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**Comments of the Confederated Tribes of the Goshute Reservation
on the Draft Report to Congress: Energy Policy Act of 2005,
Section 1813 Indian Land Rights-of-Way Study**

February 5, 2007

Via U.S. Mail and Electronic Mail

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

RE: Section 1813 Comments

Dear Sir or Madam,

On December 21, 2006, the United States Departments of Interior and Energy (collectively, the “Departments”) issued its revised Draft Report to Congress regarding the Indian land energy rights-of-way study as required by Section 1813 of the Energy Policy Act of 2005 (hereinafter “Report”). The Confederated Tribes of the Goshute Reservation (“Goshute Tribe”) submit the following comments on the Report.

We would like to commend the Departments for their efforts in completing this report following the numerous comments of tribes, the energy industry and the general public. The energy rights-of-way issues addressed in this report are of great significance to the tribes as they include treaty rights, tribal sovereignty and self-determination, preservation of tribal lands and natural and cultural resources, the federal trust relationship between tribes and the federal government, and the ongoing business relationship between the energy industry and tribal governments.

Federal-Tribal Relationship

While the Goshute Tribe appreciates the Departments' goal of carrying out the Section 1813 rights-of-way study and draft report in an objective manner, the Goshute Tribe strongly believes that the issues considered in the study and report must be viewed through the prism of the unique legal and political relationship between the United States and the Indian tribes. As Congress, the courts and executive branch have repeatedly affirmed, this fiduciary relationship requires the United States to act in the best interest of the tribes. When a federal agency is "faced with a decision for which there is more than one 'reasonable' choice, [the agency] must choose the alternative that is in the best interests of the Indian tribe."¹ Therefore, in accordance with the current law the Departments' recommendations should favor tribal interests. The Departments stated that they "have a duty to assure the management of trust assets is in accordance with the best interest of tribes and tribal members."² However, the Departments' final recommendations for Congressional approaches to address the issue are not all "in accordance with the best interest of tribes and tribal members."

Tribal Sovereignty and Consent Required

We support the Departments' recognition of the vital importance of the exercise of tribal sovereignty and inherent authority of tribes to consent to energy rights-of-way across their lands. This finding is consistent with the current law requiring tribal consent to rights-of-way across tribal lands.³ It is also well supported by the treaties and agreements with tribes which recognize the land ownership and sovereign powers over tribal lands, and the legal fiduciary obligation of the United States to preserve and protect tribal property. By these treaties and agreements, the tribes reserved their governmental authority and ownership of part of their aboriginal land base. The title to this reserved land remains held in trust by the United States for the benefit of Indians. Under the federal trust responsibility it is the duty of the United States to protect the Indians' rights to the lands they reserved. We agree with the Departments' statement that:

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 resource, with a corresponding reduction in its sovereignty and abilities for self-determination. Granting a ROW on tribal land only with the consent of a tribe is in accordance with the federal policy promoting tribal self-determination and self-governance.⁴

The Report finds that there is no evidence that tribal consent contributed to or would be an issue in an emergency situation. The Departments were not persuaded by the energy industry's unsupported claims. In contrast, the overwhelming testimony of tribes and energy companies showed that they consistently reached agreement through negotiations. The nation's energy supply will likewise not be disrupted by the negotiation of rights-of-way across Indian

¹ *Jicarilla Apache Tribe v. Supran Energy*, 728 F.2d 1555, 1567 (10th Cir. 1984).

² Draft Report to Congress: Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study, §3.4 (December 21, 2006) (hereinafter "Report").

³ 25 U.S.C. § 324; 25 C.F.R. § 169.3(a).

⁴ Report at § 3.4.

reservations.

The Departments determined that the tribal right of consent is not increasing the cost of energy for the nation or consumers. Again, this finding rejects the false claims made by some of the energy representatives that consumers will pay more for energy if the energy companies must negotiate with tribes for rights-of-way. The Report specifically stated that tribal consent for energy rights-of-way across tribal lands is not “consequential” in terms of energy costs for either the nation or consumers.

The long standing federal policy of tribal self-determination also requires tribal consent for use of tribal lands. The tribal consent requirement for rights-of-ways is a critical aspect of tribal sovereignty, allowing tribes to negotiate acceptable terms relating to tribal jurisdiction, environmental protection, and cultural concerns, as well as compensation. The Departments correctly stated that “tribes have become increasingly involved in the process for approving the grant, expansion, or renewal energy ROWs on tribal lands.”⁵ In light of the Departments’ findings concerning tribal consent to energy rights-of-ways on tribal lands, we believe that the Report needs to more plainly and articulately state that energy rights-of-way across tribal lands is not a problem that requires any type of Congressional action. We also believe that the Departments must remove the approaches that disregard tribal sovereignty and tribal consent from the final Report.

Case Studies Inadequate

The case studies in the draft report are limited and not comprehensive enough to capture the uniqueness of tribes locally and nationally, particularly with respect to determining the historical rates of compensation paid to tribes. The Departments were charged with analyzing the historic rates of compensation paid for energy rights-of-ways on tribal lands. We believe that the Departments’ analysis is severely lacking and limited. The Report presents general information about the diversity of rights-of-ways on tribal lands, but fails to reach any conclusions about the historic rates.

Congress requested data and information relating to the basic historic rates of compensation received by Indian tribes and individual Indians. In addition to this data, the Departments must recognize that any discussion of rights-of-way must be understood in the context of the history, economics and geography of Indian reservations. Moreover, the Departments should consider the actual process of securing the rights-of-ways and other critical issues relating to the rates. The case studies reflect the unique situation of only four tribes, and only touch on the issues faced by those four tribes, and their situations cannot be generalized or used for other reservation circumstances. The case studies do not permit the Departments to make reliable assessments of the extent to which tribes have been historically under compensated for rights-of-ways over their land for energy purposes. Many tribes issued comments regarding their concerns over the case studies. These comments were summarized by the Departments in their Report issued in August of 2006. Although the Departments conceded that the case studies do not adequately represent historical compensation for energy rights-of-

⁵ Id. at § 3.4.

ways, they still relied on the case studies in determining and formulating their recommendations to Congress. In their final Report to Congress, the Departments should not consider the historical rates of compensation for only four tribes and should explicitly exclude the case studies from their recommendations to Congress.

Standard Method of Valuation Approach

The Departments stated in their Report that one approach to address the issue would be for Congress to “either choose a valuation methodology itself or authorize the federal government to determine ‘fair and appropriate’ compensation.”⁶ This proposal ignores the uniqueness of the treaty-guaranteed homeland of the tribes. To tribes, land is a fundamental attribute of the exercise of tribal sovereignty. Tribes place significant cultural and spiritual significance on their lands. Unlike private landowners, Tribes provide essential governmental services to individuals, both native and non-native. Tribes rely on the money raised from the use of their lands, including compensation received from rights-of-way, to pay for these services. This unique quality of tribal lands and self-government has been clearly recognized by treaties with the United States government.

The Report acknowledged that “imposing any standard valuation method and mandating its acceptance would constitute an exercise of eminent domain that is not applicable to lands owned by the United States.”⁷ The Report also articulated tribal comments which stated that using market value principles for valuation would be “inappropriate and inapplicable to tribal lands” because “tribal lands are not bought and sold on open markets and therefore traditional land appraisal techniques are not applicable” and finally, that “tribal lands are held in trust by the federal government and are protected against alienation through treaties and in other agreements which recognize tribal sovereignty over tribal lands and federal obligations to tribal property.”⁸

Despite tribal comments rejecting a standard method of valuation, the Departments included such a method as one of its final approaches to resolve the issue of energy rights-of-ways on tribal land. Any legislation to standardize a fair market value set would undermine the tribal power and seriously compromise the strides made by tribes to protect their lands. If a fair market value approach is permitted to be applied, the past paternalistic practices of the federal agencies in negotiating extremely low rates of compensations for the Tribes would be brought back to practice. This is contrary to the long-standing federal policy of tribal self-determination and the Energy Policy Act of 2005. This approach should be removed from the final Report.

Binding Dispute Resolution Approach

The Departments also propose that “Congress could modify the current process for energy ROW agreements by establishing binding procedures to resolve any impasse that may result in negotiations”⁹ including binding arbitration or requiring the parties to accept fair compensation determined by a federal agency. This option is simply condemnation in another

⁶ Id. at § 7.3.

⁷ Id. at § 5.1

⁸ Id.

⁹ Id. at § 7.4.

form. This process would grant a right-of-way without tribal consent and provide payment to the tribe that the tribe has not agreed to as set by some binding outside authority. It is exactly like an eminent domain action. This alternative also second-guesses a tribe's assertion of its economic, cultural or spiritual values, all of which might influence a tribe's willingness to consent to an energy right of way.

This is a very extreme option to replace the consent requirement which has worked for many decades. Moreover, by giving final authority to grant a right-of-way and set compensation in a federal agency would entrust the determination to agencies that historically have failed to obtain fair market value for tribal lands. This approach certainly would be a step backwards in the era of tribal self-determination. The approach should therefore be removed from the final report.

Condemnation of Tribal Lands Option

The Departments also propose an approach where "Congress could on a case-by-case basis authorize condemnation of tribal lands for public necessity." There is absolutely no basis in the testimony or written comments to support this option. This approach would authorize the condemnation of tribal lands for energy rights-of-way.

This approach would be a major reversal of the established federal law that recognizes tribal ownership of and sovereign control over tribal lands. Current law requires tribal consent to rights-of-ways across tribal lands. These basic principles are compelled by the federal government's trust relationship to Indian tribes and their land and the federal government's longstanding policy of tribal self-determination. Such an option is totally inconsistent with the Energy Policy Act of 2005 which supports tribal self-determination and the many decades of congressional, judicial and executive promotion of tribal self-sufficiency.

The Department acknowledged in its Report that "condemning tribal lands for private energy purposes violates the 'exclusive use' provision of many treaties, the federal government's trust responsibility to the tribes and the promise that tribal lands and tribal reservations will remain under the control and beneficial ownership of Indian tribes."¹⁰ We question why the Departments would propose a condemnation process in light of its numerous findings in support of tribal self-determination and against condemnation. There is no basis for this approach and it should be deleted from the Report.

No Congressional Action – Continuation of Current Negotiation Practices

We support the Departments' finding that most energy rights-of-way negotiations are successfully completed. This is true even if the negotiations are protracted and the method for determining the value of the energy rights-of-way results in compensation that sometimes greatly exceeds the market value of the tribal lands involved.

The end result of these bilateral negotiations has seen a reversal of the paternalistic

¹⁰ Id. at § 5.1.

practices of the Bureau of Indian Affairs in negotiating rights-of-way on the Reservation and enabled the Tribes and individual Tribal members to achieve a level of economic self-sufficiency unheard of even a generation ago. Today, the tribes are able to engage in negotiations with the energy industry, secure better deals and more revenues for tribal governmental services for tribal members, and provide stability and certainty to the energy industry. The Departments noted in its findings that “negotiations between the interested parties are an appropriate method for determining compensation.”¹¹ Therefore, this approach should remain in the final Report.

The Recommendation – Status Quo with Congressional Case-by-Case Intervention

In addition to articulating distinct approaches to address the rights-of-way issue, the Departments made two recommendations to Congress in the Report. The Departments recommended that first, “valuation of energy rights-of-way on tribal lands should continue to be based upon terms negotiated between the parties,” and second, “[i]n the event that a failure of negotiations regarding the grant, expansion, or renewal of an energy right-of-way has a significant regional or national effect on the supply, price, or reliability of energy resources, the Departments recommend that Congress consider resolving such a situation on a case-by-case basis through legislation targeted at the specific impasse, rather than making broader changes that would affect tribal sovereignty or self-determination generally.”¹²

The first recommendation, that negotiations should continue and Congress should refrain from acting, is directly in line with the Departments’ overwhelming findings that tribal sovereignty and consent are both essential to approving and renewing energy rights-of-way on tribal land. It also reaffirms that negotiation between tribes and energy companies has been overall successful and will continue to benefit both tribes and the energy companies. By negotiating their own terms with energy companies regarding rights-of-ways, tribes are able to exercise sovereignty, provide consent as mandated by current law and value compensation they feel necessary for allowing energy companies to use their land. Likewise, as the Department has found and reported, requiring tribal consent through the negotiation process does not create any energy supply emergency and is inconsequential in terms of energy costs for nations and consumers.

The second recommendation, that Congress resolve negotiation impasses through legislation” undermines the Departments’ findings that “negotiations between interested parties are an appropriate method for determining compensation.” It also removes control over tribal land from the tribes and diminishes tribal sovereignty and self-determination. The opportunities for tribal self-sufficiency and development of the tribal economy come from the fundamental sovereign power of tribes to control and regulate land use, including rights of-way. The determination of whether to enter into an agreement with an energy company regarding rights-of-way on tribal land should be a tribal decision and not a congressional one. The sovereignty of tribes must be respected.

If pursued by Congress, this recommendation would also breach the trust responsibility

¹¹ Id. at § 5.3.

¹² Id. at § 8.2.

owed by the United States to Indian tribes. The Departments admit in the Report that “[t]here is no doubt that the trust relationship exists with regard to land held in trust for tribes. Trustees must act in the best interests of the beneficiary of the trust by protecting and preserving the corpus.”¹³ By legislatively forcing tribes to give up one of their most cherished possessions, their land, to make way for energy companies is a breach of trust responsibility on the part of the United States, even if done on a case by case basis. It directly violates current law requiring tribal consent for all rights-of-way across tribal lands.¹⁴ It also erodes decades of case law, legislation, treaties, executive orders and policies that have recognized and strengthened tribal sovereignty and self-determination. This recommendation must be removed from the final Report.

In light of these findings, the only possible recommendation from the Departments is for Congress to take no action regarding energy rights-of-ways on tribal land and “continue the present practice, which allows tribes and energy companies to use their own methods for valuing a ROW and to conduct negotiations on their own terms.”¹⁵

Thank you for allowing the Goshute Tribe to submit its comments regarding this matter. If you have any further questions regarding our stance on Section 1813 please contact Ed Naranjo, Goshute Tribal Administrator, at (435) 324-1302. If you have any questions regarding these comments please contact Beth Parker at (801) 676-0863.

Sincerely,

Beth Parker
Tribal Attorney
Confederated Tribes of the Goshute Reservation
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¹³ Id. at § 3.3.

¹⁴ 25 U.S.C. § 324; 25 C.F.R. § 169.3(a).

¹⁵ Report at §7.1.