

January 20, 2006

Section 1813 ROW Study  
Office of Indian Energy and Economic Development  
1849 C Street NW, Mail Stop 2749  
Washington, D.C. 20240  
[IEED@bia.edu](mailto:IEED@bia.edu)

Re: Comments of the Navajo Nation-Proposed Workplan-Section 1813  
Energy Policy Act of 2005

Dear Comment Recipient:

These comments are submitted on behalf of the Navajo Nation by the Navajo Nation Department of Justice, in response to the notice published at *70 Federal Register* 77178 on December 29, 2005.

As a prelude to these comments we want to emphasize that the Navajo Nation is the largest Native nation in the United States. It bases its government-to-government relationship with the federal government on treaties signed in 1849 and 1868. The Navajo Nation uses revenue gained from its natural resources to provide essential governmental services and to improve the standard of living of its citizens.

Currently, the Navajo Nation and the El Paso Natural Gas Co. are involved in a well-publicized compensation dispute, which centers on what constitutes fair consideration for a long-term extension of El Paso's rights-of-way across Navajo lands. In fact, this dispute is the genesis of the Section 1813 Study ("Study"). We would not be here today commenting on the protocol for the proposed study had not El Paso Natural Gas Co. and other energy companies used their considerable influence in Congress to obtain the study's inclusion in the Act. It is thus, only natural, for the Navajo Nation and other tribes to see this study as the federal government's first step toward abrogating a fundamental aspect of tribal sovereignty.

With that in mind, we offer the following comments on the proposed work plan.

As a preliminary matter, we note that the schedule for completing the Study is completely unrealistic as are the dates referenced in the Notice. The Secretaries should inform Congress now that a complete and balanced (i.e. useful) report cannot be delivered by August 7, 2006

**Step One:**

The Work Plan should state that the discussions of the pre-scoping work group will be summarized in writing and distributed to all interested parties sufficiently in

advance of the two day nation-wide scoping meetings referenced in Step 3. The names and affiliations of the work group members should also be provided.

### **Step Two:**

The Work Plan should provide that interested parties will have input on what information the DOE Laboratory analysts will look at in connection with the analysis of historical compensation rates. These information areas are suggested below:

**A.) Data parameters-** the following information will need to accompany the compensation rate if the compensation rate numbers are to have any meaning (not intended to be comprehensive list):

- type of energy related rights-of-way (e.g. pipelines, overhead transmission lines, [together with size and throughput]);
- whether a company is paying compensation for its facilities under a rights-of-way agreement, or a business site lease;
- terms of the rights-of-way grant (including length and width of ROW, foot print of facilities, duration, and other terms that affect the value of the grant such as right of assignment);
- purpose for which the energy ROW is being used (e.g., community development, tribe's energy development, transmission of third party resources across the Indian reservation);
- type of rights-of way approval document used by the tribe (simple terms and condition sheet specifying consideration for a single rights-of-way, or an Indian Mineral Leasing Act or Indian Mineral Development Act-type agreement in which a single consideration amount might cover many different rights-of-way and other terms that are not related to the company's access and occupancy).

**B.) Comparisons-** In order to properly interpret and evaluate the historic tribal compensation rates, the analysts need to look at compensation rates paid by governmental-type entities to use Indian land, for example payments made for 1) general federal rights-of-way and 2) Western Area Power Authority rights-of-way. Furthermore, any historical analysis should be performed on an individual tribal basis.

**C.) Bureau of Indian Affairs Policy-** Because the BIA ultimately approves the tribe's terms for consent (including compensation payments), the BIA's policies in connection with proper compensation rates (during the chosen historical period) must be examined by the analysts. This can be done by reviewing correspondence from the BIA and the Solicitor's office. For example, the Solicitor's Office in the past has stated that fair and appropriate compensation rates must include 1) opportunity cost, and 2) beneficial use together with the economic value of the rights-of-way.

Therefore, Step 3 of the Work Plan should be modified to include these topics in the list of subjects for which the Departments will solicit input during the 2-day nationwide scoping meetings

**Step 3:**

Step 3 of the Work Plan, in addition to the changes noted above, needs to reflect that the interested parties will have input on the fundamental direction, analytical structure and organization of the study and report. Here are examples of issues (in the form of questions) that could provide an analytical framework for the study and report:

- Is there any indication that compensation rates charged by tribes for energy rights-of-ways pose a long-term problem in connection with the Nation's energy policies? What is the justification and need for the Section 1813 report?
- In a House Report titled "House Committee on Government Operations, Disposal of Rights in Indian Tribal Lands Without Tribal Consent," H.R. Rep. No.78, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess.9 (1969), the Committee rebuked the Secretary for entertaining a policy that would allow the federal government to approve rights-of-way over tribal land without the tribes' consent. What has changed since 1969 to justify an abandonment of the Committee's analysis and conclusions?
- Given the number of tribes and the differences between those tribes, is legislation encompassing all of the tribes either viable or wise?
- How will legislation impact Government treaties (the supreme law of the land) and treaty rights?
- How can the legislation be squared with those treaty rights?
- How will tribes fulfill their fundamental obligations to their members to do land planning in the tribe's best interests? How will the legislation protect this land use planning right, which has been confirmed by the Supreme Court?
- The tribes currently have many contracts with companies that specify when the companies must leave the reservation and the disposition of their improvements. Will the legislation create the potential for unconstitutional impairments of contracts or takings of property rights?
- How will the United States fund the recoveries for takings of tribal land in violation of the treaty provisions?
- Will the legislation breach the government's trust duties to the tribes?

Thank you for this opportunity to comment.

Sincerely,  
Louis Denetsosie, Attorney General  
Navajo Nation