May 12, 2006

Mr. Kevin Kolevar
Section 1813 ROW Study
Office of Indian Energy and Economic Development
1849 C St., NW.
Mail Stop 2749-MIB
Washington, DC, 20240

Dear Mr. Kolevar:

On behalf of the more than 27,000 members of our professional appraisal organizations, please accept these comments regarding the study being conducted pursuant to Section 1813 of the Energy Policy Act of 2005.

Section 1813 requires the Secretaries of the Departments of the Interior (DOI) and Energy (DOE) to jointly conduct a study of energy rights-of-way on tribal land. Specifically, Section 1813 requires the DOI and DOE to submit to Congress a report on the findings of the study, including:

- An analysis of historic rates of compensation paid for energy rights-of-way on tribal land;
- Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals for energy rights-of-way on tribal land;
- 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, and;
- An analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.

Our comments relate to recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals for energy rights-of-way on such tribal lands over which Congress has legal authority. Our organizations strongly believe that the best standard and indicator for "fair and appropriate compensation" is "market value." We believe further, that the best procedure for determining "market value" is the appraisal process whereby a professional real estate appraiser utilizes and analyses relevant market data specific to the property rights being considered. These standards and procedures are recognized routinely throughout public policies established by federal and state governments and courts of law, which have generally determined that *just compensation* is measured by market value.[1]

[1] Nichols on Eminent Domain, vol. 4, 12.01 (1990); Harwell v. United States, 316 F.2d 791 (10th Cir. 1963); United States v. Miller, 317 U.S. 369 (1943).

Historically, “market value” is the standard applied to rights-of-way crossing lands owned and managed by the federal government, and we believe it should also be applied to tribal lands, where existing law allows such standards to be used. Supporting this view is the fact that “market value” has been used in many previous settlements of tribal claims against the United States. That standard, when developed and applied appropriately, is unbiased and favors neither tribal interests nor that of a prospective user of the rights in question.

Currently, all Code of Federal Regulations applications to tribal land appraisals require “market value” as the basis for compensation. This includes the application of the Uniform Appraisal Standards for Federal Land Acquisitions, developed by the U.S. Department of Justice, which apply to all federal appraisals including acquisitions and dispositions.

There are differences, however, in how these rules apply to Indian tribes that maintain their status as sovereign nations and are therefore not bound to certain legislative requirements. Currently, no right-of-way (easement or any other title encumbrance) attaches to tribal land without an appraisal being performed in accordance with the Uniform Standards of Professional Appraisal Practice, published by The Appraisal Foundation. However, the eventual consideration paid for the rights is typically a result of negotiations between the private parties and the Indian tribes and are not necessarily based on the appraisal. Concerns in this area appear to be more of a policy issue than an appraisal or “market value” problem that perhaps Congress will need to address.

Additionally, where private ownership easements are typically compensated for in a specific dollar amount for a permanent easement in perpetuity, easements on tribal lands are compensated for in a specific dollar amount for a period of years. Such easements are essentially long-term leases of those property rights, as opposed to a sale of rights. Nevertheless, “market value” as a standard is still relevant.

Our organizations propose to work with the DOI and DOE to develop a “standard scope of work” for this type of appraisal assignment; which we believe will help make these valuations more uniform. Our organizations strongly favor such an approach and would oppose, for example, a valuation matrix designed to set rates that would apply to Indian tribal lands. Compared to a properly developed real estate appraisal, we believe valuation matrices are far less likely to provide just compensation and will require continuous adjustment because of changing market conditions. Since the objective is to provide fair and just compensation, we believe that appraisals should be the preferred method of valuation.

Finally, we understand there are many policy decisions yet to be made on this issue. Our organizations stand committed to help the DOI, DOE, other federal agencies, tribal organizations and Congress find a resolution to this issue. If we can be of further assistance, please contact Don Kelly, Vice President of Public Affairs at 202-298-5583, dkelly@appraisalinstitute.org.

Sincerely,

Appraisal Institute
American Society of Appraisers
American Society of Farm Managers and Rural Appraisers