

**Vivian Juan-Saunders
Chairwoman**



**Vacant
Vice Chairman**

TOHONO O'ODHAM NATION

P.O. Box 837 Sells, Arizona 85634
Telephone (520) 383-2028 Fax (520)383-3379

February 1, 2007

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

Dear Sirs,

The Tohono O'odham Nation submits the following written comments in response to a request by the Departments of Energy and Interior (the Departments) for public comment on the Draft Report to Congress on energy rights-of-way across tribal lands as required by Section 1813 of the Energy Policy Act of 2005 (the Report). The Departments request was published in the Federal Register on December 22, 2006 at 71 Fed. Reg. 77060. The Tohono O'odham Nation appreciates the opportunity to comment on the Report.

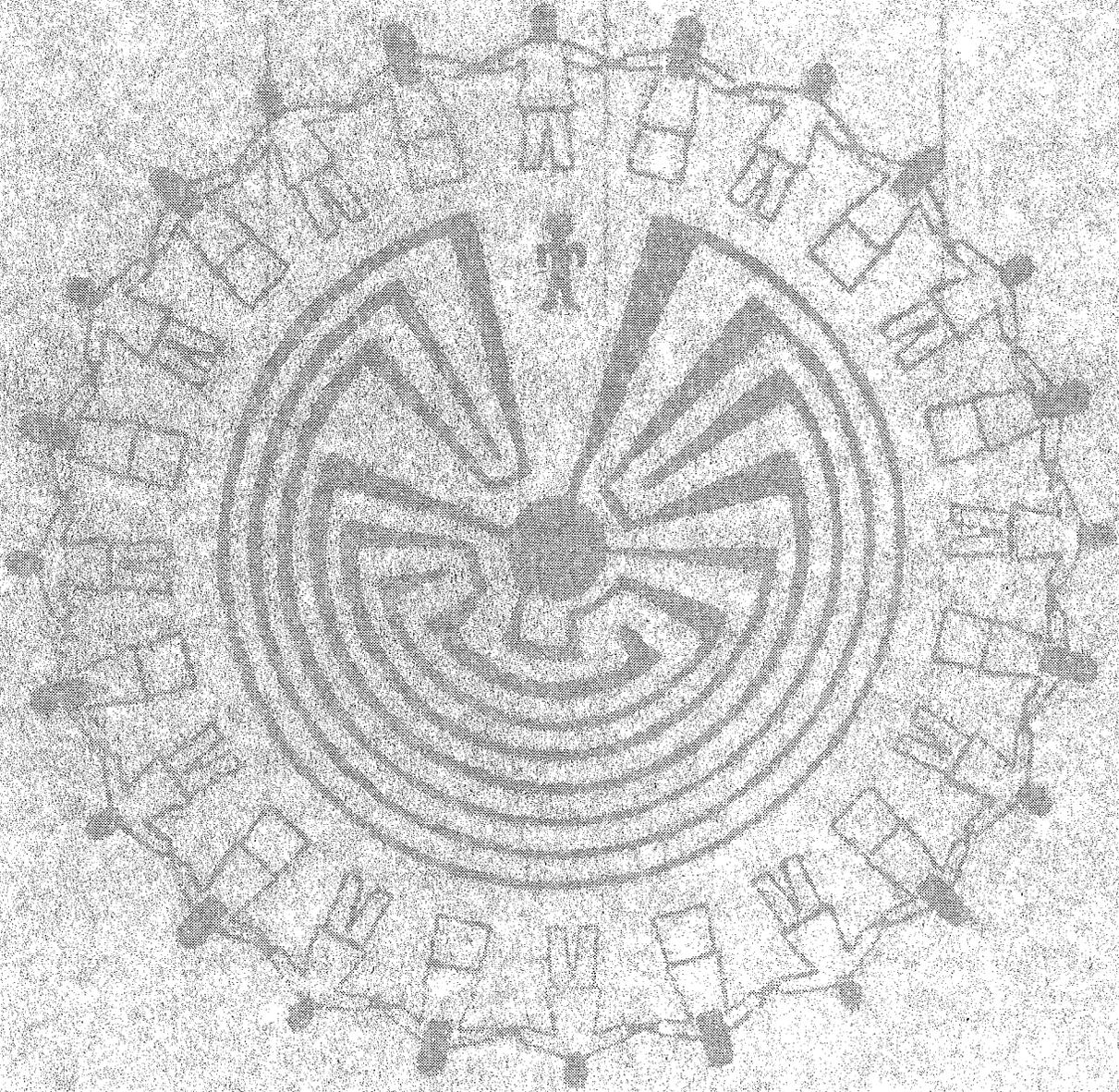
As the enclosed comments state, the Tohono O'odham Nation supports the recommendation of the Draft Report, i.e., (1) Valuation of energy rights-of-way ("ROW") on tribal lands should continue to be based upon terms negotiated between the parties, and (2) In the event that a failure of negotiations regarding 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. The Nation requests that the final report strongly and clearly recommend that no legislative action is necessary and therefore no action be taken in the area of Indian rights-of-way.

We commend the Departments for their work in the assembly, analysis, of data and compilation of the Report. The Tohono O'odham Nation looks forward to working with the Departments to contribute to the successful completion of the 1813 study. If you have any questions please do not hesitate to contact me at (520) 383-2028 or Veronica Geronimo, Assistant Attorney General at (520) 383-3410.

Sincerely,


Vivian Juan Saunders
Chairwoman

c: Frances Antone, Chairwoman, Natural Resources Committee, TOLC
Veronica Geronimo, Assistant Attorney General, Tohono O'odham Nation



RESOLUTION OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL
(Approving Comments to the December 21, 2006 Draft Study Required by Section 1813
of the Energy Policy Act of 2005)

RESOLUTION NO. 07-066

1 **WHEREAS, Section 1813 of the Energy Policy Act of 2005 (P.L. 109-58) required the U.S.**
2 **Departments of Energy and Interior to conduct a study of issues regarding energy**
3 **rights-of-way across tribal lands; and**

4 **WHEREAS, Section 1813 required the Departments to submit to Congress a report on the findings**
5 **of the study, including (1) an analysis of historic rates of compensation paid for energy**
6 **rights-of-way on tribal land; (2) recommendations for appropriate standards and**
7 **procedures for determining fair and appropriate compensation to Indian tribes for**
8 **grants, expansions, and renewals of energy rights-of-way on tribal land; (3) an**
9 **assessment of the tribal self-determination and sovereignty interests implicated by**
10 **application for the grant, expansion, or renewal of energy rights-of-way on tribal land;**
11 **and (4) an analysis of relevant national energy transportation policies relating to**
12 **grants, expansions, and renewals of energy rights-of-way on tribal land; and**

13 **WHEREAS, certain industry representatives seek to eliminate the current valuation**
14 **methodologies and also want to eliminate the need for tribal consent on the premise**
15 **that continuing these procedures is contrary to national security and consumer**
16 **interests; and**

17 **WHEREAS, after conducting consultation sessions and public meetings, and soliciting comments,**
18 **the Departments distributed their second draft report on December 21, 2006 with**
19 **findings that energy costs to consumers have not increased significantly as a result of**
20 **the exercise of tribal consent in rights-of-way negotiations and that there is no threat**
21 **to national energy transportation security as a result of the exercise of tribal consent**
22 **in rights-of-way negotiation; and**

23 **WHEREAS, despite these findings the draft report, still presents to Congress options for**
24 **consideration by Congress which undermine tribal sovereignty and self**
25 **determination; and**

26 **WHEREAS, the power of tribes to consent to the use of tribal lands is a critical element of tribal**
27 **sovereignty that is deeply rooted in federal law; and**

RESOLUTION NO. 07-066

(Approving Comments to the December 21, 2006 Draft Study Required by Section 1813 of the Energy Policy Act of 2005)

Page 2 of 3

1 WHEREAS, Indian tribes are an integral part of the energy security of the United States in that
2 tribes have permitted critical energy facilities to be used pending negotiations even
3 in cases where rights-of-way have expired; and

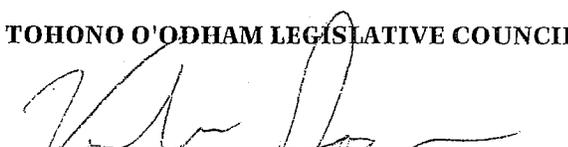
4 WHEREAS, the Natural Resources Committee of the Legislative Council has reviewed the attached
5 Comments and recommends approval by the Legislative Council.

6 NOW, THEREFORE, BE IT RESOLVED that the Tohono O'odham Legislative Council:

- 7 1. Approves the Comments of the Tohono O'odham Nation, substantially in the form
8 attached hereto, to the December 21, 2006 draft study required by Section 1813 of
9 the Energy Policy Act of 2005;
- 10 2. Urges the Departments to endorse their findings in the Final Report and to
11 unequivocally recommend that Congress take no action at this time with regard to
12 altering or impairing the tribal right to consent in rights-of-way negotiations; and
- 13 3. Authorizes the Chairwoman of the Nation to submit these comments to the
14 respective Departments prior to the deadline of February 5, 2007, for inclusion in
15 the record related to the Study of Energy Rights-of-Way under Section 1813 of the
16 Energy Policy Act of 2005.

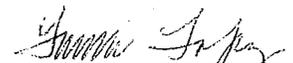
17 The foregoing Resolution was passed by the Tohono O'odham Legislative Council on the 30TH. Day
18 of JANUARY, 2007 at a meeting at which a quorum was present with a vote of 2,440.80 FOR; -0-
19 AGAINST; -0- NOT VOTING; and [03] ABSENT, pursuant to the powers vested in the Council by
20 Section 1 (j) of Article VI of the Constitution of the Tohono O'Odham Nation, adopted by the Tohono
21 O'Odham Nation on January 18, 1986; and approved by the Acting Deputy Assistant Secretary -
22 Indian Affairs (Operations) on March 6, 1986, pursuant to Section 16 of the Act of June 18, 1934 (48
23 Stat. 984).

24
25 TOHONO O'ODHAM LEGISLATIVE COUNCIL

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30 Verlon M. Jose, Legislative Chairman

31 31 day of January, 2007

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33 ATTEST:

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37 Lucille Lopez, Acting Legislative Secretary

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39 30 day of January, 2007.

RESOLUTION NO. 07-066

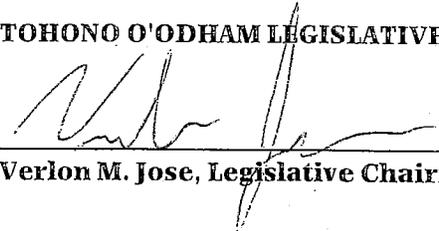
(Approving Comments to the December 21, 2006 Draft Study Required by Section 1813 of the Energy Policy Act of 2005)

Page 3 of 3

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Said Resolution was submitted for approval to the office of the Chairwoman of the Tohono O'Odham Nation on the 31 day of September, 2007 at 12:02 o'clock, 7 .M., pursuant to the provisions of Section 5 of Article VII of the Constitution and will become effective upon her approval or upon her failure to either approve or disapprove it within 48 hours of submittal.

TOHONO O'ODHAM LEGISLATIVE COUNCIL

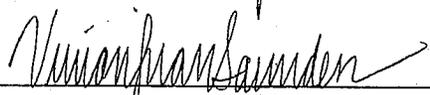

Verlon M. Jose, Legislative Chairman

APPROVED

on the 31 day of January, 2007

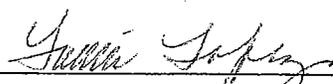
DISAPPROVED

at 4:20 o'clock, 7 .M.


VIVIAN JUAN-SAUNDERS, CHAIRWOMAN
TOHONO O'ODHAM NATION

Returned to the Legislative Secretary on the 01 day of

February, 2007, at 8:42 o'clock, 11 .M.


Lucille Lopez, Acting Legislative Secretary

**THE TOHONO O'ODHAM NATION
SELLS, ARIZONA**

**COMMENTS ON THE DRAFT REPORT TO CONGRESS:
ENERGY POLICY ACT OF 2005, SECTION 1813
INDIAN LAND RIGHTS-OF-WAY STUDY**

JANUARY 22, 2007

INTRODUCTION

The Tohono O'odham Nation (the Nation), a federally recognized Indian tribe located in Southern Arizona, takes this opportunity to comment on the December 21, 2006 Draft Report (the "Report") to Congress under Section 1813 of the Energy Policy Act of 2005 (the Report). The Nation appreciates the work of the Departments of Energy and Interior (Departments) in the assembly, analysis of data and compilation of the Report. The Nation also appreciates the Departments' effort to consult with Indian tribes.

First, the Nation fully supports the recommendation of the Report, i.e., (1) Valuation of energy rights-of-way ("ROW") on tribal lands should continue to be based upon terms negotiated between the parties, and (2) In 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. The Nation requests that the final report strongly and clearly recommend that no legislative action is necessary and therefore no action be taken in the area of Indian rights-of-way.

Second, some of the specific comments provided here can be found in the corresponding sections of the Report but one would only find that after reading the entire Report (78 pages). The Report must explicitly highlight these findings early on in the Report so it is clear that the current system is working and no action from Congress is required. The Nation recommends that the Report take each of the four topics identified for study by Section 1813(b) and list each topic along with its specific findings before proceeding with the full Report. In this way if a reader does not want to read the entire Report the reader can simply look to the specific topic and see the findings associated with that topic.

Third, it is only prudent that the Report talk about the context in which this study was required. It is widely known that the motivation behind the study is the impasse in renewal negotiations between the Navajo Nation and New Mexico Oil and Gas Association (NMOGA) and El Paso Natural Gas (EPNG) of over 900 miles of gas pipelines crossing the Navajo Reservation. (See March 7, 2006 comments of the Navajo Nation, also EPNG September 29, 2005 letter to Sue Ellen Wooldridge, Solicitor for the Interior Department). On March 8, 2005 EPNG and NMOGA proposed an amendment to the general Indian Right-of-Way Act, 25 U.S.C. §§ 323-28. The amendment would have authorized the Secretary of the Interior to grant or renew a ROW on tribal

lands without tribal consent. The Senate Energy Committee did not act on the proposal and instead ordered the study which eventually became Section 1813. The circumstances behind the study create the foundation upon which the Report should be built.

SECTION 1813 OF THE ENERGY POLICY ACT OF 2005

Section 1813(b) requires the Departments to submit to Congress a report on the findings of the study, including:

- (1) The analysis of historic rates of compensation paid for energy rights-of way on tribal land;
- (2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land;
- (3) an assessment of the tribal self-determination and sovereignty interest implicated by application for the grant, expansion, or renewal of energy rights-of-way on tribal land; and
- (4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewal of energy rights-of-way on tribal land.

The Nation has the following comments specific to the Report:

I. The analysis of historic rates of compensation paid for energy rights-of way on tribal land.

The Nation understands that there was insufficient time and resources to complete a comprehensive review of historic rates of compensation. The final report must emphasize that the case studies, given its limited sample, lack statistical validity and therefore are of limited value. As the Report correctly describes, there are hundreds of Indian tribes and many different types of energy Rights-of-Way. Each tribe and each reservation is unique in its history, culture, and politics. The Report must declare that any conclusions drawn from the case studies can only be applied to the tribe submitting the case study. The terms of any ROW are based on its location, purpose, breadth and duration. Additionally, each ROW will also vary in the way it benefits or harms the earth and only the affected tribe can determine for itself the effect of the ROW on its historic and cultural resources.

The Nation is also concerned about the case study method because a case study will almost always spotlight the exceptional case and not the routine successful case. The Report must emphasize that most energy ROW negotiations are completed successfully. It also must be clearly stated that most tribes, including the Nation, are not eager to share confidential business information about the ROW upon their lands. History has demonstrated that when tribes have shared confidential information, that information has sometimes been taken and used to the detriment of tribes.

II. Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land.

Current law requires that tribes be paid no less than fair market value for ROW across tribal land, 25 C.F.R. 169.12. Therefore a clear set of standards and procedures are already in place to determine fair and appropriate compensation. Tribes may negotiate any compensation above this market value, so long as the terms and conditions are consistent with federal law. As with any business transaction, Tribes must have the right to negotiate compensation for the use of tribal land. Tribes are the only ones who can determine what is appropriate for their lands

The Nation requests that Report recommendations 7.2 recommending that Congress choose a valuation method; 7.3 Congress direct the appointment of an executive branch agency to determine "fair and appropriate" compensation; 7.4 Congress require standards for binding arbitration; and 7.5 authorizing eminent domain over tribal lands by the federal government be deleted from the Report. The appropriate standard for fair and appropriate compensation comes as the result of negotiation between the Nation and the applicant. As with any other business transaction the tribe must have the right to negotiate compensation for the use of tribal land. Each tribe must determine the proper procedure for determining ROW consideration for tribes. The authority of tribes to determine the use of its lands is a critical element of tribal sovereignty that is firmly rooted in federal law. Tribes are the only ones who can decide best practices for their lands and how these best practices are defined will depend on the area of the reservation affected and the people affected.

Industry has commented that renegotiation of ROW have become lengthier and more uncertain. Uncertainty occurs at all levels, not just when working with Indian tribes. Industry is fully aware that every ROW, on and off Indian reservations, has an ending date and that the ROW will have to be renegotiated. So long as parties negotiate in good faith, terms for a ROW can be resolved and parties can reach mutually acceptable terms. As explained in the comments of the Council of Energy Resources Tribes and National Congress of American Indians, the American energy economy has grown to be the largest and most productive in the world and there is no reason to believe that the tribal consent requirement will in any way inhibit the future growth of the United States.

Industry has also expressed concern about the escalating cost of energy ROW which in turn will raise consumer costs. Although, industry has made these broad assertions they have provided no evidence to support their claims. The Nation acknowledges cost increases, but it must also be emphasized that the historic under valuation of ROW has the impact of overstating the increase in costs today. Increase in costs is also due to the increase in cost to tribal governments to ensure economic return for tribal land because federal resources are decreasing. However, the Report points out that a relatively small fraction of energy transportation infrastructure is on tribal lands and energy transportation costs are a small component of overall consumer energy cost. Therefore, if there are increases in energy cost to consumers it's not likely to be due to ROW on Indian lands. Additionally, tribal consent requirement for Indian rights-of-way has had a negligible, if any, effect on the availability or cost of energy to consumers. As the Report correctly points out, no

difficulties associated with ROW negotiations have led to security or reliability impacts that affect consumer costs.

III. An assessment of the tribal self-determination and sovereignty interests implicated by an application for the grant, expansion, or renewal of energy rights-of-way on tribal land.

As discussed in the Report, one of the most vital components of tribal sovereignty is the ability to determine access to and use of tribal lands and resources. In 1934, Congress enacted the Indian Reorganization Act (25 U.S.C. 476(e)) "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe." In 1948, Congress expressly reconfirmed the tribal consent requirement for rights-of-way on tribal land in 25 U.S.C. 325. The policy of self-determination is the only federal policy to have sustaining positive impact for tribes because it allows tribes to decide for themselves what is beneficial and what is detrimental to their people and their resources.

The Report recommends that tribes develop inventories of ROW to allow for predictable negotiation. In 2000 the Nation, through a P.L. 93-638 contract with the Bureau of Indian Affairs (BIA), assumed the realty function of the BIA. Before 2000, when most of the current rights-of-way within the Nation were established, record keeping was done by the BIA. Any type of inventory that is now in the possession of the Nation is inherited from the BIA. The record has been found to be incomplete so it is incumbent on the BIA to provide the necessary resources to complete the inventories. Therefore, the Report must emphasize that the Departments owe a fiduciary duty to the Nation. This duty includes the authority of the Departments to extend to the fullest its authority to secure the resources necessary to complete inventories on Indian lands.

The Report recommends that tribes develop standard business practices, and it assumes that such practices do not now exist. At least for the Tohono O'odham Nation, practices are in place that allow for the negotiation of ROW between the Nation and other parties. These practices may not emulate other typical business practices, but as the Report adequately describes, Indian tribes, unlike private parties, have a larger duty to their members in that they must provide for the protection of the lands as well as the people. Tribes have to account for the interests of the communities close to a proposed right-of-way, in addition to the tribe's interests as a whole. This fundamental duty to the land and to the people will remain at the forefront of any negotiations between tribes and any other party. Therefore, the type of ROW, and the burden or benefit it places on nearby communities, will determine the tribe's practice in the negotiation of the ROW.

IV. An analysis of relevant national energy transportation policies relating to grants, expansions, and renewal of energy rights-of-way on tribal land.

Federal policies now in place strongly support tribal decision making. The federal policy of Indian tribal self-determination is one of the only federal policies to have positive impacts on tribes because it allows tribes to decide and be responsible for the decisions that they make. Every sovereign possesses the power to govern its territory. This governmental power includes the power to place conditions on the use of tribal lands, including conditions related to jurisdiction, the preservation of environmental and cultural resources and beliefs, restriction on the kind of use and

duration of use, and compensation for the best interest of the tribe and its people. The requirement of tribal consent permits Indian tribes to become productive partners in the energy industry and is consistent with federal policies favoring the self-determination of Indian tribes.

The Energy Policy Act of 2005 affirms the goal of Indian self-determination. Tribes must decide for themselves whether to consent to an energy ROW across their land. Again, tribes are in the best position to determine the impacts of any ROW on their people and their lands. Any action that will take away or reduce the tribe's authority and control over its land and resources undermines sovereignty and self-determination.

V. CONCLUSION

The Report correctly concludes that there is no evidence that any of the difficulties associated with ROW negotiations on Indian lands have led to any adverse impact on the reliability or security of energy supplies to consumers and that the requirement of tribal consent for rights-of-way do not appear to be consequential for the United States or consumers in general. Therefore, the Nation again recommends that the final report clearly state that no legislative action is necessary in the area of Indian rights-of-way.

Thank you for the opportunity to provide these comments. The Tohono O'odham Nation appreciates the opportunity to work with the Departments and Congress to address the concerns raised by the Section 1813 study. We look forward to a successful conclusion.