



**NAVAJO NATION DEPARTMENT OF JUSTICE**  
**OFFICE OF THE ATTORNEY GENERAL**

LOUIS DENETSOSIE  
ATTORNEY GENERAL

May 13, 2006

HARRISON TSOSIE  
DEPUTY ATTORNEY GENERAL

Attn: Section 1813 ROW Study  
Office of Indian Energy and Economic Development  
1849 C St., NW  
Mail Stop 2749-MIB  
Washington, DC 20240

Re: Navajo Nation Comments and Information

Dear Sir or Madam:

**I. INTRODUCTION**

The Navajo Nation is pleased to submit the accompanying comments and information to the Departments of Energy and Interior for use in the Departments' analysis and report to the Congress under section 1813 of the Energy Policy Act of 2005 ("2005 EAct"). See 71 Fed. Reg. 26,483 (May 5, 2006). The Navajo Nation submitted comments on the proposed work plan for the study on January 20, 2006 and participated in meetings held by the Departments in March and April. In addition, the Navajo Nation agreed to assist the researchers by providing narrative case studies and supporting documents. This submission is intended to consolidate prior submissions of the Navajo Nation and to supplement those submissions with later economic and case studies and legal analysis. An index of these submissions is attached to this letter. Please note that the Appendix to the accompanying "Navajo Nation Position Paper on the Requirement of Navajo Nation Consent as a Condition for Granting Rights-of-Way Across Navajo Land" is the same Appendix of documents referred to in the El Paso Natural Gas Company case study narrative.

**II. THE REQUIREMENT OF TRIBAL CONSENT HAS NOT CAUSED AND WILL NOT CAUSE DAMAGE TO CONSUMERS OR NATIONAL ENERGY SECURITY.**

This submission shows, first, that there is simply not a problem with respect to the current requirement that the consent of the Navajo Nation and other Indian tribes must be obtained before the Government grants rights-of-way through tribal land. See, e.g., Transwestern Pipeline Company Case Study. The Navajo Nation Council has made it quite clear that the "Navajo Nation will not use its right to control Navajo land to harm other Americans." See accompanying Resolution of the

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Intergovernmental Relations Committee at Ex. A, ¶ 2. The Navajo Nation has reached mutually acceptable terms with all of the energy transporters doing business on or over Navajo Nation lands since the regulations of the Interior Department made that requirement explicit for all tribes in 1951. That record of accommodation extends to the present, with all energy companies except the El Paso Natural Gas Company able to negotiate right-of-way agreements with the Navajo Nation, and, in fact, El Paso is operating under an interim arrangement while the parties negotiate a longer term agreement.

It is well known that the genesis of section 1813 is the current right-of-way compensation dispute between the El Paso Natural Gas Company and the Navajo Nation related to about 900 miles of pipeline that cross the Navajo Reservation. The Navajo Nation and El Paso recently reached an interim agreement allowing El Paso to lawfully use the pipeline right-of-way through December 31, 2006. El Paso and the Navajo Nation are continuing their negotiations for a longer term agreement under the terms of a confidentiality agreement. The Navajo Nation looks forward to reaching such an agreement with El Paso, but, even if the parties are unable to reach an agreement by the end of 2006, the Navajo Nation Council has made it clear by formal resolution that the Nation will take no action that could result in the disruption of interstate transportation of natural gas. The attached El Paso case study provides detailed historical information and compensation rates, and the attached Appendix provides source documentation to allow the Departments to verify the narrative.

The impact on consumers of even the Navajo Nation's opening bargaining position in the El Paso negotiation (as shown on El Paso's web site) would be negligible. See "The Economic Implications of Navajo Right of Way Fees" by Dr. Cicchetti (calculating that Arizona natural gas customers would face an additional four to six cents per month on their utility bills, and California and Nevada customers an additional five to seven cents per month). The increase in the price of one first-class postage stamp from 1985 to the present is far greater. It is difficult to imagine that such insignificant impacts from potential tribal right-of-way fees could be the basis for upsetting the historic relationship between the Indian nations and the federal government.

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As Dr. Cicchetti shows, exactions added to utility bills by states and localities - who may provide no land rights at all - are \$87.12 per year for each consumer in Arizona, \$229.60 per year in California, and \$172.90 in Nevada. These exactions dwarf the nickel or dime attributable to Navajo rights-of-way on a monthly utility bill. Moreover, the attached survey performed by George White, President of Municipal Administrative Services, Inc., shows that the opening bargaining position of the Navajo Nation in the El Paso negotiation is consistent with the consideration demanded and received by those municipalities that do contribute land rights to energy transporters and distributors. As Associate Solicitor Robert Anderson stated in his September 6, 1995 memorandum to the Assistant Secretary for Indian Affairs (attached hereto), in determining the fair market value of an energy right-of-way, "the beneficial use and economic value of the right-of-way for a transmission line must be considered, rather than the mere severance value of the land."

Dr. Cicchetti reports that, simply by collecting sales and gross receipts taxes, states and municipalities impose an annual burden on the Arizona consumer that is 8,130% of the highest Navajo right-of-way fee request, 20,000% for a California consumer, and 16,393% for a Nevada consumer - all figures using the most disadvantageous assumptions from the Navajo Nation's perspective. These governmental entities fund essential government services using those tax revenues. That is the same purpose to which the comparatively insignificant right-of-way fees are devoted by the Navajo Nation Government - to provide the benefits of an organized society to members, visitors, and businesses. See Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200 (1985) (Navajo government is perhaps the most elaborate of all Indian tribal governments); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137-38 (1982).

The Navajo Nation government provides the full range of governmental services, and right-of-way fees are an essential component of the tribal budget. The Navajo Nation must provide those services and infrastructure for an area the size of West Virginia, and its burden is heightened by the poverty and enormous infrastructure deficit on the reservation. See U.S. Comm'n on Civil Rights, The Navajo Nation: An American Colony 42 (1975) (\$3.778 billion infrastructure deficit). United States census and other sources reveal that the per capita

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income for Navajo people is about \$5600, and that approximately 90% of Navajo residents lack any natural gas service, 70% have no running water, and 50% lack any electric service. The Navajo Nation requests that the report note these disparities, so that the Congress may better understand the importance of energy right-of-way compensation to the Nation's residents as compared with the insignificant effect such compensation has on their more affluent neighbors.

**III. ALTHOUGH HISTORIC COMPENSATION RATES HAVE BEEN LOW, ARM'S-LENGTH BARGAINING BETWEEN THE NAVAJO NATION AND INDUSTRY HAVE RESULTED IN GREATER NATIONAL ENERGY SECURITY AND PRESERVED FUNDAMENTAL TRIBAL SELF-DETERMINATION AND SOVEREIGNTY INTERESTS CONSISTENT WITH FEDERAL ENERGY POLICY.**

With regard to the four categories of issues listed in section 1813, the El Paso, Arizona Public Service Company and Western Area Power Company case studies reflect not only unfair historical right-of-way compensation, but also, in the APS case, the continuing trespass of companies whose rights have expired, the lack of a constructive federal response to such violations of federal law, a likely need for BIA administrative process improvements,<sup>1</sup> and, because APS and others seek to avoid tribal authority even when doing business in the tribal territory, the need to maintain the principle of tribal consent from a tribal self-determination and sovereignty standpoint. The Navajo Nation's more complete analysis of the sovereignty and self-determination implications of section 1813 is presented in the accompanying paper prepared by Paul Frye.

As the Nation's initial recommendations state, the

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<sup>1</sup> The scoping meetings and our own experience suggest that improvements can be made in expediting BIA appraisals and the environmental studies that are now required by federal law, and in ensuring that all BIA offices understand both that non-cash consideration may be perfectly proper in many instances and also that there is no legal impediment to granting rights-of-way for terms that exceed 20 years. See Blackfeet Indian Tribe v. Montana Power Co., 838 F.2d 1055 (9th Cir.), cert. denied, 488 U.S. 828 (1988) (harmonizing 25 U.S.C. § 321 with general Indian Right-of-Way Act of 1948).

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proper procedure for determining consideration for rights-of-way across tribal land is by arms-length negotiations. The proper standard for that consideration is the resulting business arrangement between the tribe and the company. Any formulation that would impose a "metric" or a decision by a third party would violate fundamental and treaty-based rights of the Navajo Nation to exclude non-members and to condition the entry of those seeking to do business within the tribal territory. It would also deprive Indian nations of the ability to leverage their access rights to attain economic self-sufficiency and to increase energy production from their lands, as the Texas-New Mexico Pipeline case study and other tribal case studies show.

The Congress studied the tribal consent requirement from 1967 to 1969, when the Department of the Interior proposed rules to eliminate that requirement for some tribes in 1967. The resulting report concluded that diluting the tribal consent requirement would be contrary to law, good government, democratic principles, property rights, and the pattern of modern Indian legislation, and that eliminating that requirement could lead to costly litigation in the Court of Claims. "Disposal of Rights in Indian Tribal Lands without Tribal Consent," H.R. Rep. No. 91-78 (1969) at 3, 12. Present federal energy policy strongly favors tribal self-determination, and that is the only federal policy that has worked. Dilution of the consent principle would, in the words of the House Report constitute "an enormous shift of control away from the Indians' own local units of government to the Department of the Interior." House Report at 8. That would be contrary to modern federal energy policy, as exemplified in the Energy Policy Act of 1992, most dramatically in the 2005 EPAct, and, just this year, in Secretary Bodman's "Department of Energy American Indian & Alaska Native Tribal Government Policy" issued on January 20, 2006. The Navajo Nation urges that the report highlight the conclusions of the House Report, observe that there have been no developments to alter those conclusions, and, rather, state that federal policy supporting those conclusions has been strengthened by both the Congress and the Executive Branch.

#### **IV. CONCLUSION**

To summarize, the verifiable data show (1) that there is no problem regarding the tribal consent requirement for

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energy rights-of-way meriting the attention of Congress, (2) the tribal consent requirement has not resulted and will not result in any jeopardy or harm to consumers, (3) national energy security is enhanced, not diminished, by adherence to the consent principle, (4) historic rates of compensation for tribal rights-of-way were often inadequate, especially when the federal Government was granting rights to itself, (5) the proper procedure for determining right-of-way consideration for tribes wishing to permit or allow continued entry by non-members is by arms-length negotiations and the proper standard for compensation is the business arrangement that results from those negotiations, (6) the tribal consent principle is consistent with important federal and tribal policies promoting tribal sovereignty and self-sufficiency, and (7) continued respect for tribal decision making is consistent with modern federal energy policy. The Navajo Nation urges the Departments of Interior and Energy to so state in their report to Congress and to recommend that no legislation that might dilute the principle of tribal consent to the grant or renewals of rights-of-way be considered.

Please do not hesitate to call my office if additional input is desired.

Sincerely,

The Navajo Nation



Louis Denetsosie  
Attorney General

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#### INDEX

- A. Louis Denetsosie, "Recommendations of the Navajo Nation in Response to Notice of Public Scoping Meeting of Energy Policy Act 2005" (Mar. 7, 2006).
- B. Paul E. Frye, "Section 1813 of the Energy Policy Act of 2005: Implications for Tribal Sovereignty, Territorial Management, and Economic Self-Sufficiency" (April 2006).
- C. Economic Analyses:
  - 1. Charles J. Cicchetti, Ph.D., "The Economic Implications of Navajo Right of Way Fees" (May 15, 2006).
  - 2. George T. White, President, Municipal Administrative Services, "A Report on Right-of-Way compensation Review of Certain Local Governments (May 12, 2006).
- D. Case Study Narratives:
  - 1. El Paso Natural Gas Company
  - 2. Transwestern Pipeline Company
  - 3. Texas-New Mexico Pipeline Company
  - 4. Western Area Power Administration
  - 5. Arizona Public Service Company
- E. Summary of Navajo Nation Position Paper on the Requirement of Navajo Nation Consent as a Condition for Granting Rights-of-Way Across Navajo Land
- F. Submission to Department of the Interior regarding Tribal Consent Requirement:
  - 1. Letter from Louis Denetsosie, Attorney General, to Solicitor Sue Ellen Wooldridge (Nov. 21, 2005), with attachments:
    - a. Transwestern Pipeline Co. v. Acting Deputy Ass't Secretary, 12 IBIA 49 (1983);
    - b. Motion of United States for Partial Summary Judgment, Transwestern Pipeline Co. v. Clark, CIV Nos. 83-1884 HB, 84-0251 HB (D.N.M. filed Sept. 11, 1984), with Statement of Undisputed Material Facts and Supporting Memorandum of Law.

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2. Navajo Nation Position Paper on the Requirement of Navajo Nation Consent as a Condition for Granting Rights-of-Way Across Navajo Land (Nov. 18, 2005).

3. Appendix to Navajo Nation Position Paper (Nov. 2005).

G. Resolution of the Intergovernmental Relations Committee of the Navajo Nation Council Relating to Intergovernmental Relations; Resources; Approving Principles or Rights-of-Way Across Navajo Nation Lands (May 1, 2006).



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

SEP 6 1995

## Memorandum

To: Assistant Secretary - Indian Affairs

From: Associate Solicitor, Division of Indian Affairs

Subject: Right-of-Way Across Hopi Reservation

This opinion concerns renewal of a right-of-way across lands of the Hopi Tribe. The BIA granted the right-of-way to Arizona Public Service Company (APS) in 1967. Now, the Tribe wishes to negotiate with APS concerning the renewal. In its February 19, 1992 letter to APS, the Tribe noted that the original grant conditioned renewal on compliance with applicable regulations, namely Part 169 of Title 25 of the Code of Federal Regulations.

The Hopi Tribe has requested that the Solicitor or Associate Solicitor review and concur with the Phoenix Field Solicitor's opinion dated June 3, 1994. That opinion concerned whether a right-of-way granted to Arizona Public Service Company (APS) for a transmission line across the Hopi Reservation had expired, necessitating a new consent by the Tribe. In the view of the Field Solicitor, a new consent was required. Whether or not such consent is required, the BIA has a duty to assure that the Tribe receives "fair market value of the rights granted, plus severance damages," (emphasis added) as explained below.

The BIA granted a right of renewal "upon compliance with applicable regulations . . . subject to the provisions of the Hopi Tribal Council on Resolution No. H-18-66." (emphasis added)<sup>1</sup> That resolution states that there would be "a second

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<sup>1</sup> The BIA granted the right-of-way in 1967, stating:

[the right-of-way] is hereby approved . . . for a period of 25 years from the date of approval, and is subject to renewal for a like term upon compliance with applicable regulations . . . subject to the provisions of the Hopi Tribal Council on Resolution No. H-18-66. (emphasis added)

The Tribe's resolution concerning the grant and its renewal:

BE IT RESOLVED by the Hopi Tribal Council  
that the consent of the Hopi Tribe is hereby

payment to be made at the commencement of the second 25 year term in an amount equal to [the payment for the first 25 years.]” The resolution appears to consent to a renewal for a second 25 years for the same amount.<sup>2</sup> The Hopi Tribe, however, withdrew such consent prior to approval of the renewal.<sup>3</sup> See Moccasin v. Acting Billings Area Director, 19 IBIA 184 (1991).

The consent issue aside, the BIA stated that the right-of-way “is subject to renewal for [25 years] upon compliance with applicable regulations . . . .” The applicable regulations provide that consideration for any right-of-way granted or renewed “shall not

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given to commence construction and to grant a right of way to ARIZONA PUBLIC SERVICE COMPANY for a transmission line across the joint use area of the Hopi Executive Order Reservation, subject to compliance by that company with the requirements of Sec. 161.7 of the Title 25 of the Code of Federal requirements of said title as the Secretary or his authorized representative may deem applicable, and hereby consents to a payment of damages of \$775.00 per mile for a right of way 200 feet wide (if fixed according to law and the Code of Federal Regulations in said amount) one half of said payment to be for the Hopi Tribe, it being understood that the route of said line is to be generally as indicated on the plats submitted by Arizona Public Service Company to the Hopi Tribe, and it being further understood that the above payment is to be for the first 25 years of the term of the permit, with a second payment to be made at the commencement of the second 25 year term in an amount equal to the above payment. (emphasis added)

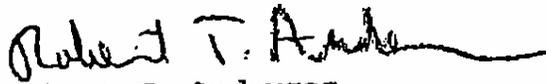
Hopi Tribal Resolution No. H-18-66 (July 6, 1966).

<sup>2</sup> The case law cited by the Field Solicitor does not control whether the Tribe is owed additional money because the Fond du Lac Band of Lake Superior Chippewa Indians had consented only for the initial grant, not its renewal. See Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124, 128 (1987).

<sup>3</sup> By letter of February 3, 1995, the Chairman of the Hopi Tribe advised the Phoenix Area Director “. . . that the Hopi Tribe has withdrawn any prior tribal consent to the granting of right-of-way renewals . . . .”

be less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate." (emphasis added), 25 C.F.R. § 169.12. Therefore, regardless of whether the Tribe effectively withdrew any consent, the BIA must assure that the total compensation meets this regulatory requirement. In determining the fair market value of the right granted, the beneficial use and economic value of the right-of-way for a transmission line must be considered, rather than the mere severance value of the land. In this regard, the BIA may consult with the APS, the Hopi Tribe, and others in seeking to ascertain the value of the rights granted.

Please forward this memo to the Hopi Tribe.

  
Robert T. Anderson

cc: Field Solicitor, Phoenix  
Deputy Commissioner, BIA