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Via e-mail to IEED@bia.edu

Section 1813 Right-of-Way Study
Office of Energy & Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, NW
Washington, D.C. 20245

Re: Comments on Section 1813 Draft Report

Dear Study Team:

I am writing on behalf of the Pueblo of Santa Ana, to provide our comments on the August 7 draft of the Report to Congress (“Report”) being prepared pursuant to Section 1813 of the Energy Policy Act of 2005, Pub. L. No. 109-58, Tit. XVIII, 119 Stat. 594, 1127-28 (“the Act”). We have just a few comments, but consider these points to be especially significant, and trust that they will be given due consideration.

1. We wish to compliment the authors of the draft Report for their straightforward acknowledgment of the importance of the doctrine of tribal sovereignty and self-determination, particularly as it bears on the issue of the requirement of tribal consent to grants of rights-of-way across tribal lands, and the extent to which that doctrine is a fundamental element of federal Indian policy. We also appreciate the straightforward acknowledgment in the draft of the lack of evidence that the requirement of tribal consent for energy rights-of-way has contributed to any “emergency situation,” or that it could have any adverse impact on the security of the nation’s energy transportation infrastructure, or on the delivery of energy supplies to consumers or on the price consumers pay for those energy supplies. Draft Report at §§ 3.2.1 and 4.3. Indeed, the draft notes, at § 4.3, that the issue of tribal consent “does not appear to be consequential for the nation or consumers in general.” Because these conclusions are so critical, considering the factors that led Congress to call for the Section 1813 study to be undertaken, we believe that they deserve emphasis in the executive summary to be provided at the beginning of the Report. The energy companies and their trade organizations have been barraging Congress with horror stories of the threat to our energy transportation systems, energy prices, and energy security overall, if Congress did not act to abolish, or at least greatly constrain, the tribal consent requirement, as if the tribes were some sort of domestic energy terrorist group. The Report’s clear and unqualified

(and, of course, fully supported) conclusion that these claims are baseless need to be prominently highlighted, lest Congress be inclined to give the industry's view any credence.

2. The draft Report mentions in several places, *e.g.*, §§ 1.3.8, 4.2, the sharply conflicting views of the tribes and the industry as to how rights-of-way on tribal land out to be valued, with the industry demanding that traditional "fair market value" standards, established by customary appraisal techniques, ought to govern, and tribes insisting that such standards simply do not apply to tribal land, as there is no "fair market" for such lands. The report points out that the approach suggested by the industry is the approach applied in eminent domain proceedings, which is a key point: eminent domain does not apply to tribally-owned land, and the industry's urging that that standard ought to be imposed unavoidably puts the industry in the position of calling for the power to condemn tribal land, or something very much like that.

This is plainly a substantial issue, but the draft Report, after dutifully reporting the positions of the various parties and their arguments in support, oddly seems to take no position on it, other than to observe, at § 4.1, that under the current legal regime, "the value of a grant, expansion, or renewal of an energy ROW on tribal lands is determined through negotiations between an Indian tribe and an energy company," and to say that this "open negotiation process" is "consistent with long-standing expressions of tribal sovereignty and self-determination in the federal-tribal relationship." To be sure, the draft does make the point, as noted above, 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," and that "any reduction in the tribe's 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." § 2.4. But that discussion is completely detached from the discussion of valuation methods, despite its direct bearing on the applicability of the "market value" standard touted by the energy companies.

We urge that the Departments make the obvious connection, and explain that imposition of a "market value" standard (or, indeed, any supposedly "objective" standard) on the valuation of rights-of-way over tribal lands essentially amounts to imposing the power of condemnation of those lands, with the enormous implications for tribal sovereignty and self-determination that that would entail. Unless there were some clearly demonstrable threat posed to the nation's energy security by the existing regime—which the study flatly found not to exist--no such extraordinary measures can possibly be warranted, and it is vital that Congress be clearly apprised of the policy consequences of such an approach.

3. Section 1813(b)(2) of the Act requires that the Departments include in the Report "recommendations for appropriate standards and procedures for determining fair and appropriate

compensation to Indian tribes for grants, expansions, and renewals of energy ROWs [rights-of-way] on tribal land.” But rather than comply with this very explicit requirement, the draft Report eschews any “recommendations,” and instead simply lays out a list of “options” to be considered by Congress, at § 4.4.2, without any comment as to whether any of them is appropriate or not under the circumstances, or indeed, any expression of opinion by the Departments at all as to any of them. This is the only portion of the draft that we find objectionable, but we find it deeply objectionable, and indeed, believe that it actually undermines the integrity of the remainder of the Report, besides violating the statutory mandate of Congress.

Elsewhere in the Report, it is plainly stated, as noted above, that the data show that tribes and energy companies have, in general, been successful in reaching agreement on compensation for energy rights-of-way over tribal lands without any federal intervention. The fact that those agreements in many (or even most) cases result in levels of compensation that exceed what an appraiser might arrive at as “fair market value,” is beside the point: as is noted above, that standard is inapplicable to tribal lands, and its imposition here would be wholly inconsistent with longstanding and firmly grounded federal Indian policy. Indeed, the fact that parties reach agreement on compensation levels in disregard of the fair market value standard tends to support the view that “fair and appropriate compensation” in this context has nothing to do with “fair market value.”

More importantly, however, the fact that right-of-way negotiations with respect to tribal lands have generally been concluded successfully, and that, as the draft Report shows, whatever the levels of compensation agreed to, the results of the negotiations have posed no adverse impact on energy infrastructure, the delivery of energy supplies, or the cost of such supplies to consumers, necessarily forces the conclusion that there is no demonstrable warrant for any congressional intervention with respect to rights-of-way over tribal lands. At the most, all that can be said is that some energy companies are having to pay more than they would like to for the right to use and occupy tribal lands as pathways for the delivery of energy supplies. That attitude is undoubtedly largely shaped by the fact that up until the last two or three decades of the 20th century, before tribes began to be able to negotiate these agreements for themselves, those very same companies generally were able to acquire the same rights for mere pennies, small fractions of what they were required to pay on private and government lands. Congress has no business, and should have no interest in, imposing on tribal sovereignty and self-determination with respect to dispositions of tribal land, so as to give the energy companies—who make up, after all, one of the most powerful and profitable segments of American industry--superior bargaining leverage in their dealings with the tribes, who have historically been among the most poverty-stricken and oppressed groups in American society.

For that reason, for the Report to include as among the "options" presented to Congress for its consideration such possibilities as giving the federal government the right to determine "fair compensation," or forcing tribes into binding arbitration or comparable proceedings in the event of alleged failure to reach agreement, or legislating the power of condemnation of tribal lands, is in our view a gross breach of the charge given to the Departments by Congress. Obviously, these are possible options, but simply to include them in a list (along with the "do nothing" option, and the option of legislating the requirement of tribal consent in all cases), without any discussion as to whether there is any justification for the consideration or adoption of such options, creates an implication that Congress should weigh each of these options equally. Nothing in the draft Report supports such an implication, however, and the implication is false. The only option that is supported by the data presented in the Report, and by the Report's conclusions, indeed, is the "do nothing" option (although, admittedly, the "legislate tribal consent" option might also be said to be supported by the Report's discussion of the relationship between the tribal consent requirement and the federal policy in favor of supporting tribal sovereignty and self-determination). It thus is our view that the listing of all of these options, without distinguishing among them based upon the Report's conclusions, is inappropriate and highly misleading, and in fact constitutes a violation of the Departments' statutory obligation to provide Congress with recommendations (that, implicitly, are to be ones supported by the Report's findings).

This is not by any means a trivial or inconsequential point. This study originated as a response to a strong industry request for legislation that would allow for condemnation of tribal lands, or that would establish federal standards for right-of-way compensation or force tribes into binding arbitration if agreement could not be reached in right-of-way transactions, which amounts to the same thing. That request was, in turn, backed, as noted above, by claims of dire consequences for the nation's energy transportation system and consumer energy prices if such legislation were not forthcoming. This Report plainly refutes the premises of that request; but in light of that, to include the very proposals that the energy companies initially sought as "options to be considered by Congress," even in the absence of any factual support for such options, utterly undermines the principal findings of the Report, and creates an untrue implication that there is any justification at all for Congress' consideration of such "options."

Section 1813 did not invite the Departments to lay out "options" for Congress; Congress is perfectly capable of imagining all the possible kinds of action that it could take on its own. What it did command was that the Departments study the issue and report back to Congress with "recommendations" based upon the results of that study. The Report fails to do that, and indeed deliberately declines to do so, and in our view this constitutes a serious breach of the Department's statutory duty. We must strongly urge that the Department scrap the "options," and instead do what Congress directed, which is to provide recommendations, derived from the

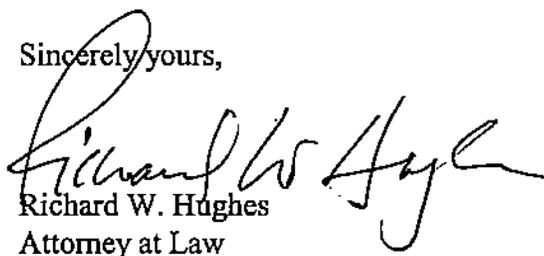
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results of the study. It is clear from the draft Report, moreover, that the only recommendation that may be fairly derived from the data compiled by the Departments is that Congress take no action to change the existing legal regime governing the requirement of tribal consent to rights-of-way.¹

In short, we urge that the Departments not gravely impair the intelligence and integrity of the Report by including an array of options that run directly contrary to the substance and findings of the Report. The Report should rather state, forthrightly, that based on the study the Departments have undertaken, there is no need for congressional action in this area at this time.

The Pueblo appreciates your efforts in this matter, but urges that the final Report be corrected in the manner described above.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Richard W. Hughes".

Richard W. Hughes
Attorney at Law

RWH/lc

xcs: Hon. Leonard Armijo, Governor
Bruce Sanchez, Lt. Governor

¹As suggested above, the Report could also be construed as supporting a recommendation that Congress make the requirement of consent by all tribes a matter of positive law, rather than merely one of Interior regulation. While we believe that that course is fully supportable, Santa Ana does not support its pursuit at this time, given the likelihood that the proposal would very likely draw unwarranted attention, and possible qualification, in the legislative process.