

January 18, 2005

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James E. Cason, Associate Deputy Secretary
U.S. Department of the Interior

Kevin M. Kolevar, Director
Office of Electricity and Energy Reliability

Office of Indian Energy and Economic Development
MS 2749, ATTN: Section 1813 Study
1849 C Street, NW
Washington, DC 20240

Re: Study Required by Section 1813 of the Energy Policy Act of 2005

Dear Mr. Cason and Mr. Kolevar,

I am writing in regard to the Proposed Workplan for a study regarding energy rights-of-way on tribal lands. I have three concerns, shared with colleagues at the University of Arizona's Native Nations Institute for Leadership, Management, and Policy. The first has to do with the adequacy of the overall study plan; a second concern has to do with the first of the subjects that the study will address: "an analysis of historical rates of compensation"; and the last has to do with the third of the listed subjects: "an assessment of tribal self-determination and sovereignty interests implicated by applications for rights-of-way on tribal land."

Adequacy of the study plan

As presently conceived, the plan includes, in steps (3) and (4), the establishment of working groups "to solicit and further develop information" on a variety of subjects. The plan further proposes to then convene as many as two workshops for each of these working groups, and indicates that you "expect to draw extensively on the results of the groups' efforts in preparing the report to Congress." In other words, these working groups will be primary sources of both information and analysis.

We assume that these working groups will be organized to include the diverse entities and constituencies with an interest in this study. But some of those entities and constituencies are far better equipped than others to participate in these groups and to gather, present, and interpret information.

How will you take into account, for example, the fact that industry groups are likely to have massive staff and financial resources they can direct toward sustained participation in this study and toward the assembly, analysis, and presentation of information, while Indian nations—who have at least as much at stake—typically have extremely limited staff and financial resources that they can direct to this effort, are likely to have difficulty sustaining participation, and are likely to be disadvantaged in the assembly, analysis, and presentation of information?

Analysis of historical rates of compensation

The Workplan proposes to contract with a Department of Energy National Laboratory “to prepare an analysis of historical rates of compensation for pipelines crossing Indian land...using a case study approach.” This raises three concerns for us.

First, we wonder if the national laboratories can deliver what you are seeking. Do they have sufficient familiarity not only with the history surrounding compensation issues in Indian Country but with the kinds of forensic accounting techniques that such a study requires? For example, such a study would have to address complex comparative valuation, alternative use, opportunity set, and principal-agent issues. Lack of expertise in these areas could seriously undermine the study. An alternative would be to contract this portion of the study to a reputable, independent body, unattached to the federal government or the energy industry, that is capable of state-of-the-art historical and contemporary economic analysis.

Our second concern is methodological. You have proposed a case-study approach. Case studies can be very helpful in generating hypotheses, illustrating diversity in approaches and outcomes, establishing a range of models of processes or structures, and so forth. But absent rigorous sampling (difficult to do in this case), they are a most uncertain method of determining overall patterns, and they seem particularly inappropriate here. A small number of case studies cannot tell you, with any confidence, what the historical pattern of tribal compensation for rights-of-way has been. We believe the proposed method in this part of the study will leave your results particularly vulnerable to challenge and will provide a weak basis for policy-making.

Third, we are skeptical that you can obtain the data you say you will collect within the timeframe allowed. Consequently, there is a very real danger that this part of the study will rest not only on inappropriate case analysis but on fragmentary, non-systematic data, inviting additional challenges.

Assessment of tribal self-determination and sovereignty interests

Policies regarding rights-of-way across Indian lands clearly have consequences for self-determination and tribal sovereignty. Access is an asset. Reduction in tribal control over assets is an alienation or taking; by definition, it is a reduction in sovereignty. Expansions of tribal control over assets enhance sovereignty and self-determination.

This issue has more than legal dimensions, however. Self-determination and sovereignty have economic consequences, and they are related to reservation poverty in important ways. A growing and vigorous body of research, much of it carried out by the Native Nations Institute here at the University of Arizona and by the Harvard Project on American Indian Economic Development at Harvard's Kennedy School of Government, examines links between federal Indian policies and socioeconomic conditions on American Indian reservations (see the following two pages for citations; exemplary documents are attached). This research has shown, among other things, that the federal policy of self-determination is the first federal policy to have *any* sustained, positive impact on reservation poverty.

In the three-quarters of a century since the 1928 Meriam Report first documented the dire socioeconomic conditions in Indian Country, the U.S. government has experimented with a wide range of policy approaches to deal with the problem, from boarding schools to termination to urban relocation to federally controlled anti-poverty initiatives. In all of that time, self-determination—moving practical control of lands and resources, governmental form, development strategies, internal affairs and other matters into tribal hands—is the *only* policy ever to produce broad, sustained, positive results. And, as research published within the last two years has amply demonstrated, this remains the case even if we remove Indian gaming from the analysis.

Furthermore, it can be shown that sustainable economic development on indigenous lands typically spins off benefits to non-Native communities in the form of jobs, vendor business, reduced welfare rolls, and so forth. In short, reservation economic success is in the interest of non-Natives, *but reservation economic success becomes less likely as tribal sovereignty is diminished.*

These established facts (see citations attached) argue strongly that not only Indian nations but the United States as a whole has a practical, significant, economic interest in a robust self-determination policy and in the maintenance of tribal sovereignty.

Will the study take into account the economic impact—on Indian nations, on taxpayers, and on the United States—that changes in policy regarding rights-of-way and, therefore, toward tribal sovereignty would produce? Will the study confront the role that reductions in Indian control over Indian lands and resources play in crippling the efforts of Indian nations to overcome the poverty of their peoples? How will your analysis take such ripple effects into account?

Sincerely,



Stephen Cornell

Director

Professor of Sociology and of Public Administration and Policy

Attachments

Citations for Research Conclusions Noted in this Letter

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- Cornell, Stephen, and Joseph P. Kalt. 1992. "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations." In *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, ed. Stephen Cornell and Joseph P. Kalt. Los Angeles: American Indian Studies Center, UCLA. Pp. 1-59.
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Moore, Meredith A., Heather Forbes, and Lorraine Henderson. 1990. "The Provision of Primary Health Care Services under Band Control: The Montreal Lake Case." *Native Studies Review* 6, no. 1: 153-64.

Taylor, Jonathan B., and Joseph P. Kalt. 2005. *American Indians on Reservations: A Databook of Socioeconomic Changes between the 1990 and 2000 Censuses*. Cambridge: Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University.