



The Confederated Tribes of the Colville Reservation  
P.O. Box 150, Nespalem, WA 99155  
**OFFICE OF THE CHAIRMAN**

(509) 634-2212  
FAX: (509) 634-4116



April 17, 2006

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

**Re: Comments from the Confederated Tribes of the Colville Reservation on  
the Section 1813 Rights of Way Study**

Dear Comment Recipient:

These comments are submitted on behalf of the Confederated Tribes of the Colville Reservation in response to the Department of Energy ("DOE") and Department of the Interior's request for comments on the Section 1813 Rights of Way Study required by the Energy Policy Act of 2005, Pub. L. 109.58. Additionally, I submit Colville Business Council Resolution 2006-175 in support of a set of "Tribal Principles" that should be incorporated into the study.

**INTRODUCTION**

The Colville Indian Reservation is located in Eastern Washington and was established by Presidential Executive Order in 1872. The original Colville Reservation was bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions. In 1891 the northern half of the Colville Reservation was restored to the public domain. The Colville Reservation currently consists of approximately 1.4 million acres of land and was originally twice as large as it is today.

The Confederated Tribes of the Colville Indian Reservation ("Colville Tribes") are made up of the following aboriginal tribes: Colville, Nespalem, San Poil, Lake, Palus, Wenatchi (Wenatchee), Chelan, Entiat, Methow, southern Okanogan, Moses Columbia and the Nez Perce of Chief Joseph's Band. The governing body of the Confederated Tribes of the Colville Reservation consists of 14 members of the Colville Business Council ("CBC"). The CBC is responsible to protect and preserve tribal culture, property, natural resources and the health, security and general welfare of the Colville Tribes. Under its constitution and consistent with its

sovereignty, the CBC exercises control over Colville tribal lands for the benefit of the membership and future generations.

### COMMENTS

Under § 1813 of the Energy Policy Act of 2005 the Department of Energy (“DOE”) and Department of the Interior (“DOI”) are charged with the responsibility of submitting to Congress a report on energy rights-of-way on tribal land. The report must include (1) an 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 for energy rights-of-way on tribal land, (3) an assessment of the tribal self-determination and sovereignty interests implicated by applications 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 renewals of energy rights-of-way on tribal land.

First, I would like to pose the following questions and then offer comments on the study:

1. What is the scope of this study? Energy rights-of-way on tribal land is very vague and could mean several types of rights of way, including but not limited to oil transmission pipeline, oil gathering line, natural gas transmission line, natural gas gathering line, electricity transmission line, electricity distribution line, or transit line.
2. How is tribal land defined? Do all lands that Indian tribes hold where an energy rights-of-way exist qualify for the study, i.e., trust lands on and off reservation, tribal fee lands within the reservation, tribal fee lands outside the reservation? Further, will the study cover allotted lands both on and off reservation held by individual Indian landowners?
3. Can the Department of Energy and the Department of the Interior complete this study by the established deadline? The deadline is fast approaching and the scope of the study may not be fully developed yet.
4. What support is there to indicate that compensation rates charged by tribes for energy rights-of-ways pose a threat to the United States energy policies? The Colville Tribes fails to see how energy companies can be harmed by tribes exercising their sovereign right to seek fair value for their lands.

***Federal Indian Policy for Rights-of-Way on Tribal Lands and the Federal Trust Responsibility***

Any analysis of historic rates of compensation must take into account the federal Indian policies that were in place throughout each period of history with regards to rights-of-way on tribal lands. In 1934, Congress passed the Indian Reorganization Act “to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.” 25 U.S.C. 476e. In 1948, Congress reaffirmed the tribal consent requirement for rights-of-way on tribal lands. Prior to 1948, rights-of-way over tribal and individual lands were authorized by a hodge-podge of statutes, the first of which was enacted in 1899. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.09[4] (2005 ed.).

Removal of the requirement for tribal consent for tribes that were not organized under the IRA was considered by the Secretary of the Interior in the 1960s. The House Committee on Government Operations rejected the Secretary’s proposed regulation changes to remove tribal consent, finding that tribal land was the property of Indian tribes, not the United States.<sup>1</sup> The Committee noted the grant of right-of-way without tribal consent “violated property rights, democratic principles, and the pattern of modern Indian legislation.”<sup>2</sup> Presently, tribes are exercising their inherent right to consent to the use of their land. Any infringement on that right would violate the federal governments trust responsibility towards Indian tribes.

***Tribal Right to Consent to Use of Tribal Lands***

Indian tribes are one of four sovereigns recognized in the United States Constitution and should enjoy the same protections as states do against condemnation. This study should give deference to the sovereign status of tribes, not just the market value of land as if it were subject to eminent domain. An inherent principle of sovereignty is the right to consent to the use of one’s land. Each sovereign tribe has the right to consent to the use of tribal lands and to place terms and conditions on that use. The Colville Tribes insist that tribal consent to the use of

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<sup>1</sup> *Disposal of Rights in Indian Tribal Lands without Tribal Consent*, H.R. Rep. No. 91-78 (1st Sess., March 13, 1969).

<sup>2</sup> *Id.*

Colville tribal lands is not only a property right, but is an absolute inherent right that should not be infringed upon.

### ***Perpetual Grants of Rights-of-Ways and Easements***

The grant of perpetual rights-of-ways and easements to is contrary to tribal self-determination and sovereignty. Easements and rights-of-way in perpetuity deprives Indian tribes their right to consent to the use of their land and to place terms on that use. The Bureau of Indian Affairs (“BIA”) have granted perpetual rights-of-ways and perpetual easements on Indian reservations to the detriment of tribes and in direct conflict with federal policies regarding rights-of-ways. The Colville Tribes would like to re-examine the perpetual rights-of-way and easement grants that were granted by the BIA to the detriment of the tribes.

### ***Land Valuation for Tribal Land***

The Colville Tribes are not like typical landowners who simply buy and sell land on the market; rather they have a strong sense of responsibility to care for the land in a way beyond what an individual landowner normally does. For example, tribes are not just responsible to buy and sell land like an ordinary landowner but they have the responsibility to take care of the land for purposes of a homeland, for purposes of protecting the health and safety of their membership and for future generations.<sup>3</sup> Similarly, Colville Tribes are charged with the extra duty of a landowner to ensure that tribal lands are treated in a way that provides protection for: the environment, the membership’s well being, the four-legged, the two-legged, the winged, the fish and future generations. Hence, Colville Tribes should be able to negotiate a premium to fair market value based on the difference between tribal lands and other types of lands.

### ***Case Study Approach***

The case study approach is flawed due to the unique circumstances each tribe has endured throughout their history. Each Indian reservation is unique in its history, culture, and politics. Each Indian reservation was created for specific purposes, including but not limited to providing a homeland for the tribes on the reservation. Again, inherent in protecting one’s

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<sup>3</sup> The Ninth Circuit Court of Appeals found that the Colville Reservation was created not only for purposes of providing a homeland but also for the purpose of preserving the tribe’s access to fishing grounds. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981).

homeland is the notion of consent to allow third parties to use that land and to place conditions on the use of the land.

There is no "one-size-fits-all" case study that can comprehensively represent the issues Indian tribes face with regards to energy rights-of-way on tribal lands. Just as each Indian reservation is unique in the type of energy resource(s) they own, each is unique in how those resources have been accessed historically via energy rights-of way grants and/or renewals. Thus, Colville Tribes believes a case study will not adequately inform Congress of the problems Indian tribes face with regards to energy rights-of-ways.

### CONCLUSION

The DOE and DOI should ask Congress for more time to complete the study because the scope of the study must be defined before tribes and industry can effectively assist the departments in completing the study. Indian tribe's inherent right to consent to the use of their lands should not be infringed upon. The federal government has a trust responsibility to ensure that tribal self-determination is respected and not impeded upon. Tribal land is not subject to eminent domain and each tribe should be able to exercise their right to negotiate the terms and compensation for the use of their lands. Valuation of tribal lands should reflect the fact that tribal lands are significantly different than ordinary lands owned by individuals. Finally, the set of "Tribal Principles" that are adopted in Colville Business Council Resolution 2006-175 should be included in the § 1813 study.

  
Harvey Moses, Jr., Chairman  
Colville Business Council

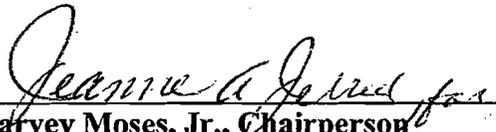
**EMERGENCY  
RESOLUTION**

**WHEREAS**, it is the recommendation of the Community Development Committee that the Colville Tribes issue the attached policy statement with regards to the Energy Policy Act of 2005, Section 1813 Energy Rights-of-Way Study on tribal lands, in support of a set of "tribal principles" that the Departments of Energy and Interior should incorporate into the study.

**THEREFORE, BE IT RESOLVED**, that we, the Colville Business Council, by authority of Resolution 1991-431 (10 affirmative signatures on this recommendation sheet, an emergency) this 14<sup>th</sup> day of April, 2006, acting for and in behalf of the Colville Confederated Tribes, Nespelem, Washington, do hereby approve the above recommendation of the Community Development Committee.

The foregoing was duly enacted by the Colville Business Council by a vote of 12 **FOR 0 AGAINST 0 ABSTAINED**, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs in April 19, 1938.

**ATTEST:**

  
**Harvey Moses, Jr., Chairperson**  
**Colville Business Council**

cc: Community Development Committee Chair  
CBC Recording Secretary  
BIA Superintendent  
Dept. or Program:

10 SIGN

2006-175

COLVILLE CONFEDERATED TRIBES  
Nespelem, Washington

TO: COLVILLE BUSINESS COUNCIL

DATE: April 11, 2006

FROM: Cherie Moomaw, Community Development Committee

SUBJECT: Energy Policy Act of 2005, § 1813 Energy Rights-of-Way Study on Tribal Lands and "Tribal Principles" that the Departments of Energy and Interior should consider during the study.

Committee Recommendations:

WHEREAS, it is the recommendation of the Community Development Committee that the Colville Tribes issue the attached policy statement with regards to the Energy Policy Act of 2005, Section 1813 Energy Rights-of-Way Study on tribal lands, in support of a set of "tribal principles" that the Departments of Energy and Interior should incorporate into the study.

<u>COMMITTEE MEMBERS</u>	<u>VOTE CAST</u>		<u>COMMITTEE MEMBERS</u>	<u>VOTE CAST</u>	
	(YES)	(NO)		(YES)	(NO)
<i>Cherie Moomaw</i>	X		<i>Andrew C. Joseph</i>	X	
<i>Bill Lopez</i>	X		<i>Vigil Spangue</i>	X	
<i>Marjorie Hutchinson</i>	X		<i>Stanley H. Chasley</i>	X	
<i>Richard J. Tenby</i>	X		<i>Lee Alalga</i>	X	
<i>Dale M. ...</i>	X				
<i>Jane H. Joseph</i>	X				

Business Council Actions:

Seconded by: \_\_\_\_\_

\_\_\_ FOR \_\_\_\_\_

Signed: *Cherie Moomaw* 4-11-06  
Committee Chairperson

\_\_\_ NAY \_\_\_\_\_

Signed: *Marjorie Hutchinson*  
CBC Chairperson for

\_\_\_ ABSTAINED \_\_\_\_\_

Date Enacted: \_\_\_\_\_

Amendments: \_\_\_\_\_

Emergency (10 Affirmative Signatures) Rationale attached: The Departments of Energy and Interior are holding a three-day public scoping meeting regarding the § 1813 Energy Rights-of-Way Study on Indian Lands on April 18-20, 2006, in Denver, Colorado. The Community Development Committee is not scheduled to meet again until April 25, 2006. This Resolution supports a set of "tribal principles" that Colville Tribes will submit prior to the April 18-20<sup>th</sup> meeting, to the Departments of Energy and Interior for their incorporation into the study.

**CONFEDERATED TRIBES OF THE COLVILLE RESERVATION  
STATEMENT REGARDING THE ENERGY POLICY ACT OF 2005,  
SECTION 1813 ENERGY RIGHTS-OF-WAY STUDY**

**WHEREAS**, the Confederated Tribes of the Colville Reservation (“Colville Tribes”) is a federally recognized Indian tribe; and

**WHEREAS**, the Colville Business Council is empowered and authorized to act on behalf of the Colville Tribes; and

**WHEREAS**, Section 1813 of the Energy Policy Act of 2005 requires the Departments of Energy and Interior to prepare a study on the compensation practices and policy implications associated with the issuance of tribal consent for energy-related rights-of-way crossing tribal lands (“Right-of-Way Study”); and

**WHEREAS**, the Right-of-Way Study is a matter of great importance to the Colville Tribes and to all tribes and may have significant implications regarding future legislation and tribal sovereignty; and

**WHEREAS**, under longstanding law, the consent of the governing body of a tribe must be obtained as a condition for the grant or renewal of a right-of-way across tribal lands; and

**WHEREAS**, the tribal consent requirement is a critical aspect of tribal sovereignty that allows tribal governments to negotiate acceptable terms, including those related to duration and compensation, for the use of tribal lands; and

**WHEREAS**, Colville Business Council has reviewed the following Statement of Tribal Principles, and has determined that these principles should be incorporated in the Right-of-Way Study and maintained as a matter of federal law and policy.

**NOW, THEREFORE, BE IT RESOLVED**, that the Colville Business Council adopts these principles:

1. **Tribal Sovereignty and Consent.** The power of tribes to prevent third parties from using tribal lands without tribal consent is a critical element of tribal sovereignty that has been established in Federal law and policy for over 200 years. The tribal consent requirement to the use of tribal lands should be honored and preserved.
2. **Conditions to Consent.** The tribal consent requirement includes the power of tribes to place conditions on the use of tribal lands, including conditions related to tribal jurisdiction, preservation of environmental and cultural resources, duration of use, and compensation.
3. **No Negative Effects.** Adherence to the tribal consent requirement has resulted in greater energy production in Indian country and lower energy costs to consumers. The tribal consent requirement for rights-of-way has not had a noticeable negative effect on the availability or cost of energy to consumers.

4. **Preservation of Tribal Jurisdiction.** No right-of-way agreement or other business arrangement that permits third-party use of tribal land should reduce the sovereign power of a tribe over its lands or the activities conducted on its lands in the absence of the specific consent of the tribe.
5. **Restricted Duration of Rights-of-Way.** Federal law and policy should not be changed to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.
6. **Negotiated Compensation.** Tribes should continue to have the right to negotiate compensation for the use of tribal land that gives tribes a fair share of the economic benefits produced by use of their lands. Such revenues sustain tribal governments and cultures.
7. **National Security.** Indian nations are an integral component of energy security of the United States, not a threat to that security. History demonstrates that tribes have permitted critical energy facilities to be used pending compensation negotiations even in cases where tribal rights-of-way have expired.
8. **Industry Partnerships – Best Practices.** Federal law and policy should provide positive incentives to tribes and industry to foster partnerships and the mutual alignment of economic interests related to energy development, transmission and distribution.
9. **Appropriate Deference.** As reflected in the Indian Tribal Energy Development and Self Determination Act of 2005, deference to tribal decision-making should remain a fundamental component of Federal Indian energy policy.
10. **Allottee Experience.** The creation of a Federal administrative valuation process for fixing tribal right-of-way compensation would be an affront to tribal sovereignty and, as shown by the disastrous Federal management of Indian allottee resources, would be a mistake.