

THE FAIR ACCESS TO ENERGY COALITION
PRESENTATION
TO THE DEPARTMENTS OF ENERGY AND OF THE INTERIOR
REMARKS OF THOMAS L. SANSONETTI
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Members of the Department of Energy and Department of the Interior, my name is Tom Sansonetti: I appear today on behalf of the FAIR Access to Energy Coalition.

You will hear from some participants today that the Congress should do nothing as a result of the Section 1813 Study; nothing is wrong; the status quo is working just fine. You will hear from others today that eminent domain or condemnation authority is the only way to ensure that reliable, safe energy supplies are delivered to consumers across tribal lands. The Fair Access to Energy Coalition submits that there is a middle ground that achieves energy infrastructure security and at the same time advances important tribal sovereignty. The key task -- and the necessary public policy outcome -- is an objective, consistent, transparent, accountable and uniform standard for valuing rights-of-way across tribal lands.

With the Section 1813 study due to Congress five months from today, I am here to encourage your departments to focus on the future aspects of the tribal sovereignty versus national energy security conundrum by concentrating on the second element of the study concerning "recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes." The ever-increasing demands of the American citizenry for all forms of energy and the challenges of finding the supplies necessary to meet those demands will require ever-more dependable energy delivery systems. In turn, dependable delivery systems require certainty in the ability of companies to secure long-term rights-of-way (ROW) across private, municipal, state, federal and tribal lands.

We are all Americans. Each of those jurisdictional entities I just named are made up of constituencies that are, first and foremost, American citizens. All of those citizens deserve a constant, uninterrupted source of electricity and petroleum products. All of those jurisdictional entities deserve fair compensation from those companies that cross their lands. All deserve a fair and open process for resolving any differences over what constitutes fair compensation.

First, we need certainty. On non-tribal lands, the concepts of fair market value, backed up by the laws of eminent domain, have provided a certainty of process for the landowner and the holder of the ROW. The future demands that a similar certainty of process be available on tribal lands as well. Today is the start of a national

conversation about how best to achieve that certainty. Presently, such certainty does not exist.

Second, we need predictability. The applicable laws do not provide for perpetual terms for ROWs on tribal land. They also do not provide clear access to state or federal courts for suits brought under eminent domain causes of action. Unlike the ROWs in perpetuity that can be bargained-for on non-tribal lands, or that can be decreed by Congress under its Indian Commerce Clause powers in Article I, Section 8 of the United States Constitution, energy infrastructure stakeholders are typically limited to obtaining and renewing tribal ROWs for limited terms.

This never-ending process of having to renew and renegotiate pre-existing ROWs magnifies the problem of uncertainty. In the future, this lack of certainty could lead to a disruption in the nation's flow of energy supplies.

This disruption could occur because a lack of a "meeting of the minds" between an Indian tribe and an energy transporter over the compensation required for a new or renewed ROW can occur every time a lease term ends. All it takes is one unreasonable pipeline company or electric transmission line owner to cause disruption. All it takes is one unreasonable Indian tribe to disrupt service to millions of people. Even if the bargaining entities are both reasonable, but just far apart on their respective appraisals of the value of the ROW, the problem persists without a fixed procedure for review, decision and enforcement in place.

The participants in ROW negotiations are in the important middle of the supply and demand matrix. The pipelines that carry oil, natural gas and refined products do not own that which they transport. Nor do they consume it. The electric transmission line companies that carry the electric charge across the country typically do not own the power plants that produce the electricity, nor do they consume the electricity they transmit. The unfortunate victims of future ROW stalemates over compensation will be not only the negotiation participants, but the energy producers on one side of the matrix and millions of consumers on the other.

There needs to be a future remedy for compensation because presently we have the potential for a refusal to pay demanded fees by companies on the one hand, and a tribal claim of trespass on the other. We have the potential of companies lacking recourse to litigate with a tribe in federal court due to a sovereign immunity defense on the one hand, and a tribal court finding of trespass with monetary fines that is potentially unenforceable outside of Indian Country on the other hand. The self-help remedy of a tribe seizing possession of a transmission line or cutting off the flow of product would be a disastrous outcome across the board for producers and consumers alike, not to mention a public relations disaster for the tribe.

As mentioned earlier, it is totally within the Congress' constitutional powers to provide the statutory guidelines to prevent this looming catastrophe to our Nation's energy

security. The Congress, having previously passed statutes creating certainty on non-tribal lands, can do so on tribal lands as well.

The Federal Energy Regulatory Commission has the sole power to issue certificates of public convenience and necessity for specific routes, create regulated monopolies and allow abandonment of service. The court system has established precedent for ROW land acquisition over the years that centers on valid competing appraisals, subject to judicial review and examination, and the fair market value (FMV) of the property in question. A trial judge's decision is appealable by the unhappy party and enforceable by the prevailing litigant. But we have no such statutes or regulations in place to deal with a future situation where a tribe is being offered an unreasonably small sum or a company is being placed in involuntary trespass by unreasonably large ROW compensation demands.

Some speaking here today will tout the concept of 100% tribal sovereignty. They will claim that tribal consent as established in the 1948 Act, which applies to those tribes organized under the Indian Reorganization Act of 1934, is the only just outcome. The logical upshot of that position is that any tribe so inclined can either totally deny ROW access to its lands or charge usurious fees to those companies licensed exclusively by FERC to deliver energy to America's rural and municipal areas. The country's energy infra-structure cannot be put at risk of dozens of choke points along its thousands of miles of lines.

Others speaking here may tout the concept of eminent domain as the only sure road to guarantee fair market value as the appropriate standard for ROW compensation. They will state that if FMV is the standard off reservation, why should it not be the standard with some adjustment for tribal sovereignty on reservation? If FMV, or some reasonable premium over FMV, is to be the standard, then this 1813 study should ask Congress to declare it clearly. If FMV is not to be the standard, then likewise let's have Congress so declare. Congress has made similar declarations in the past regarding railroad ROWs and the federal highway system.

The main focus of the 1813 study is to aid Congress. The two departments should thus concentrate on providing Congress with options for creating a process that provides certainty. The eventual answer may be found in the Executive Branch with FERC as a final decision-maker or through mediation or binding arbitration conducted by the Interior, Energy or Justice Departments. The ultimate solution may be with the Judicial Branch's federal court system. These are the items that the Section 1813 study's authors should concentrate on because they deal with the real possibility of future solutions.

The first element of the study dealing with an analysis of historical rates of compensation paid in the past for ROWs on tribal land can be dealt with by supplying a few case studies. The past will show any number of tribes that feel they were underpaid and an equal number of companies that feel they overpaid. The total number of these claimed past inequities, whether it be large or small, is irrelevant to the future. Just

because an inequity has or has not occurred in the past, does not mean it will not occur in the future. The federal government must be ready for that circumstance. Otherwise, it risks standing helplessly by a tribe and company struggle in stalemate.

The third element of the study dealing with an assessment of tribal self-determination and sovereignty interests implicated by ROWs on tribal land is likewise easily addressed. To the degree that tribes have total veto power over an existing ROW renewal or future ROW yet to be constructed, then tribal sovereignty is at its fullest. However, as a result, the nation's energy security could be put at risk at a multitude of points along the nation's energy supply map. On the other hand, to the degree that Congress mandates a ROW compensation system, then absolute tribal sovereignty may be accordingly diminished.

The fourth element of the study dealing with an analysis of relevant national energy transportation policies as they relate to tribal land should not be hard to write. Use a combination of the preamble to the 2005 Energy Act and that portion of President Bush's 2006 State of the Union message dealing with the Nation's need for increased energy supplies and energy independence and your task is done.

In conclusion, the FAIR Coalition notes that there are 150 days remaining before the 1813 study's due date. Thus, the FAIR Coalition encourages the Departments to focus on the second element of the study. Only by establishing a clear compensation standard and a certain procedure for its determination can Congress guarantee the necessary balance between tribal sovereignty and the Nation's energy security.

Thank you for your time and attention.

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