



NAVAJO NATION DEPARTMENT OF JUSTICE
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February 1, 2007

VIA REGULAR MAIL AND
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Section 1813 ROW Study
c/o Mr. Darryl Francois
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Room 20 – South Interior Building
1951 Constitution Ave. NW
Washington, DC 20245

Mr. Rollie Wilson
Office of Electricity Delivery and Energy Reliability
United States Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Re: Section 1813 Comments

Dear Sirs:

The Navajo Nation has few comments on the Draft Report to Congress. See 71 Fed. Reg. 77,060 (Dec. 22, 2006). The Navajo Nation agrees with the two recommendations (see Draft Report at 46; Executive Summary at ix) and believes that they are amply supported by the voluminous record compiled and analyzed by the Departments.

A couple of typographical errors should be corrected. On page 14, in the last paragraph before section 2.2, the words “percent of” should be inserted between “14.2” and “Indian households.” A period is needed at the end of the third paragraph of section 4.1.

The only substantive comment concerns a position of a trade association (Edison Electric Institute), which “noted . . . that the Administrative Procedure Act . . . protect[s] a timely ROW renewal applicant from actual trespass.” Draft Report at 38. It is doubtful whether this provision of the APA applies to Indian lands in such a way as to allow holding over, see Gray v. Johnson, 395 F.2d 533, 537 (10th Cir.) (rejecting non-Indian lessee’s reliance on related parts of § 558), cert. denied, 392 U.S. 906 (1968), and similarly questionable if many ROW renewal applications (where the original grants are for a set term of years and with the backdrop of federal law and policy protecting Indian lands from unauthorized uses by non-Indians) would properly be characterized as an “activity of a continuing nature” under that section, see Miami MDS Co. v. FCC, 14 F.3d 658, 659-60 (D.C. Cir. 1994); Bankers Life & Cas. Co. v. Callaway, 530 F.2d 625, 634 (D.C. Cir. 1976), cert. denied, 429 U.S. 1073 (1977). Where applicable, the APA does protect a federal licensee who has made a “timely and sufficient application for a renewal or a new license in accordance with agency rules.” 5 U.S.C. § 558(c). Therefore, while this APA provision may protect some federal licensees, it will not protect a company which has failed to include evidence of contemporaneous tribal consent with an application for renewal of a tribal land ROW. Evidence of such consent must be included for a ROW renewal application to be “sufficient . . . in accordance with agency

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rules” – even assuming an applicant for a tribal land ROW held a federal “license” for an “activity of a continuing nature” under the APA. See 25 C.F.R. § 169.19 (2005) (requiring for ROW renewal evidence of tribal consent as provided for in 25 C.F.R. § 169.3 (2005)). In light of these factors, the Navajo Nation suggests that the word “noted” be changed to “stated” or “posited” in the sentence near the top of page 38 of the Draft Report.

The Navajo Nation appreciates the additional care and thoroughness that went into the preparation of the Draft Report. We commend the Departments for their even-handedness in the often contentious public participation and tribal consultation process. Please do not hesitate to call if the Navajo Nation can assist further.

Sincerely,

THE NAVAJO NATION



Louis Denetsosie
Attorney General