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Office Of Indian Energy and Economic Development
MS 2749, ATTN: Section 1813 Study
1849 C Street NW
Washington, DC 20240

Dear Comment Recipient:

On December 29, 2005, notice was published at 70 **Federal Register** 77178 relating to section 1813 of the Energy Policy Act of 2005, Pub. L. 109-58. Section 1813 mandates a study and report on issues related to the granting, expansion and renewal of energy rights of way on and across Indian tribal lands. This letter serves as the joint submission of the Council of Energy Resource Tribes (CERT) and the National Congress of American Indians (NCAI) in response to the notice. Together NCAI and CERT represent more than 300 Indian tribal governments.

Introduction

The study required by Section 1813 takes place in a context that is not mentioned in the Federal Register notice. The impetus is the well-publicized dispute between El Paso Natural Gas Company and the Navajo Nation in right of way renewal negotiations over 900 miles of gas pipelines crossing the Navajo Reservation. As a result of this dispute, in early 2005 El Paso and other energy companies proposed and amendment to the Senate Energy Committee during its consideration of the Energy Act of 2005. The amendment would have authorized the Secretary of the Interior to condemn tribal lands for energy rights of way *without tribal consent*. The Chairman and Ranking Member of the Committee did not accept this amendment and the companies responded by requesting what is now the Section 1813 study requirement.

As early as May, 2005 - three months before the Energy Policy Act was signed into law - both CERT and NCAI were on record as opposing any changes in policy or law that undermined the bedrock concept of tribal consent for any alienation of tribal land, including rights-of-way across tribal lands. We believed then, and still do, that the study is the underpinning of a larger agenda on the part of certain oil and gas companies in anticipation of negotiation struggles with Indian Tribes over compensation of rights-of-way over Indian lands.

Current law required that Tribes be paid *no less than* fair market value for rights-of-way across their lands. In 1934, Congress enacted the Indian Reorganization Act (25 U.S.C. 476 (e)) "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the Tribe". In 1948, Congress expressly reconfirmed the tribal consent requirement for rights of way on tribal land in 25 U.S.C. 325. Thus, standards and procedures are already in place for determining compensation and requiring tribal consent.

What is not in place is a system under which the Department of the Interior can insinuate itself into private negotiations and override tribal decisions on rights of way for energy purposes. Since 1934 the American energy economy has grown to be the largest and most productive in the world and there is no reason to believe that the tribal consent requirement will in any way inhibit its future growth.

The underlying intent of the study is clearly to try to inform Congress's consideration of the issues surrounding a critically important policy decision. In our view, this study will only be valuable to the degree that it illuminates two critical tribal concerns. First, the tribal consent requirement is a fundamental aspect of tribal sovereignty. Indian tribes hold no power that is more vital to their continued existence than the power to control their remaining lands. Second, the Department of Interior has historically grossly undervalued the compensation for rights of way on tribal lands. The tribal consent requirement is a critical component of the federal policy of tribal self-determination that has been so successful in correcting the abuses that occurred under earlier paternalistic policies. We strongly believe that the Interior and Energy Departments have a trust and statutory obligation to conduct this study in a manner that will bring these concerns to the forefront of Congressional consideration.

Process

You have asked for comments on the process under which the Departments intend to proceed with the study that is outlined in the joint letter dated December 15, 2005 from James E. Cason, Associated Deputy Secretary of DOI and Kevin M. Kolevar, Director of the Office of Electricity Delivery and Energy Reliability at DOE. As a threshold matter, CERT and NCAI believe the schedule and process are very ambitious given the vast amount of material that must be analyzed and the breadth of the issues to be addressed. In short, we are doubtful that a full and fair study of the issues presented can be accomplished in the time allotted. Our first recommendation would be for the Departments to jointly request an extension from the Congress of at least an additional year in order to do the subject justice. Even if an extension is granted, the Department needs to begin accumulating as much data as possible for study and analysis. We question whether the Department will have the access it needs to old records and data to accomplish its assigned task. Much of the material may be difficult to access and may also be protected under confidentiality provisions.

The process of identification of interested parties in a pre-scoping process followed by a nation-wide-2-day scoping meeting in February appears to be a reasonable first step. However, the purpose of the scoping meeting is to get tribal input on how the rest of the consultation process should proceed. The format for consultation may work as a starting point, but the key is that it must achieve meaningful dialogue and exchange of information from all of the interested tribes. If this does not happen then the consultation process should be expanded.

Items 3 and 4 of the letter discuss the proposed 2-day scoping meeting in February 2006 to include broad discussions of the four divergent topics of the study and then it proposes to establish workgroups to further refine the subjects.

One concern is that persons working on "tribal sovereignty concerns" for example may have information and valuable insights on one or more of the other topics. This linear approach might be avoided if all of the workshops are conducted at that same place at the same time so that interaction among the workgroups can also take place.

Conducting only three regional tribal consultation meetings in the months of May through mid-July is insufficient to be able to get a sufficient and accurate feedback from tribal governments on the draft report. Particularly because affected tribes may not have the funding to travel long distances, more than three consultation meetings should be planned within the time frame and the location of the meetings are important to ensure high attendance of Indian tribes.

We also have concerns about the "case study" approach. On any large reservation there are thousands of rights of way, and it is likely that there are several hundred thousand rights of way nationwide. Case studies could easily be manipulated to highlight select examples of what the industry believes are unreasonable demands for compensation. In addition, since each Tribe and each reservation in the United States is unique in its history, culture, and politics, a case approach probably will not give a representative sample or produce meaningful results that could be used to determine national policy. The rights of way also vary widely in their purposes and in the way they benefit or harm the reservation aside from the direct monetary compensation. We believe that the purpose of the rights of way would have to be understood before an evaluation could be made.

We need more information to evaluate the use of "a National Laboratory" to conduct the analysis. This study should be conducted by a disinterested party with experience in the subject matter of tribal government and energy rights of way. Some of the national laboratories are run by private contracts with strong connections to the energy industry. In addition, many national laboratories occupy former tribal lands that were taken from Indian nations in the last century for national security and development purposes. The national laboratories now assume ownership of the Tribal lands upon and many tribal cultural and sacred sites. There are many examples that illustrate the lack of sensitivity of the national laboratories' officials and contractors. These areas have been looted, studied and subjected to degradation. In recent years the Department of Energy was mandated to implement cultural resources protection plans. Only a few national laboratories have viable programs and Department of Energy budget for historic preservation officers no longer exists. In short, tribes have reason to question whether a National Laboratory will consider tribal concerns fairly and we need to know more specific information.

As stated, because of the tremendous policy and legal implications that might ensue from this study, we believe the time allotted is far too short to produce a quality product that would be useful to Congress and not be potentially detrimental to tribal interests. Federal law and policy on tribal consent for rights-of-way over tribal lands is well-established.

CERT and NCAI staff and attorneys are available to work with the Department as needed to secure a definitive and fair work product.

Sincerely,


Alvin Moyle, Tribal Chairman
Fallon Business Council

cc: FBC
Steve Chestnut, Tribal Attorney

Pete Sferrazza, Tribal Attorney
Bill DuBois, Tribal Consultant