

Warm Springs, Oregon 97761 / 541 553-1161

November 21, 2005

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Ms. Julia Souder
U.S. Department of Energy
Office of Electricity Delivery and Energy Reliability
1000 Independence Avenue SW
Washington DC 20585

Re: Energy Corridors Programmatic Environmental Impact Statement Scoping Comments
and Request for Government-To-Government Consultation

Dear Ms. Souder:

The Confederated Tribes of the Warm Springs Reservation of Oregon (“CTWS” or the “Tribes”) received notice of the intent of the Departments of Interior, Commerce, Agriculture, and Defense to develop a Programmatic Environmental Impact Statement (“PEIS”) for the proposed action of designating energy corridors on Federal Land in eleven Western States under Section 368 of the Energy Policy Act of 2005. CTWS provides the following scoping comments.

First, CTWS is opposed to the designation of any energy corridors on the Warm Springs Reservation (“Reservation”) without CTWS approval of such corridor.

The Tribes fully endorse the comments of the Affiliated Tribes of Northwest Indians, Economic Development Corporation. As described in those comments, Indian lands held “in trust” should not be confused with federal lands under the sole control of federal agencies. The trust lands have been reserved for tribal use, and the inherent sovereignty of tribes and their treaty rights to set policies for trust lands cannot be abrogated through regulatory processes. As, such the Warm Springs Reservation, as other Indian trust lands, must be excluded from any designation as an energy corridor under this process.

With respect to CTWS, in particular, the Treaty of 1855 defined the initial area of the Warm Springs Reservation and provides that the treaty tribes have “exclusive use” of the reservation. (Treaty of 1855, Article 1.) The Tribes are organized under section 16 of the Indian Reorganization Act (“IRA”) of 1934. (25 USC § 476.) Pursuant to section 16, the Tribes adopted the Tribal Constitution and Bylaws in 1938, with the approval of the U.S. government

through the Department of Interior.¹ The Tribal Constitution and Bylaws formally constituted a government for the Tribes through a Tribal Council. The Tribal Council is the central governing authority for the Tribes. Its jurisdiction “extend[s] to all lands contained within the present boundaries of the Warm Springs Reservation and to such lands as may have been heretofore or may hereafter be acquired by the Confederated Tribes of the Warm Springs Reservation or by the United States in trust for such tribes.” (Tribal Constitution and Bylaws, Article II.) The Tribal Council has a combination of legislative, executive and judicial responsibilities which include the authority “to approve or veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other qualified official or agency of Government * * *” and “to exclude from the territory of the Confederated Tribes persons not legally entitled to reside therein under ordinances, which shall be subject to review by the Secretary of the Interior.” (Tribal Constitution and Bylaws, Article V, Section 1(c) & (h).)

The Department of Interior, through the Bureau of Indian Affairs, is without authority to grant rights-of-way across tribal lands without the consent of the affected tribe. 25 USC § 324; *see also* 25 CFR § 169.3. Section 368 does not obviate or alter this requirement, but instead directs the Department of Interior to designate energy corridors “under [its] respective authorities.” Indeed, in addition to the consent requirement of 25 USC § 324, land use planning and revision by the Secretary of Interior (and Agriculture) under the Federal Land Policy and Management Act of 1976 (43 USC § 1712) requires coordination with and consideration of tribal land resource management programs.

Second, using this legislation as a tool to liberalize energy leasing on tribal lands or on lands that would impact treaty resources also significantly erodes the Department of Interior’s and other federal agencies’ trust responsibilities.

There is a long history of energy companies failing to provide compensation or under-compensating for tribal rights-of-way and Interior oversight has helped to ensure the current trend of fair compensation. It is also incumbent in such trust responsibility to seek tribal input on the impacts of an energy corridor to treaty resources and other tribally-significant resources on the Reservation and on the Tribes’ ceded lands and usual and accustomed fishing, hunting and gathering sites. As noted above, the Treaty of 1855 reserved land for the Tribes’ exclusive use, but it also identified the lands that the Tribes ceded to the United States and reserved special rights to the Tribes to utilize these lands and usual and accustomed fishing, hunting and gathering stations (which stations extend far beyond the Reservation and ceded lands

¹ Constitution and By-Laws of the Confederated Tribes of Warm Springs Reservation of Oregon, As Amended, Approved February 14, 1938 (Approved by Oscar L. Chapman, Assistant Secretary of the Interior of the United States of America).

boundaries). (Treaty of 1855, Article 1.) Adversely impacting these reserved treaty rights without CTWS consent raises serious concerns regarding the federal government's trust responsibilities.

The Tribes have also adopted an Integrated Resources Management Plan ("IRMP") that governs all habitat-impacting activities on the Reservation. This tribal resource management program is a state-of-the art land management plan that seeks to implement the highest standards of resource management on the Reservation. Compliance with the IRMP is essential to maintaining, restoring and improving the integrity of tribal treaty resources. The IRMP has been approved by the Bureau of Indian Affairs as its Environmental Assessment for its management of the Reservation. Accordingly, any energy corridors across Reservation land would need to be consistent with the IRMP among other applicable tribal laws. Tribal input on this issue is critical to ensuring such consistency.

In short, in the current environment of ongoing trust litigation, designating energy corridors that affect tribal resources should be carefully considered and should be based on tribal consent.

Third, CTWS notes that section 1813 of the Energy Policy Act of 2005 directs the Departments of Interior and Energy jointly to conduct a study of issues regarding energy rights-of-way on tribal lands in particular. Such study must be conducted in consultation with Indian tribes and result in a report that: (1) analyzes historic rates of compensation paid for energy rights-of-way on tribal land; (2) recommends appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land; (3) assesses 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 (4) analyzes relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land. Designating energy corridors without the benefit of this study would be premature.

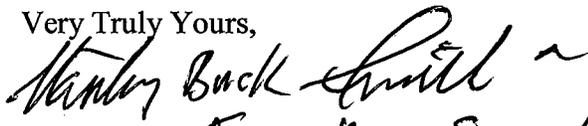
Fourth, the Tribes recognize the lead agencies' intent to initiate government-to-government consultation as consistent with Executive Order 13175 and request that such consultation be initiated with CTWS.

In summary, in light of the Tribes' sovereignty interests and treaty rights, the Department of Interior's existing authorities, the federal government's trust responsibilities, and the unique knowledge and expertise that only tribal participation can provide with respect to tribally-significant resources, the Tribes:

- Assert that Indian trust land, including the Warm Springs Reservation, must be excluded from any consideration or designation as an energy corridor under this process;

- Oppose designation of energy corridors on the Warm Springs Reservation without the Tribes' consent;
- Oppose designation of energy corridors on the Warm Springs Reservation that would be inconsistent with or violate the Tribes' Integrated Resources Management Plan or other applicable tribal laws;
- Oppose designation of energy corridors on the Warm Springs Reservation or in the Tribes' ceded lands or in usual and accustomed hunting, fishing and gathering stations without Tribal consultation and consent;
- Oppose designation of energy corridors on the Warm Springs Reservation without consideration of a final Section 1813 report analyzing impacts to tribal self-determination and sovereignty interests; and
- Seek government to government consultation with the lead agencies in preparation of this PEIS to ensure that the above considerations are included in the scope of the PEIS and ultimate Record of Decision.

Very Truly Yours,



Stanley "Buck" Smith, Vice-Chair, CTWS

Ron Suppah

Chairman, Tribal Council

Confederated Tribes of the Warm Springs Reservation of Oregon

