



**NAVAJO NATION DEPARTMENT OF JUSTICE
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VIA EMAIL (IEED@bia.edu)
AND REGULAR MAIL

September 1, 2006

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United States Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

RE: Section 1813 Comments

Dear Sirs:

Please find enclosed the Comments of the Navajo Nation on the Draft Report to Congress: Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study. The Navajo Nation appreciates the opportunity to comment on the Draft Report.

As the enclosed comments state, the Navajo Nation agrees with the principal findings of the Draft Report, believes that they should be highlighted early in the report for the convenience of the reader, and urges that the Departments recommend to the Congress that no legislative action is warranted on this issue.

We commend the Departments and their contractors for analyzing extensive factual and legal issues in the short time frame permitted under section 1813. We trust that our involvement has proved helpful to the Departments.

Sincerely,

A handwritten signature in cursive script that reads "Louis Denetsosie".

Louis Denetsosie, Attorney General

xc: Liz Hocking, Esq.

**COMMENTS OF THE NAVAJO NATION
on the DRAFT REPORT TO CONGRESS:
ENERGY POLICY ACT OF 2005, SECTION 1813
INDIAN LAND RIGHTS-OF-WAY STUDY
September 1, 2006**

I. INTRODUCTION AND SUMMARY

The Navajo Nation appreciates the opportunity to comment on the Draft Report to Congress under section 1813 of the Energy Policy Act of 2005. We particularly appreciate the hard work done by the Departments of Energy and Interior to collect and analyze significant amounts of data in a compressed time frame, and the willingness of the Departments to consult meaningfully with the Navajo Nation during the process.

The Navajo Nation respectfully submits comments on five topics. First, we fully support the two principal conclusions of the Draft Report, *i.e.*, (1) that the present requirement of tribal consent for issuance or renewals of easements across tribal trust lands does not pose, and is not likely to pose, any risk of disruption of energy supplies, and (2) the cost of energy is not, and is not expected to be, materially affected by the cost of rights-of-way across tribal lands. These and other key findings are fully supported by the verified information and sworn statements in the record.

Second, we believe that the final Report should recommend explicitly that no legislative action be taken in the area of Indian rights-of-way. That recommendation is implicit in the Draft Report's principal findings and its conclusions regarding sovereignty, self-determination, and national transportation policies, but, without such an explicit recommendation, the reader would only be able to draw that inference after reading the entire report.

Third, the Navajo Nation urges that the "options" for Congress listed in the Draft Report be deleted, for two principal reasons. First, several of the options are inconsistent with the principal findings of the Draft Report and with its conclusions regarding tribal self-determination and national energy transportation policies. Those objectionable options (which dilute or vitiate the tribal consent principle) suggest that there is a problem national in scope, contrary to the record and the Draft Report's conclusions. Second, we believe it is not responsible for the Departments to recommend to Congress *any* option that would necessarily entail violation of treaty rights, since treaties are the "supreme law of the land" under the Constitution, or that would violate constitutional prohibitions on impairing contracts (such as those between the Navajo Nation and pipeline companies) or the taking of tribal property (such as the property that reverts to the Navajo Nation and other tribes at the termination of a right-of-way agreement). We believe that, if *any* options are presented to Congress, they should be consistent with the Government's treaty commitments and with the Constitution.

Similarly, we believe that the discussion of alternative valuation methodologies is largely inapposite. Finally, these comments clarify or correct the more significant factual misstatements regarding Navajo rights-of-way discussed in the Draft Report.

II. THE KEY FINDINGS ARE CORRECT AND SUPPORTED BY THE RECORD, AND SHOULD BE HIGHLIGHTED EARLY IN THE REPORT.

In conversations with federal legislators, the Navajo Nation was informed that the El Paso Natural Gas Company (“EPNG”) had convinced Congress of the need for the section 1813 study by, for example, representing to a California member of the House of Representatives that the Navajo Nation was about to cut off natural gas service to a military base in his District. (Conversation with Rep. Rick Renzi, R. Ariz., Apr. 26, 2006). EPNG, initially and later through its alter ego, the so-called FAIR coalition (which owes its existence and almost all of its funding to EPNG), also represented that consumers and the national economy would be harmed by excessive right-of-way fees demanded by unreasonable Indians.

The record refutes these false contentions and the Draft Study properly rejects them. As the Draft Report states, “there is no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers,” and from the “public interest perspective” the requirement of tribal consent for rights-of-way “does not appear to be consequential for the nation or consumers in general” Draft Report § 4.3; accord id. § 4.4.2 (“ . . . it appears unlikely that these difficulties [in ROW negotiations] could lead to significant cost impacts for energy consumers or to significant threats to the physical delivery of energy supplies to market areas.”). Moreover, the “Departments’ analysis finds that emergency authorities could provide a means of rectifying [an emergency] situation if it did occur.” Id. § 3.2.1. The Navajo Nation believes that these key findings should be highlighted early in the final Report for the Congress, as concerns over these issues motivated the study.

In addition, section 1813 requires the Departments to examine four specific topics. The Navajo Nation agrees with the Departments that there was insufficient time to complete a comprehensive review of the first topic, historic rates of compensation. We sympathize with the many tribes who have expressed concern that the case study method (where trends for only a few rights-of-way of only four tribes were examined) lacks statistical validity because of the small sample size. See Draft Report App. A at 18. And the four tribes studied include the most creative and assertive Indian nations with energy resources. Nonetheless, the Navajo Nation agrees with the general conclusions of HRA and commends its diligence and hard work.¹ As the HRA report shows, the requirement of tribal consent permits Indian nations to become productive partners in the industry and tribal revenues have increased with greater tribal participation in right-of-way negotiations. These results are fully consistent with “important federal interests” of “encouraging tribal self-sufficiency” generally, see California v. Cabazon Band of Mission Indians, 480 U.S. 202,

¹ Part IV of these comments addresses a few significant factual shortcomings of the part of the HRA report that concerns Navajo rights-of-way.

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217 (1987) (citing President Reagan's Indian policy), and with federal energy policy specifically, as most recently expressed in Title V of the Energy Policy Act of 2005. Indeed, congressional study of the issue *applauded* the increase in tribal revenues attributable to the consent principle when it studied (over a three-year period) and affirmed the requirement of Indian consent for rights-of-way in 1969. Disposal of Rights in Indian Lands without Tribal Consent, H.R. Rep. No. 91-78 (1969) ("House Report") at 8.

With respect to the second issue identified in section 1813, the Draft Report properly concludes that arms-length negotiations between tribes and energy companies have historically produced satisfactory results. Draft Report § 4.2 ("The Departments note, however, that most energy ROW negotiations are completed successfully. This is true even if the negotiations are protracted . . ."). Moreover, as stated in the Draft Report, "[t]his [negotiation] process is consistent with long-standing expressions of tribal sovereignty and self-determination in the federal-tribal relationship." Id. § 4.1. We believe that the unverified and admittedly selective survey data supplied by industry should be deleted from the final Report, or that, at a minimum, the final Report should state clearly that such data are unreliable.

The Navajo Nation agrees wholeheartedly with the conclusions of the Departments regarding the third topic identified in section 1813, the tribal self-determination and sovereignty issues implicated by energy rights-of-way. Specifically, the Draft Report correctly finds that

[a] tribe's determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self-determination. The implication of any reduction in the tribes' authority to make that determination is that it would reduce the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.

Id. § 2.4. Because the self-determination policy is so fundamental to federal Indian policy in the modern era, this finding should be emphasized for the Congress early in the final Report. It is the only federal policy that has worked for the benefit of the Indian people and the United States.

Finally, regarding the fourth item, national energy transportation policies, the Draft Report concludes that "the policies put in place by Congress and the executive branch strongly support tribal decision-making regarding energy ROWs on tribal lands," that Congress has approved those policies, and that the present Bush administration has honored and embraced those policies. Id. §§ 3, 3.1.1, 3.2.2 (citing Presidential Proclamation No. 7500, 66 Fed. Reg. 57,641 (2001), and Presidential Proclamation No. 7956, 70 Fed. Reg. 67,635 (Nov. 7, 2005)). Again, the Navajo Nation agrees, and believes that these findings should be highlighted near the beginning of the final Report for the convenience of members of Congress.

III. THE FINAL REPORT SHOULD RECOMMEND THAT NO LEGISLATIVE ACTION BE TAKEN.

Congress inserted the section 1813 report requirement in the 2005 Energy Policy Act due to claims that the tribal consent principle jeopardized national security, the economy, and consumer interests. The Departments have found that those fears are unfounded. Section 1813 itself requires analysis of four specific issues. The Departments have found that rates of compensation to the tribes are rising but that tribal right-of-way compensation is inconsequential to consumers and the national economy, that arms-length negotiations have historically produced satisfactory agreements and permit greater tribal contributions as energy providers, and that adherence to the tribal consent principle is consistent with both tribal self-determination and national energy transportation policies. There is only one conclusion to be drawn from these well-supported findings: no legislative action is warranted.

Congress deserves that recommendation. Otherwise, it may remain uncertain about the weighty issues implicated in section 1813 and conduct unnecessary and costly (for the Government as well as the Indian people) hearings. Also, the uncertainty that this exercise has engendered with both the Indian tribal leaders and many of our partners in the industry, see Draft Report §§ 4.2 at text following n.94 and last paragraph, and 4.4.1(c), would be ameliorated by such a straightforward recommendation. The Navajo Nation has already been facing some hesitation by its valued industry partners to conclude negotiated deals because of uncertainty over the future ground rules.

IV. THE "OPTIONS" IN SECTION 4.4.2 SHOULD BE DELETED.

For similar reasons, the section dealing with "Options for Consideration by Congress" should be deleted. With the exception of the first and second options (which are tantamount to a recommendation that no legislative action be considered), the options do not conform to the factual findings of the Departments. By comparison, if Congress had directed the Departments to determine the effect of the status of a particular endangered species on energy production in the West and the Departments had concluded that such status had no discernible effect, one would not expect the Departments to offer the Congress options that included de-listing the species or the creation of additional habitat for it.

Just as importantly, options (c), (d), and (e) should not be presented to Congress because their adoption would be unlawful under the Constitution. The Departments would disserve Congress in suggesting that these are realistic options. Under Article VI, section 2 of the Constitution, treaties are the "supreme law of the land." The Navajo Nation, and many other treaty tribes, were guaranteed the right to exclude or to condition the entry of nonmembers seeking to do business within the tribal territory by treaties executed with the United States. The United States Supreme Court has interpreted the Navajo Treaty as providing that "no one, except United States Government personnel,

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was to enter the reserved area” without tribal permission. Williams v. Lee, 358 U.S. 217, 221 (1959). More generally, decisions of the Supreme Court “have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.” United States v. Mazurie, 419 U.S. 544, 558 (1975) (quoting Williams). The power to exclude includes the correlative power to condition the entry of nonmembers by, for example, limiting their stay for set terms of years. See Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). Congress should not be led to believe that it should or may properly legislate in a way that violates these fundamental treaty-based rights of Indian tribes.

Likewise, the Navajo Nation and many energy companies have entered into contracts that limit the right to do business within the Navajo Reservation to a set term of years. See, e.g., Ex. F(2) to the Navajo Nation’s Comments on the Section 1813 Study (May 13, 2006), submitted to the Departments pursuant to 71 Fed. Reg. 26,483 (May 5, 2006) (the “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)) at 10-12. In addition, many of those contracts have created Navajo Nation rights to improvements and other personalty affixed to Navajo Reservation lands. See id. at 13-16 and App. 179 (describing lease agreements requiring company to deliver up the premises and certain compressor station improvements peaceably at the end of the term or extended term of compressor station leases). Options (c) - (e) could not be legislated without Congress impairing such contracts and without the Government taking property from Indian nations. Congress should not be led down that path, because legislation adopting any of those options “would not be an exercise of guardianship, but an act of confiscation” and thus compensable in the Court of Federal Claims. United States v. Creek Nation, 295 U.S. 103, 110 (1935) (citation omitted). The House Report, at 3, concluded the same.

We recognize that a few industry parties are urging a list of options. That is understandable, because Congressional adoption of any of the objectionable options would likely, after litigation brought by tribes against the Government, shift the financial responsibility of those companies to the taxpayer and increase corporate profits. The Navajo Nation believes that would be unsound and short-sighted public policy. Any options presented to Congress should be consistent with the Constitution and with the treaties that are held sacred by the Indian nations.

Finally, if option (c), (d), or (e) is presented to Congress, the Departments should carefully inform Congress of the probable implications of their adoption. As many tribal representatives have stated, the ensuing litigation would make the Cobell litigation appear tame by comparison. Indeed, Congress made a similar observation after it studied the issue in 1969. House Report at 12. Such a departure from longstanding federal policy would also disrupt tribal/industry energy partnerships, create mistrust of Government agencies, and cause additional delays and hurdles in implementing energy development projects on Indian lands. Two representatives of other tribes have even stated

in the public meetings that any implementation of such options would not be peaceful. Adoption of any of those options would also interrupt the progress under the only federal Indian policy that has ever worked – self-determination. Ironically, those options would threaten the well-considered policies in Title V of the 2005 Energy Policy Act itself. Finally, diminishment of tribal treaty rights would equally diminish the national honor. “Great nations, like great men, should keep their word.” Federal Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

V. MOST OF THE DISCUSSION OF VALUATION METHODOLOGIES IS INAPPOSITE.

The Draft Report notes that there are numerous methods that tribes, private landowners, and other governmental entities have employed to determine appropriate compensation for rights-of-way. But most of these are inapposite and should be omitted in the final Report. For example, the method for valuing BLM land is irrelevant to tribal land valuations, because the policies underpinning mineral development on public lands fundamentally differs from those relating to tribal lands. Compare Boesche v. Udall, 373 U.S. 472, 481 (1963) (purpose of mineral leasing on public lands is to prevent monopolies and encourage conservation), with Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200 (1985) (“basic purpose” for leasing tribal lands for mineral development is “to maximize tribal revenues from reservation lands”). And unlike tribal governments, the BLM is not responsible for providing essential government services and infrastructure to members living on lands under its control.²

Similarly, any methodology that utilizes “fair market value” concepts or valuations applicable to condemnation of non-Indian lands has no utility where Indian reservation lands are concerned, because these lands have been set aside under treaties or executive orders for the exclusive use of Indians as their permanent homeland. Under congressional policies dating from the first Congress, these lands cannot be condemned and are not bought and sold on the open market, and they have unique legal, cultural, religious and moral significance to the tribes and the United States. See Cohen’s Handbook of Federal Indian Law §§ 15.01 at 965 (“Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations.”); 15.06 at 1000 (citing Act of July 22, 1790, § 4, 1 Stat. 137).

On the other hand, the Draft Report omits the one methodology now successfully used by the Department of the Interior and tribes under the General Indian Right-of-Way Act, 25 U.S.C. §§ 323-28. The Department, as trustee, has specifically required that, “[i]n determining the fair market value

² Land rentals make up about 15% of the Navajo Nation’s general fund and are used to serve over 250,000 members living in third-world conditions. See U.S. Comm’n on Civil Rights, The Navajo Nation: An American Colony 41-42 (1975).

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.” Memorandum Opinion from Associate Solicitor - Division of Indian Affairs to Assistant Secretary - Indian Affairs (Sept. 6, 1995) at 3.³ This approach and the related comparative analysis approach used by many tribes are similar to that described in oral comments by Jim Noteboom for the Warm Springs Tribes and employed under the Federal Power Act, but that approach is not mentioned in the Draft Report either.

VI. CLARIFICATIONS OR CORRECTIONS TO HISTORICAL DISCUSSIONS.

A. RIGHT-OF-WAY COMPENSATION COMPARISON

The Navajo Nation believes that the final Report should highlight the fact that the total compensation to Indian nations attributable to energy rights-of-way pales in comparison to the exactions of other governments, many of which provide no land rights of significance. The MAS study included as Ex. C(2) to the Navajo Nation’s May 13, 2006 Comments to the Departments, demonstrates this fact. The final Report should also reflect the fact that Indian nations, such as the Navajo, rely to a significant extent on revenues from rights-of-way to fund essential government services, and dilution of the consent right would further impoverish the poorest of America’s poor in a time when additional federal funds are simply not available.

B. TRANSWESTERN NARRATIVE

The incomplete chronology of section 5.4.4(c) concerning the Transwestern Pipeline Company must be clarified, because the missing information is crucial to the understanding of pipeline rights-of-way across Navajo Nation lands and it reflects the highest standards of federal trusteeship. The Draft Report states that “[i]t is not clear what followed” between 1981, when Transwestern and the Navajo Nation were at loggerheads, and 1984, when Transwestern and the Nation agreed on a comprehensive right-of-way agreement. The critical facts are matters of public record. Transwestern submitted its renewal application without Navajo Nation consent, the BIA rejected that application, and the Interior Board of Indian Appeals, which speaks for the Secretary, 43 C.F.R. § 4.1 (2005), ruled that Navajo consent was required by the Navajo Treaty of 1868 and by applicable federal regulations. Transwestern Pipeline Co. v. Acting Deputy Ass’t Secretary, 12 IBIA 49 (1983). Transwestern then sued the Secretary to overturn that decision, and the Government defended vigorously and supported the Navajo Nation’s subsequent suit against Transwestern. The Government’s briefs fully supported the Nation’s sovereign authority to determine the conditions under which Navajo land could be used. The Government’s principal brief is attached as Ex. F(1)

³ This Opinion is the first attachment to the Navajo Nation’s May 13, 2006 Comment letter to the Departments.

(b) to the Navajo Nation's May 13, 2006 Comments to the Departments. As a result, Transwestern came to the negotiating table in good faith, and an agreement was reached. Transwestern is now one of the Nation's most valued energy partners.

The third paragraph states that Transwestern could acquire an additional 79,507 miles of right-of-way, but that figure should be corrected to approximately 79.5 miles. In addition, the first sentence of the last paragraph under the Transwestern heading is incorrect. An extension of the agreement up to November 2009 was agreed to because Transwestern's other rights, including the compressor stations and microwave tower sites, would expire at that time, and the parties desired that all rights-of-way would have the same renewal and expiration dates.

C. EL PASO NARRATIVE

The last sentence of the third-to-last paragraph of section 5.4.4(d) should be clarified. The 1985 agreement with El Paso did consolidate all of El Paso's rights-of-way into one right-of-way agreement covering several individual easements, all with one expiration date. The agreement itself recites that "it will ease the administrative burdens of both parties if all existing El Paso rights-of-way on Navajo land are consolidated into a single right-of-way easement grant with a term of twenty (20) years." See Ex. D(1) at 6 and App. 66 to the Navajo Nation's May 13, 2006 Comments to the Departments. We also recommend that the final Report include additional facts, documented at page 13 of such Ex. D(1), relating to the compensation paid historically by El Paso, demonstrating that even the Navajo Nation's opening bargaining position highlighted on El Paso's web site represents only a 57% inflation-adjusted increase over that to which El Paso agreed in 1995.

D. NAVAJO NATION OIL AND GAS COMPANY DISCUSSION

In the third paragraph of section 5.4.4, the Draft Report states that "[t]he Navajo Nation Oil and Gas Company (NOG) was chartered by the Navajo Nation Council in 1998." Actually, the Secretary of the Interior chartered NOG as a federal corporation under section 17 of the Indian Reorganization Act and the Navajo Nation Council ratified the formation of the company. More importantly, the discussion of NOG is isolated from the right-of-way discussion in the Draft Report. The Navajo Nation requests that this discussion reflect the facts, documented in Ex. D(3) to the Navajo Nation's May 13, 2006 Comments to the Departments, that it is flourishing and the United States is benefitting from additional crude oil production because of the Navajo Nation's use of its authority over rights-of-way. NOG's entry into the upstream oil business began when the Nation took over a neglected crude oil line after the ROW term expired and granted a new 20-year term to NOG on commercial terms. NOG smart-pigged and repaired the line, agreed with the sole shipper (valued partner Giant Industries, recently purchased by Western Refining) on a tariff schedule, and used the proceeds to purchase interests in declining and neglected oil fields in the Aneth area, ultimately reversing the decline curve there with its partner, Resolute Natural Resources Company.

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The last sentence of that paragraph is erroneous, also. As the files of the Bureau of Indian Affairs should reflect, the Navajo Nation granted rights to 254,000 acres to Chuska Energy Company for oil and gas exploration and development under an operating agreement signed in 1987, in addition to two prior agreements with Chuska, in 1983 and 1984.

VII. CONCLUSION

Congress first studied this issue comprehensively in 1969. The central findings and conclusions of the Departments under section 1813 match those of the Congress in 1969. The Navajo Nation Council has legislated that it will not use its right-of-way consent authority to harm other United States citizens. Ex. G to the Navajo Nation's May 13, 2006 Comments to the Departments. The Navajo Nation negotiates in good faith and has reached acceptable terms with almost every company who seeks to transport energy over Navajo lands, but occasionally that good faith is not reciprocated by companies seeking termination of tribal authorities.

The Draft Report contains all of the verified information needed to address Congress' concerns. The Navajo Nation urges that the key findings discussed above be highlighted and that the final Report recommend, consistent with those findings, that no legislative action be undertaken.

Thank you for your consideration of these comments.