

Nancy Ives  
Executive Director



February 28, 2007

The Honorable Kevin M. Kolevar  
Director of Electricity Delivery and Energy Reliability  
U.S. Department of Energy  
1000 Independence Avenue, SW  
Washington, D.C. 20585

The Honorable James Cason  
Associate Deputy Secretary  
U.S. Department of the Interior  
Office of Congressional and Legislative Affairs  
1849 C Street, NW  
Room 6117  
Washington, D.C. 20240

*Submitted via e-mail to [ieed@bia.edu](mailto:ieed@bia.edu) and via U.S. Mail*

*Re: Section 1813 Study — Supplemental Comments*

Dear Gentlemen:

On behalf of the Fair Access to Energy Coalition (“FAIR”), I am writing to provide supplemental legal authority for comments FAIR submitted on February 5, 2007.

Following the close of the comment period for the Draft Report, the United States Court of Appeals for the District of Columbia Circuit issued an important decision regarding the interplay of Native American tribal sovereignty with federal statutes of general applicability. FAIR respectfully submits that the Departments should consider this very significant decision as they prepare the final Section 1813 report and make recommendations to Congress concerning appropriate standards and procedures that should govern grants, renewals and extensions of energy rights-of-way traversing tribal lands.

On February 9, 2007, the D.C. Circuit decided the case of *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 2007 WL 420116 (D.C. Cir. 2007). A copy of the decision is attached. The D.C. Circuit decided that the National Labor Relations Board could apply the National Labor Relations Act to employment at an on-reservation casino owned by the San Manuel Band of Serrano Mission Indians. This decision supports FAIR’s position that the Departments should remind Congress that it has *plenary* authority over tribes and that tribal sovereignty is *always* subject to congressional determination. (See FAIR’s February 5, 2007 Comments at pages 5-8.) This decision also supports FAIR’s position that the Departments should recommend to Congress that it enact legislation providing for standards and procedures

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for determining fair compensation on tribal lands to support new and existing energy infrastructure determined to be in the public interest. (See FAIR's February 5, 2007 Comments at pages 4-5.)

In the *NLRB* case, the San Manuel tribe opposed application of the National Relations Labor Act to its casino employees, primarily on the grounds of tribal sovereignty. The Court resolved the case by analyzing Supreme Court and congressional "contours and limits of tribal sovereignty." The Court began its analysis with the Supreme Court's decision in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and the Supreme Court's statement that "a general statute in terms applying to all persons includes Indians and their property interest." *Id.* at 116. The Supreme Court applied that principle to allow condemnation of private property owned by a tribal government, finding the general grant of eminent domain powers located in the Federal Power Act to be applicable to the tribe. The D.C. Circuit noted the countervailing Supreme Court canons of construction in Indian cases—that statutory ambiguities must be construed in favor of Indians and impairment of tribal sovereignty must be clearly expressed by Congress. On balance, the D.C. Circuit concluded:

Tribal sovereignty is far from absolute, as the Supreme Court has explained:

Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations . . . .

As the Court . . . [has] recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.

*Santa Clara Pueblo [v. Martinez]*, 436 U.S. [49] at 55-56. . . .  
[W]hen a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction [sic] with non-Indians, its claim of sovereignty is at its weakest. (Citations omitted.) *San Manuel Indian Bingo and Casino*, at \*5.

The application of the Court's reasoning in the *NLRB* decision to the Departments' important work under Section 1813 is obvious. When tribes enter into business transactions (such as right-of-way "consent" agreements) with off-reservation energy transporters, tribal sovereignty is, in the Court's words, "at its weakest." *San Manuel Indian Bingo and Casino*, at \*5. That weakness

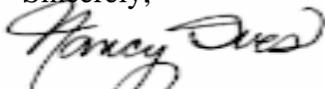
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is magnified when it is compared to the larger needs of *all* Americans — Native and non-Native — for reliable and affordable energy. Stated differently, agreements between tribes and non-Indian energy infrastructure operators concerning the terms of energy rights-of-way are fundamentally *commercial*, not *governmental*, in nature. They are transactions very far removed from what the D.C. Circuit described as the “intramural” subject matters fundamental to tribal self-government (such as the terms and conditions of tribal membership, the internal relations of tribal members, local customary law, and the relationship of tribal members to their tribal government). *Id.*

The D.C. Circuit cited a number of instances, similar to those cited by FAIR in its comments, where tribal sovereignty has been limited by acts of Congress and by state legislatures as well. Tribal sovereignty has been constrained by the Americans with Disabilities Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act, and in the context of off-reservation fishing, investments in non-residential private property, and other “commercial enterprises that tend to blur any distinction between the tribal government and a private corporation.” *San Manuel Indian Bingo & Casino*, at \*7-\*8. The D.C. Circuit’s decision added the National Labor Relations Act to the list. FAIR respectfully submits that the D.C. Circuit’s reasoning would extend to the Natural Gas Act and the Federal Power Act, no less than the National Labor Relations Act, as acts of general applicability. The reasoning also extends to the complex regulatory regime under the Federal Energy Regulatory Commission as well as state commissions, no less than the regulatory regime under the National Labor Relations Board.

FAIR's fundamental point has thus been confirmed by this important and recent development in decisional law: Congress has plenary authority over Indians and may statutorily set standards and procedures for determining fair and appropriate compensation to Indian tribes for energy rights-of-way on tribal land. The Departments should recommend that Congress set appropriate standards and procedures for compensation for grants, renewals and extensions of energy rights-of-way traversing tribal lands — standards that make clear that nothing more and nothing less than fair market value is just compensation where negotiations do not successfully and consensually resolve an impasse between the relevant energy transporter and the relevant tribe.

Sincerely,



Nancy Ives  
Executive Director  
Fair Access to Energy Coalition

Attachment

cc: Abraham E. Haspel  
Daryl Francois  
Mark Whinton  
Robert Middleton  
David Hill