section 6.4. Risk to Investment in Infrastructure.

Comment. None.

Section 6.5. Differences Among Grants, Expansions, and Renewals of Rights-of-Way.

Comment. None.

Section 7. Congressional Approaches to Address the Issue.

Comment. The five options put forth in section 7 are those adduced in the initial draft report. The Colville Tribe believes the factual, legal, and market observations made in the Report support no option other than Option 7.1 “No Action”, because “current policies for granting and renewing energy ROWs are, in general, working.” As we made clear above, we do believe that efforts could be made to aid the negotiating parties in cases of imperfect information, unfamiliarity with the matters presented, and/or providing unorthodox or creative ways to overcome difficulties in arriving at a completed negotiation.

Section 8. Recommendation of the Departments.

8.1 Departmental Observations.

Comment. The Colville Tribe endorses Department Observation (4), which states that “[n]egotiations between Indian tribes and energy companies for the grant, expansion, or renewal of energy rights-of-way across tribal lands have had no demonstrable effect on energy costs for consumers, energy reliability, or energy supplies to date. Therefore, broad changes to the current

¹⁷ Report at 38.

¹⁸ Report at 39.

federal policy of self-determination and self-governance for tribes—or the existing right of tribal consent—are not warranted at this time.”¹⁹

8.2. Recommendation – Status Quo with Congressional Case-by-Case Intervention.

Comment. The Colville Tribe concurs in the Departments’ recommendation that valuation of ROW should continue to be based upon the terms negotiated by the parties and that any impasse in ROW negotiations should be addressed on a case-by-case basis.

With respect to recommendation (2), the Tribe is specifically supportive of the Departments’ recommendation that Congress, in addressing impasses on ROW negotiations, should not “mak[e] broader changes that would affect tribal sovereignty or self-determination generally.” This issue is at the heart of Indian country’s concerns with Section 1813, and the Tribe is appreciative that the Departments took heed of these concerns in its recommendations.

DC01/ 519404.1

¹⁹ Report at 45.