

Michael D. Olsen
Principal Deputy Assistant Secretary--Indian Affairs
Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue NW
Washington, DC, 20245 (or e-mail to IEED@bia.edu)

Dear Deputy Assistant Secretary Olsen:

The Western Business Roundtable (“Roundtable”) respectfully submits the following comments regarding the *Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study*.

EPAct05 Section 1813 specifically requires the Secretaries of Energy and Interior to: conduct a joint study of the history of consent payments for rights-of-way on tribal lands; evaluate the impact of current practices on energy infrastructure; and propose solutions to Congress for determining compensation for tribal land rights-of-way that are both fair to Indian Tribes and consistent with the nation’s energy policies.

Roundtable’s Position

The Roundtable recognizes that DOI and DOE faced a significant challenge in meeting the requirements of Section 1813. The scope of the required analysis was considerable, encompassing hundreds of tribes and many different types of energy rights-of-ways (“ROWS”) on tribal lands over the entire course of the federal relationship with Indian tribes. However, the Section 1813 Draft Report does not adequately address core issues raised by Congress. The linchpins of any truly effective comprehensive energy policy must be aggressive domestic energy exploration/development efforts and robust delivery infrastructure systems including (particularly in the American West): electricity transmission; oil flow lines; coal transportation systems; and natural gas pipelines that cross Indian tribal lands.

Currently, the excessive ROW and other access costs associated with Indian tribal lands: raise delivered-energy prices for consumers; impact reliability of energy infrastructure (natural gas and products, transmission lines, producers, electric transmission lines, etc.); discourage expansion of, and investment in, existing facilities; and reduce investment, job creation and development opportunities for Native Americans on tribal lands.

Section 1813 could have served an important function by resolving what has historically often been a source of uncertainty and conflict among relevant stakeholders. While the Draft Report's recommendations provide a modest start, further improvements are needed to establish a set of fair, equitable procedures that can be used by energy exploration/development and infrastructure entities and Native American Tribes in negotiating ROW provisions across tribal lands.

Specific Roundtable Comments

1. Section 1813 requires that the study make recommendations for appropriate standards to determine fair and appropriate compensation for access across tribal lands. The Department of Interior and the Department of Energy ("The Departments") recommend that "valuation of energy ROWs on tribal lands should continue to be based upon the terms negotiated between the parties." In doing so, the Draft Study fails to address the following:
 - The business environment with tribes and industry. This environment has shifted dramatically since original ROW agreements were made – some tribes withhold ROW agreements to extract "consent" payments that approximate the avoided costs of build-around infrastructure. When the original ROW agreements were made, valuation was more clearly rooted in traditional notions of fair market value.
 - The negotiating environment between tribes and industry has deteriorated to the point that industry is left with a bad choice – pay tribes' exorbitant rates based on the replacement cost of relocating the infrastructure off tribal lands or simply abandon that infrastructure. In addition, recent ROWs have relatively short terms, expiring in some cases in three to five years from their effective dates. Long-term ROWs or at least terms that are aligned with the life of the property they serve are critical to the economic viability of energy infrastructure.
 - The Draft Report asserts that "ROW fees are akin to tax rates on assessed real estate by local government to fund budgets to provide local services." The issue of what constitutes fair and appropriate compensation has historically been based on the fair market value of the land usage rights, not on the fiscal needs of the landowner.

- Current tribal ROW policy provides industry with strong incentives to route their pipelines and transmission lines around tribal trust land. Transmission projects that do get built are likely to traverse less direct routes, consume more resources, and impose great burdens on the environment than would have otherwise been the case. Moreover, many beneficial projects may be rendered unprofitable by these extra costs. Even when industry attempts to proceed with new projects in tribal areas, the unconstrained process for obtaining tribal ROWs increases project risks and can significantly delay the provision of economical and reliable energy to consumers in constrained areas.
2. The Departments also recommend that “In the event that a failure of negotiations regarding the grant, expansion or renewal of an energy ROW has a significant regional or national effect on the supply, price, or reliability of energy resources, the Departments recommend that Congress consider resolving such a situation through specific legislation, rather than making broader changes that would affect tribal sovereignty or self-determination generally.” This recommendation does not address the following:
 - 90 percent of the outstanding renewals for companies have yet to occur. A potential for a great wave of impasse exists. It is impractical to expect that Congress can fix the growing systemic failure of ROW renewals by using an existing policy of enacting specific ROW legislation on a case-by-case basis. Instead, Congress should be advised to act in a comprehensive manner now.
 3. The Draft Report does not include a cost-benefit analysis of policy options that it recognizes.
 - The Departments acknowledge in the Draft Report that “because of the time and fiscal constraints on this study, the Departments have not conducted individual cost-benefit analysis for each approach.” The Departments’ Draft Report contains no analysis of the costs or benefits of either the status quo or any proposed changes to the status quo. As a result the Draft Report does not attempt to provide the cost-benefit data Congress requires to take informed action.

Conclusion

Without assurances that costs for all energy exploration/ development and transportation infrastructure rights-of-way on tribal lands bear a resemblance to regional market costs through consistently applied pricing mechanisms which are tied to recognized fair market value property valuation methodologies and principles, a great uncertainty exists for industry.

Using a fair market value approach will provide consistency with longstanding federal policies that, with respect to other public and private lands, use fair market value as the standard for rights-of-way valuation in order to best serve the public interest.

On behalf of the member companies of the Western Business Roundtable, I urge the inclusion of these recommendations as part of EPA05, Section 1813's Study of Energy Rights-of-Way on Tribal Lands.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Sims". The signature is fluid and cursive, with the first name "Jim" and the last name "Sims" clearly distinguishable.

James T. Sims
Executive Director

cc:

Department of Energy Secretary Bodman
Deputy Secretary of Energy Garman
Vice President Dick Cheney
House Resources Committee Chair Nick J. Rayhall
Senate Energy Committee Members
Interior Secretary Dirk Kempthorne
BLM Director Kathleen Clarke
Federal Energy Regulatory Commission
Western Governors' Association
Western Governors
Western Congressional delegations

The Western Business Roundtable is a broad-based coalition of companies doing business in the Western United States. Our members are engaged in a wide array of enterprises, including accounting, engineering, construction, communications, manufacturing, retail sales, refining, iron and steel, mining, electric power generation, and oil and gas exploration, development, and distribution. We work to defend the interests of the West and support policies that encourage economic growth and opportunity, freedom of enterprise and a common sense, balanced approach to conservation and environmental preservation.

