



THE SENECA NATION OF INDIANS

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January 20, 2006

Michael D. Olsen
Principle Deputy Assistant Secretary (Acting)
Department of the Interior
Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
1849 C St., NW
Mail Stop 2749 – MIB
Washington, DC, 20240

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Re: Public Comment on Congressionally Mandated Study of Energy Rights-of-Way on Tribal Lands

Dear Mr. Olsen:

The Bureau of Indian Affairs (BIA) published a Federal Register Notice on December 29, 2005 stating that the Departments of Interior and Energy are requesting comments from the public on how to carry out the implementation of the one year study required by Section 1813 of the Energy Policy Act of 2005, P.L. 109-58.¹ This letter provides the comments of the Seneca Nation of Indians of New York ("the Nation") pertaining to the Section 1813 study that is the subject of the Federal Register Notice.

Federal Register Notice

As indicated in the Federal Register Notice, the Departments plan to conduct a series of pre-scoping phone calls and meetings with selected tribal leaders, members of the energy industry, appropriate government entities and affected businesses and consumers to discuss the various aspects of the report mandated by Section 1813. Specifically, the Departments propose to contract with a Department of Energy National Laboratory to prepare an analysis of historical rates of compensation for pipelines crossing Indian land, using a case study approach. The Departments also plan to conduct a two-day nationwide scoping meeting in February 2006 and up to two workshops between February and May 2006. The written work generated from these meetings will be prepared in a report that will be sent to the tribes and published in the Federal

¹ Federal Register, Vol. 70, No. 249 (Dec. 29, 2005).

Register. Between May 2006 and mid-July 2006, the Departments intend to hold three regional tribal consultation meetings to receive written and oral comments on the draft study. These comments will be considered as the Departments prepare a final report for delivery to Congress by the August 7, 2006 deadline.

The Departments are requesting public comment on this proposed work plan in addition to any other areas of concern regarding the Section 1813 study.

Seneca Nation of Indians – Unique Leasing Authority

The Seneca Nation of Indians is a federally recognized, self-governing Indian Nation in Western New York with approximately 7,300 enrolled members. Uniquely, the Nation has four Territories in Western New York -- the Allegany, Cattaraugus, and Oil Springs Indian Reservations, in addition to Territory in downtown Niagara Falls, New York.

The Allegany Indian Reservation is located along the Allegheny River from the Pennsylvania border upriver to Vandalia, New York, and is located entirely within Cattaraugus County. It originally included 30,469 acres of land surrounding the Allegheny, of which some 10,000 acres were inundated by the Kinzua Reservoir when the Army Corps of Engineers built the Kinzua Dam in 1964. This reservation also includes the City of Salamanca, the only city in the United States located entirely within an Indian reservation.

The Cattaraugus Indian Reservation is located along the Cattaraugus Creek, from Gowanda, New York, downstream to the shore of Lake Erie. It is comprised of some 21,618 acres in Cattaraugus, Chautauqua and Erie counties.

The Oil Springs Indian Reservation is located on the border of Cattaraugus and Allegany Counties near Cuba, New York. It is made up of one square mile of land that includes access to Cuba Lake. The Nation and privately owned enterprises operate on this reservation.

Recognizing the unique history of the Nation's Territories and relationship with the surrounding community, Congress authorized the Seneca Nation of Indians to extend

and approve leases of its restricted fee land in the Seneca Leasing Act of 1950² and the Seneca Nation Settlement Act.³

The Seneca Leasing Act authorizes the Seneca Nation to collect and disburse all monies generated from the lease of land within the Cattaraugus, Allegany, and Oil Springs Reservations. Section 5 of the Leasing Act also provides the Nation with authority to lease lands within the Cattaraugus, Allegany and Oil Springs Reservations, and outside the limits of the congressional villages established by the Act of February 19, 1875⁴ for such purposes and periods permitted by the laws of the State of New York. The Leasing Act builds upon leasing authorities granted to the Nation in the Act of February 19, 1875 for lands within the City of Salamanca and within the congressional villages.

Furthermore, in 1990, the Seneca Nation Settlement Act (“Settlement Act”)⁵ ratified a settlement agreement between the City of Salamanca and Seneca Nation regarding leases within the City of Salamanca and the congressional villages established under the Act of February 19, 1875. Among other purposes, the Settlement Act governs all new leases within the City of Salamanca and the villages. Section 1774c of the Settlement Act provides that with regard to such new leases, Seneca Nation is solely responsible for negotiation and approval of such leases and that approval of any such leases by the United States is not required. The same subsection states that the United States shall not serve in a capacity to approve such leases.

In the Leasing Act and the Settlement Act, Congress carefully considered and recognized the unique history and status of the Nation’s Territories and the unique authority of the Nation to negotiate, approve, and manage the leasing process within its Territories. As a result, the Secretary of Interior lacks authority under 25 U.S.C. § 81 or other federal laws to approve Nation energy leases in conflict with the authorities contained within these existing federal laws.

Due to the Nation’s acknowledgment of its authorities and responsibilities over leases of land within its Territories, in the late 1980s, the Nation devoted considerable resources to undertaking a complete inventory of all of its existing rights-of way. This

² 64 Stat. 442 (Act of Aug. 14, 1950).

³ 25 U.S.C. § 1774 et seq.

⁴ 18 Stat. 330.

⁵ 25 U.S.C. § 1774 et seq.

endeavor was no small task, and took a full year to complete, but was undertaken and completed to provide the Nation with a clear record of land lease interests within its Territories.

Concern # 1 – The Case Study approach has the potential to make generalized conclusions about rights-of-way leasing in Indian Country, ignoring the unique status and laws applicable to the Nation’s Territories.

Given the Nation’s unique Leasing and Settlement Acts, the Nation is not subject to the provisions of the Energy Policy Act of 2005. For example, Section 2604 of Title V of the Energy Policy Act of 2005 addresses leases, business agreements and rights of way involving energy development or transmission on Indian lands. Specifically, Section 2604 facilitates such agreements by providing that if a tribe establishes a Tribal Energy Resource Agreement (TERA) which is approved by the Secretary, then 25 U.S.C. § 81, and any other federal statute requiring Secretarial approval, would not be required for energy development leases, agreements and rights of way entered into by such tribe. Section 2604 does not preempt existing federal statutes that provide authority for Seneca Nation to approve leasing of land within its Territories, as described above.

The Departments propose to contract with a Department of Energy National Laboratory to prepare an analysis of historical rates of compensation for pipelines crossing Indian land, using a case study approach. Because of the uniqueness of the situation, the proposed case study approach has the potential to make generalized conclusions about rights-of-way leasing that would not be accurate or appropriate in light of the Nation’s issues. This is particularly troublesome to the Nation if the generalized report then serves as the basis for legislation concerning tribal rights-of-ways, without any acknowledgement of the Nation’s unique leasing authorities previously recognized by Congress.

Furthermore, inadequate consideration has been given to very limited benefits of the proposed case study, especially when viewed in light of the potential benefits of a full and accurate comprehensive inventory of all existing tribal rights-of-way. While it is understood that it will take time and effort to conclude a comprehensive inventory, with proper consultation in Indian country and with the full cooperation of energy stakeholders, such an approach would yield a much more meaningful end product.

Concern #2 – The proposed schedule does not permit adequate time to conduct a thorough study.

In the Federal Register Notice, the Departments have proposed an ambitious agenda of pre-scoping meetings, drafting sessions, and consultative meetings to be completed within less than 9 months. While the Nation appreciates the Departments' efforts to comply with the August 7, 2006 deadline to report to Congress, the time frame suggested is simply inadequate for purposes of generating a useful and accurate assessment of historical rates of right-of-ways while assimilating all relevant tribal and other comments. As mentioned above, it took the Nation an entire year to inventory the existing rights-of-way on its lands. While the process was expensive and time consuming, its comprehensiveness and accuracy were well worth it.

Concern #3 – The proposed schedule does not permit the affected tribes adequate time to participate in the proposed process.

The Nation is one of many tribes that has the potential to be adversely affected by the rights-of way study. Many tribes, in contrast to the private energy industry, simply lack the resources and man power to participate fully in the proposed process. The Nation is therefore concerned that the schedule as proposed is simply too abbreviated to permit many tribes to engage in the process, and thereby risks skewing the ultimate findings in the report to the benefit of the private energy industry.

Summary

Although we understand the time constraints placed upon the Departments by Congress to accomplish this study, we believe that given the complexity of the issues being studied and the number of stakeholders, if the Departments were to return to Congress requesting more time to conduct the study, that time would likely be granted.

Thank you in advance for taking into account the uniqueness of the Nation's Leasing and Settlement Acts. If you should have any questions regarding this matter, do not hesitate to contact Christopher Karns, Deputy Counsel at Seneca Nation of Indians, at (716) 945-1796.

Sincerely,



Barry E. Snyder, Sr., President

Seneca Nation of Indians