

# THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

## COMMENTS ON DECEMBER 21, 2006 DRAFT SECTION 1813 RIGHT OF WAY STUDY

February 2, 2007

The Confederated Tribes of the Warm Springs Reservation of Oregon is a federally recognized Tribe occupying the Warm Springs Indian Reservation in north Central Oregon (“Tribe”). The Warm Springs Indian Reservation was established by the Treaty of June 25, 1855, between the United States and the Tribes and Bands of middle Oregon. (12 Stat. 963)

The Tribe has the following comments on the Draft Report to Congress dated December 21, 2006 and wishes to reiterate its prior comments provided on May 15, 2006, June 14, 2006, and September 4, 2006 respectively.

The Tribe is concerned about the way Section 5 pertaining to *Standards and Procedures for determining Compensation for Energy ROWs on Tribal Land*, continues to inadequately take into consideration the unique nature of Tribal lands and Tribal governance concerns and obligations. First, it gives too much credence to valuations determined pursuant to the Federal “Yellow Book,” the BLM Compensation Schedule, and the FERC net benefits approach for determining valuation. This Section 5.2 indicates that “[w]hatever method is used to determine market value for land, it should represent the baseline value. A process for adjusting the value up or down could be specified.” This statement is consistent with industries’ position as earlier stated in Section 5 that “use of market value principles for energy ROWs on tribal lands would increase certainty for existing and new energy infrastructure by providing an objective standard for determining values.” No market value approach suggested to date is appropriate for use on Tribal lands.

Section 5.3 suggests “negotiations between the interested parties are an appropriate method for determining compensation,” however, it goes on to discuss the adoption of “practices, procedures, an actions.” It is unclear whether the Departments are suggesting that such practices procedures and actions should be standard and applicable to all ROW negotiations between a tribe and an industry member or adopted by the individual tribe and industry member on a case-by-case basis. It appears, however, that the Departments are suggesting the former. Section 5.3.1 and 5.3.2 set forth suggested standards, including development of a comprehensive ROW inventory for tribal lands, development of model or standard business practices for energy ROW transactions, and broadening of the scope of energy ROW negotiations. Although these suggestions if developed and adopted by individual tribes have merit, if they are forced upon tribes in a uniform manner will have the same failings as the market value approach.

Indian tribes have shown themselves repeatedly to be willing partners in the energy industry. There are many things that the Congress could do to facilitate and increase that participation without creating sticks to be used against Indian tribes. The Study should instead focus on those things that the Congress can do to facilitate tribal participation in the energy

industry. Following are a list of a few things that the Congress could do. The Departments of Energy and Interior should take the time to examine this list and develop other options that could create a positive atmosphere, as opposed to the negative atmosphere that the Study will inevitably lead to with this list of inappropriate options.

- (1) Provide funding to develop technical capacity within both the Department of Interior and within Indian tribes. The Bureau of Indian Affairs has significant capacity in the areas of forest and range management. However, the Bureau has always been woefully inadequate in technical expertise with regard to energy issues. Few tribes have this technical expertise. And yet, the BIA and Indian tribes are expected to negotiate with sophisticated energy companies on difficult issues without adequate tools. Congress can redress this imbalance.
- (2) Tribes are generally willing to enter into long term deals if there are appropriate safeguards. However, it is not clear from a legal standpoint that tribes can always do this. For example, when the Warm Springs Tribe and Portland General Electric Company entered into a settlement agreement over the ownership of the Pelton-Round Butte Hydroelectric Project, it was necessary for the parties to seek Congressional confirmation of the Settlement Agreement because of potential legal impediments. Congress can make clear the authority of Indian tribes to enter into long term arrangements if the tribes so choose.
- (3) The major impediment to energy development on the Reservation is the dual taxation that frequently occurs with regard to non-Indian investment on the reservations. Because state property taxes can generally be levied on non-Indian property within Indian reservations there is a significant impediment to development. States frequently provide few, if any, services related to the development, such as fire, police or other protection. The Tribe is required to bear this burden and if it imposes its own tax on the development to fund these services, the double taxation often makes the development infeasible. Congress has the power to eliminate this double taxation.
- (4) The landlord/tenant relationship usually established between the energy industry and Indian tribes is inherently likely to lead to long term conflicts because of the misalignment of the parties' interests that is inherent in such an arrangement. Congress could do many things to facilitate the alignment of the parties' interest, primarily through mechanisms to facilitate tribal equity ownership in energy projects. Expansion of the Tribal Tax Status Act with regard to tribal bonding authority, federal loan and performance guarantees, and tax incentives to developers are just a few of the myriad tools that are available to the Congress.
- (5) Congress, DOE and DOI could assist tribes in doing the necessary land assemblage, environmental studies, engineering, and other tasks to create energy rights of way that would be attractive to industry partners and speed the right of way process. Rather than time delays being an impediment to developing rights of

way across Indian reservations these efforts could enable tribes to get ahead of the curve and make rights of way available when they are needed.

There is inadequate discussion of treaty rights and the implications of the study with regard to those rights. If the study recommends any options that could result in an abrogation of Indian treaty rights it should at least state that this would be the result of those options so that the Congress could be fully aware of the implications of their actions. Section 1813 mandates “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”. Shouldn’t it at least be noted that abrogation of treaty rights, especially “exclusive use” provisions, negatively impacts self-determination and sovereignty interests? Conversely, why did the agencies give absolutely no consideration to any option that would **increase** tribal sovereignty and self-determination?