

**RECOMMENDATIONS OF THE NAVAJO NATION**  
**IN RESPONSE TO NOTICE OF**  
**PUBLIC SCOPING MEETING ON ENERGY POLICY ACT 2005**

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THE NAVAJO NATION

March 7, 2006

Good morning. I am Louis Denetsosie, the Attorney General of the Navajo Nation. The Navajo Nation has considerable interest in the subject of energy rights-of-way across tribal land. I hope to assist the Departments of Energy and Interior in your difficult task of studying such rights-of-way, by urging topics that must necessarily be considered for a meaningful study and suggesting methods of conducting the inquiries to yield useful results. Because of the short period of time allowed for oral presentations, I am also submitting a written presentation that expands on these oral comments.

Section 1813 of the Energy Policy Act of 2005 requires that the Secretaries of Energy and Interior conduct a study of "energy rights-of-way" across Indian lands, and specifically identified four issues to be included in that study: (1) historic rates of compensation, (2) appropriate standards and procedures for determining appropriate compensation, (3) tribal self-determination and sovereignty implications, and (4) national transportation policies relating to such rights-of-way. Section 1813 does not restrict the study to these issues, and a proper study requires threshold issues to be addressed, as I will identify shortly.

**THE PROPER STARTING POINT – THE 1969 HOUSE REPORT**

Initially, the New Mexico Oil and Gas Association and the El Paso Natural Gas

Company, which is seeking new rights-of-way approximately 900 miles of Navajo Nation land, proposed that Congress amend the 1948 Indian right-of-way statute to permit the Secretary of the Interior to grant rights-of-way for tribal lands over the objections of the tribe. Congress refused to do this, and instead directed that the section 1813 study be conducted. An analogous proposal was made by the Department of the Interior itself in 1967, when the Department proposed to change its Indian right-of-way regulations so that tribal consent of the Navajo Nation would no longer be required and energy development in the southwest would not thereby be threatened. Congress carefully examined that issue over a two year period, and the report of the House Committee on Government Operations, entitled “Disposal of Rights in Indian Tribal Lands Without Tribal Consent,”<sup>1</sup> found that the proposal to permit the Government to grant rights-of-way for tribal lands over tribal objections “violates property rights, democratic principles, and the pattern of modern Indian legislation . . . [and] is contrary to law, as well as to good government, and should not be entertained.” House Report at 3; see generally Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365 (1989). Based on that study and Report, the Department of the Interior retained its rule requiring the consent of all Indian nations for rights-of-way crossing their lands.

Thus, the House Report addressed the principal issues – and, indeed, the issues of principle – that the section 1813 study is to address. The Report found, and the Department of the Interior apparently agreed, that the appropriate procedure for determining compensation for rights-of-way on Indian lands is by negotiation with the tribal land owner, and that the appropriate standard for fair compensation is the results of negotiation between the Indian nation and the applicant. Compare EPLAct § 1813(b)(2). The Report, relying on the “pattern of modern

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<sup>1</sup> House Report No. 91-78, 91st Cong. 1st Sess. (Mar. 13, 1969).

Indian legislation” favoring tribal self-determination, concluded that allowing the Government to grant rights-of-way over tribal lands without tribal consent would violate property rights, democratic principles, law and good government. Compare EAct § 1813(b)(3). Its conclusion that tribal consent should be required in all instances was made in the context of the Glen Canyon Dam, the Navajo Generating Station, the so-called WEST consortium of government and private power interests, the Four Corners Power Plant, and related transmission lines. This comprehensive development had far greater energy implications than any right-of-way now under consideration. Compare EAct § 1813(b)(4). The Department of the Interior, in conformity with the House Report, nonetheless retained its regulatory requirement that tribal consent be obtained in all cases. Compare EAct § 1813(b)(4). That requirement is in place to this day. See 25 C.F.R. § 169.3.

#### **FEDERAL POLICY HAS EMBRACED AND EXPANDED UPON THE CONCLUSIONS OF THE 1969 HOUSE REPORT**

The House Report should be the starting point for the section 1813 study. The section 1813 study should use the conclusions reached by the House Committee and the Department of the Interior then as a base, and determine if anything has changed to merit a different conclusion. Interior regulations remain the same; thus, the proper procedure for determining compensation remains good-faith negotiation, and the proper standard of compensation is simply the consideration that results from such negotiation. See EAct § 1813(b)(2). Certainly, Congress and the Executive Branch have not retreated one step from their shared recognition of tribal sovereignty and self-determination; to the contrary, both have embraced ever more boldly those principles. See, e.g., 25 U.S.C.A. §§ 450a, 458aa; Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564; President’s Statement on Indian Policy, 1983 Pub. Papers 96;

Executive Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (2000). Indeed, everything related to Indian tribes in the EAct of 2005 emphasizes and promotes tribal self-determination, and seeks to free tribes of federal dominance and control. See Energy Development and Self Determination Act of 2005, P.L. 109-58, 25 U.S.C. §§ 3501-3504; compare EAct §1813(b)(3).

Finally, relevant National energy transportation policies relating to energy rights-of-way on tribal lands continue the policy in place since 1951 to honor tribal rights as landowner and sovereign. See 25 C.F.R. § 169.3 (2005). Congress has buttressed the requirement of tribal consent in the Indian right-of-way statute by other federal legislation that prohibits tribal land from being condemned or otherwise used without tribal consent. See 28 U.S.C. § 2409a (Quiet Title Act, or “QTA”); Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (QTA constitutes an “insuperable hurdle” to a suit to establish title to an easement across reservation land). The federal courts recognize this federal policy. See United States v. Pend Oreille Pub. Util. Dist., 28 F.3d 1544, 1548 (9th Cir. 1994) (“The Utility may not condemn tribal lands embraced in a reservation under the Power Act or under any other federal statute.”), cert. denied, 514 U.S. 1015 (1995). This is consistent with federal policy regarding lands held by the United States itself and other sovereigns. See Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878, 883-84 (10th Cir. 1974). Federal energy policy today thus requires tribal consent for all energy rights-of-way. See EAct § 1813(b)(4).

Therefore, the 1969 House Report establishes the baseline for the last three topics that must be included in the study. Nothing has changed as a matter of federal policy to upset the conclusions of that Report, and, in fact, Congress and the Executive Branch have advanced further the policies (1) requiring tribal consent, (2) requiring that the standard for compensation

for rights-of-way across tribal land be that agreed to as a result of negotiations, (3) advancing the central principle of tribal self-determination regarding use of tribal land, and (4) honoring these policies consistently in the context of national energy transportation matters.

### **HOW TO CONDUCT THE SECTION 1813 STUDY**

Any study of “energy rights-of-way” must begin with an analysis of whether current statutes, regulations and policy – all of which support tribal self-determination without federal control and domination – have created any problem with respect to the availability or delivery of energy. To determine if there is a problem, the Navajo Nation urges that the study use the same approach as the House Committee did from 1967-1969. For each type of “energy right-of-way” – e.g., electrical transmission line, electrical distribution line, oil gathering pipelines, oil transmission pipelines, natural gas distribution pipelines, natural gas transmission pipelines, refined products pipelines, coal slurry pipelines, roads for hauling coal, roads for hauling oil – the Department of the Interior should compile in table form the applicable reservation, the date of application, the name of applicant, the class of application (i.e., application to survey, for permission to construct, for final grant), the dimensions of the desired right-of-way, whether the tribe consented, the reason for any refusal to consent, and the present status of the application (i.e., withdrawn, rejected, pending, amended and pending, amended and approved, approved). See House Report at 34-39. For any application where tribal consent was refused and the application rejected, the study should analyze and document whether such refusal and rejection adversely and materially impacted the supply or delivery of energy, or, indeed, whether exertion of tribal authority has actually increased the supply and availability of energy resources to the public, as has occurred in several instances. This data compilation should extend back at least to 1969.

The compilation required for the section 1813 study will need to include additional information not included in 1969, because of the express requirements of section 1813. To satisfy section 1813(b)(1), the study should make an attempt to determine the amount of consideration paid for each right-of-way. I say “make an attempt” because (1) compensation for rights-of-way is considered by the Navajo Nation and many other tribes as confidential and proprietary, (2) compensation for rights-of-way may not be expressed in dollar terms, because -- often as a result of federal policies favoring greater tribal participation in energy development on tribal lands -- rights-of-way are not properly segregated from larger business transactions and relationships, and (3) many Indian nations, including the Navajo Nation, have established their own energy companies, whose rights-of-way across tribal lands may not have any ascertainable or comparable compensation terms.

In addition, the compilation must determine how such compensation levels were arrived at, so that there is a foundation for any recommendations under section 1813(b)(2). While the Navajo Nation believes that the “procedures for determining fair and appropriate compensation to Indian tribes” have typically been negotiated agreements and the terms of those agreements, there may be instances where tribal consent was not obtained. See Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977).

Next, the compilation should reflect whether each application is for a “grant, expansion, or renewal” of a right-of-way. For the study to have any true utility, the compilation must include and analyze the terms of any initial right-of-way agreement relating to expansion or renewal of a right-of-way. See EPA Act § 1813(b)(3). In this way, any apparent discrepancies in right-of-way compensation (to the extent ascertainable) in the cases of expansions or renewals may be explained by provisions in federally approved right-of-way agreements that, like some of

the Navajo Nation's, provide that the Indian nation will have title to the improvements upon the expiration of the term of the right-of-way grant. Moreover, in order to satisfy the requirements of section 1813(b)(3), the compilation should reflect whether the United States has entered into a treaty relationship with the tribe, what the applicable treaty provisions provide, whether the right-of-way crosses treaty lands or lands set apart by Congress or executive order or otherwise, the extent to which the tribe has adopted laws, regulations, or policies governing the grant or expansion or renewal of rights-of-way, potential impacts on tribal land use planning,<sup>2</sup> court cases related to the tribes' fundamental right to exclude, and similar matters relating to tribal self-governance.

The Navajo Nation opposes strongly the "case study" method. That method will not satisfy the requirements of section 1813. Interested companies are sure to try to hijack that method to advance narrow corporate interests. A limited number of case studies will likely focus on the anomalous case, not the trends and larger values that would be the subject of congressional interest.<sup>3</sup> We also oppose the creation of ad hoc "task forces" to do the work that Congress entrusted to the Secretaries of Interior and Energy. All federal agencies have trust duties to the Navajo Nation and other Indian nations. See HRI, Inc. v. E.P.A., 198 F.3d 1224, 1245 (10th Cir. 2000). Any task forces, which would probably be comprised of interested parties jostling for position, would not be guided by that principle. Nonetheless, if task forces are deemed a necessary expedient – perhaps to mask the undeniable truth that no competent study

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<sup>2</sup> See, e.g., County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992) (upholding tribe's right to designate portion of reservation as "closed" to all development).

<sup>3</sup> The House Report states that "during the year ending June 30, June 30, 1967, there were a total of 2,531 rights-of-way issued, while 4,141 applications remained pending." House Report at 48 (reproducing letter from Secretary Stewart L. Udall).

can be performed between now and August 7, 2006 – the Navajo Nation will seek representation on all of them in order to protect its inherent sovereignty, treaty rights, and self-sufficiency.

For similar reasons, the Navajo Nation urges that the report regarding tribal sovereign interests and how federal energy policy intersects with those interests not be contracted to any entity that lacks extensive experience in Indian country issues. These are issues that, regrettably, are not well understood by most Americans or by most technical consultants. They are, of course, well known to the Department of the Interior, and the Department of Energy has also published its own American Indian Policy which recognizes the tribes' "special and unique legal and political relationship with the Government of the United States." U. S. Department of Energy American Indian Policy (approved Nov. 29, 1991).

Related to the sovereignty and self-determination of tribes is the question of federal responsibilities to honor treaties, to refrain from impairing contract rights, and to refrain from taking property of Indian nations. The United States is subject to constitutional constraints when it comes to dealing with Indian property, see, e.g., Creek Nation v. United States, 295 U.S. 103, 109-10 (1935), and to its fiduciary duties when dealing with rights-of-way in particular, e.g., United States v. Mitchell, 463 U.S. 206, 223 (1983); Coast Indian Community, supra. Thus, for situations like the Navajo where federally approved right-of-way agreements provide that the energy company will leave peaceably and turn over the improvements to the Navajo upon expiration of the 20-year term, the study should examine the potential for unconstitutional impairments of contract, takings of tribal property, and breaches of treaty protections and federal trust duties if the principle of tribal self-determination is to be abandoned in whole or in part. See House Report at 12 (allowing rights-of-way on tribal land without tribal consent would cause "protracted and costly litigation in the Court of Claims"); see generally Cobell v. Norton, 2003

WL 21978286 (D.D.C. Aug. 20, 2003) (reproducing Report of Special Master's visit to the Office of Appraisal Services of the Navajo Realty Office of the Bureau of Indian Affairs).

### SUMMARY

The Navajo Nation recommends that the first order of business is to determine if there is a problem. The first task of the Secretaries of Interior and Energy is to analyze this question. The fact that tribes have negotiated literally thousands of rights-of-way each year without any hint of a problem relating to the transmission or availability of energy resources strongly suggests that there is none. If that is true, Congress should be so informed.

Any analysis of rights to Indian reservation land must be grounded in an understanding of the history of Indian reservations and the rights of Indian nations as sovereigns and landowners. Thus, the second task of the Secretaries is to memorialize, as the basis for the other studies, the sovereignty and self-determination principles outlined above. Indian reservations were established for the benefit of the Indians, not energy companies. The fundamental right to exclude nonmembers and to condition the entry of those seeking to do business on tribal lands is a fundamental one, shared by treaty and non-treaty tribes alike. Exertion of rights as sovereign and landowner has enabled the Indian people to become increasingly self-sufficient, have had the ultimate result of increasing energy production on tribal lands, and have provided much needed revenues for tribal governments to provide essential services and infrastructure for members and visitors. Compare United States Comm'n on Civil Rights, The Navajo Nation: An American Colony 42 (1975) (showing an infrastructure deficit on the Navajo Reservation of \$3.77 billion). The report should reflect these facts.

The third task is a thorough examination of the various ways that energy moves over tribal land. Historically, the tribes were passive entities that allowed use of particular lands for a

period of time for dollar consideration. However, federal policy since the 1930s has encouraged the building of tribal technical capacity and business capabilities, promoted tribal economic self-sufficiency, encouraged tribal entrepreneurship,<sup>4</sup> encouraged tribal energy production, and sought to improve employment and other economic conditions on Indian lands.<sup>5</sup> As a result, many Indian nations are no longer using the historical model, but are actively engaged in the energy industry, including energy generation and transmission. Segregating rights-of-way from the other components of the energy business would cripple the tribes in their attempts to become self-sufficient and active energy producers, and Congress should be so informed.

Fourth, the Secretaries should comprehensively examine historic rates, methodologies, and kinds of compensation. The manner of carrying out the historical analysis is suggested above. The history will likely show a trend from a lump sum payment for a term of years, to a cents-per-rod formulation, to a computation based in part on throughput, to active tribal participation in energy businesses – where rights-of-way are inseparable from other aspects of the integrated business. This progression corresponds closely with the evolved federal policy from federal conquest, to plenary federal control under a “tutelage” rubric, to federal protection under a trust theory, to true self-determination and self-sufficiency.

Fifth, the Secretaries should simply report to Congress that the proper procedure for determining the terms of business relationships that include a right-of-way component is negotiation. The proper standard for compensation and other terms is the negotiated business deal itself. In light of the base line federal policy honoring tribal self-determination and self-

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<sup>4</sup> See, e.g., section 17 of the Indian Reorganization Act, as amended, 25 U.S.C. § 477, under which the Navajo Nation Oil and Gas Company is chartered as a federal corporation.

<sup>5</sup> See, e.g., Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38.

sufficiency, exemplified in the 2005 EPAct itself, no elaborate study on this issue is required.

Sixth, the Secretaries should examine the interface of federal Indian policy and federal energy policy. From the beginning, Congress has insisted on not encumbering tribal lands for long periods of time. See, e.g., 25 U.S.C. § 321 (restricting duration of pipeline rights-of-way to 20 years). Congress has never considered Indian reservations and other tribal trust lands as equivalent to even public (federal) lands, much less private lands. It has forbidden the condemnation of tribal lands for any purpose. It has insisted on tribal consent as a precondition for the grant of a right-of-way over tribal land. The 1992 and 2005 Energy Policy Acts emphasize in no uncertain terms the desirability of Indian nations participating fully in the energy business, in part by leveraging their sovereign and proprietary attributes. During the past half-century or so when tribal consent has been demanded, there has been no real negative impact on the supply or cost of energy, but rather an increased supply due to increased tribal participation in the energy sector. The final report should document that fact.

The “case study” proposal would gather nothing more than anecdotes, and the task force approach would likewise result not in a comprehensive federal study but only in jockeying by interest groups. These approaches would not comply with the congressional mandate in section 1813. Congress required, and the Indian nations deserve, a comprehensive study that focuses on real issues of national import, not just the desire of a part of the non-Indian energy sector to increase profits at the tribes’ expense and to the detriment of federal policies promoting tribal self-determination, self-sufficiency, and full participation in the energy industry.

For the convenience of the federal officials here, I am submitting with this Statement a copy of the House Report. I urge you to examine it carefully, for it provides the template for the study mandated by Congress in section 1813.

**DISPOSAL OF RIGHTS IN INDIAN TRIBAL  
LANDS WITHOUT TRIBAL CONSENT**

**THIRD REPORT**

BY THE

**COMMITTEE ON GOVERNMENT  
OPERATIONS**



**MARCH 18, 1969.—Committed to the Committee of the Whole House  
on the State of the Union and ordered to be printed**

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES  
Washington, D.C., March 13, 1969.

HON. JOHN W. McCORMACK  
Speaker of the House of Representatives  
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's third report to the 91st Congress. The committee's report is based on a study made by its Natural Resources and Power Subcommittee during the 90th Congress and reviewed and concurred in by the Conservation and Natural Resources Subcommittee in the 91st Congress.

WILLIAM L. DAWSON, Chairman.

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# Union Calendar No. 23

91st Congress  
1st Session

HOUSE OF REPRESENTATIVES

Report  
No. 91-78

MARCH 13, 1969.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

## THIRD REPORT

BASED ON A STUDY BY THE NATURAL RESOURCES AND POWER SUBCOMMITTEE IN THE 90TH CONGRESS, AND REVIEWED AND CONCURRED IN BY THE CONSERVATION AND NATURAL RESOURCES SUBCOMMITTEE IN THE 91ST CONGRESS

On March 12, 1969, the Committee on Government Operations approved and adopted a report entitled "Disposal of Rights in Indian Tribal Lands Without Tribal Consent." The chairman was directed to transmit a copy to the Speaker of the House.

### PRELIMINARY STATEMENT

On April 4, 1967, the Interior Department published (32 Fed. Reg. 5512) the text of its proposed revision of existing departmental regulations governing "Rights-of-Way Over Indian Land" (25 CFR pt. 161). Shortly thereafter, by letter of April 24, 1967, Hon. William L. Dawson, chairman of the House Committee on Government Operations, requested the Interior Department to explain the differences between the proposed revision and certain regulations applicable to public lands.

When Chairman Dawson received the Department's response of September 12, 1967, he referred the regulations and correspondence to Hon. Robert E. Jones, chairman of the Natural Resources and Power Subcommittee, for further examination. Pursuant to Chairman Jones' request, the subcommittee staff prepared and transmitted to Chairman Jones on November 2, 1967, a staff memorandum which criticized several provisions of the new regulations, and concluded that they would be substantially more disadvantageous to the Indians than the existing regulations.

(1)

The staff memorandum particularly criticized the change proposed in section 161.3 which would declare that the Secretary of the Interior "may without prior consent of the tribe issue permission to survey and grant rights-of-way over and across tribal lands of tribes that are not organized under" any of three cited statutes. This proposed revision would change a longstanding regulation which requires "prior written consent of the tribal council" before any right-of-way over, or permission to survey or construct on, Indian tribal lands would be granted.

Despite the substantial change which the new regulation would make concerning the disposal of rights in Indian tribal lands without tribal consent, the Department's Notice of Proposed Rulemaking accompanying the publication of the proposed revision on April 4, 1967, did not mention the abolition of the consent requirement, but merely stated as follows:

The most important feature of this revision is that it will for the first time provide for methods of conveyance used in the commercial world rather than the archaic method represented by the present practice of granting rights-of-way by endorsing approval of a plat or map of definite location. Aside from constituting a modernization of methods this change should also result in savings to the Government in all phases of the process of granting rights-of-way particularly in the recording aspects, and to applicants for rights-of-way. The revision also consists of the realignment of material to present a more logical sequence; the deletion of material regarded as advisory rather than regulatory in nature, and the addition of certain material which more fully encompasses the authorities of law.

By letter of November 6, 1967, Chairman Jones transmitted the staff memorandum to the Secretary of the Interior and requested his views thereon, as well as additional information relating to the Department's actions in granting rights-of-way over Indian lands. Additional correspondence between Secretary Udall and Chairman Jones was exchanged on January 27, February 16, and July 12, 1968. The letters and staff memorandum are set forth in the appendix hereto.

The proposed regulation would make various changes which appear to be improper, or at best very questionable. This report deals with the most significant one of these changes; namely, the proposal to provide for the disposal of rights in Indian tribal lands without tribal consent.

#### CONCLUSIONS

1. On April 4, 1967, the Interior Department published proposed new Indian right-of-way regulations abolishing the requirement for tribal consent to right-of-way grants of land owned by tribes not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act. These acts require tribal consent for grants of land only in the case of tribes organized thereunder. However, since 1951 the Interior Department's regulations have provided that the Secretary will not grant a right-of-way over Indian tribal lands

without the consent of the tribe, regardless of whether or not it is organized under such acts.

2. Tribal Indian land is the property of the Indian tribes, not of the United States. There are more than 39 million acres of tribal land over which the Department of the Interior exercises trust responsibilities and which are subject to Federal right-of-way statutes. Slightly more than half of this land is owned by tribes not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act. In the lower 48 States tribes organized under these statutes have a total membership of 147,989, and tribes not so organized have a total membership of 239,561; but the great majority of the latter have some form of functioning tribal organization.

3. The Interior Department construes the Indian Right-of-Way Act as authorizing grants of Indian land not only for transportation and communication facilities, but also for reservoir sites, thermal electric powerplant sites, and a variety of other uses. The law places no limitation on the area or term of years of such grants.

4. The Bureau of Indian Affairs vigorously opposes abolition of the requirement for tribal consent to right-of-way grants over lands of tribes having governing bodies but not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act.

5. As a result of massive protest against the proposed new regulations from the Indians, the public, and this committee, the Secretary of the Interior stated that he is "inclined to change" the section dealing with tribal consent so as to require consent from any tribe "having a form of organization approved by the Secretary" whether or not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act. However, in the case of such tribes not organized under one or the other of the statutes, the Secretary insisted on a power to grant rights-of-way without their consent, in disregard of the regulation, when he deems that a tribe has refused consent against its own best interests.

6. The committee believes that the Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.

7. The committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.

#### RECOMMENDATIONS

1. The section of the present Indian right-of-way regulations (25 CFR 161.3) which requires consent of all tribes to right-of-way grants of their lands, regardless of how or whether they are organized, should be retained without modification. The committee commends the Interior Department for having done so in the revised Indian rights-of-way regulations published in the Federal Register of December 27, 1968 (33 F.R. 18903).

2. The Secretary of the Interior should obey 25 CFR 161.3 and not grant rights-of-way in disregard of it on any pretext, even when he feels the Indians are withholding consent contrary to their own best interest.

3. Consideration should be given to amending the Indian Right-of-Way Act to require tribal consent to all right-of-way grants of tribal land, so as to afford the Indians adequate protection from possible spoliation of their property by Federal officers.

### TEXT OF THE REPORT

#### I. Text of Present and Proposed Regulations Relating to Tribal Consent for Rights-of-Way Over Indian Tribal Land

The present regulation, adopted in 1951, reads as follows (25 CFR 161.3):

##### Sec. 161.3. *Consent of landowners*

(a) No right-of-way shall be granted over and across any restricted lands belonging to a tribe, nor shall any permission to survey or to commence construction be issued with respect to any such lands, without the prior written consent of the tribal council.

The proposed revision as published in the Federal Register of April 4, 1967, would delete the foregoing provision and substitute the following provisions applicable to Indian tribal lands:

##### Sec. 161.3. *Consent of landowners to grants of rights-of-way*

(a) Except as otherwise provided in this Part 161, no right-of-way shall be granted over and across tribal land nor shall any permission to survey be issued as to such lands without the prior written consent of the tribal governing body.

(b) The Secretary of the Interior may without prior written consent of the tribe issue permission to survey and grant rights-of-way over and across tribal land of tribes that are not organized under the provisions of the Act of June 18, 1934 (48 Stat. 934; 25 U.S.C. 461-473 and 474-479); the Act of May 1, 1936 (49 Stat. 1250; 25 U.S.C. 473a and 48 U.S.C. 358a and 362), and the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 501-509). If a tribe is not organized under the provisions of any of the above-mentioned Acts but has a governing body recognized by the Secretary, the applicant for a right-of-way should seek the consent of such governing body to the grant before applying to the Secretary.

#### II. Effect of the Proposed Revision of the Regulations Relating to Tribal Consent

The general Indian right-of-way statute<sup>1</sup> explicitly prohibits the Secretary (25 U.S.C. sec. 324) from granting a right-of-way, without tribal consent, over lands of tribes organized under either the Indian

<sup>1</sup> Act of Feb. 8, 1948, 62 Stat. 17, 25 U.S.C. 322-323.

Reorganization Act or the Oklahoma Indian Welfare Act.<sup>3</sup> The proposed regulations would not affect the power of tribes so organized to veto right-of-way grants. However, the tribes not organized under those acts, which can exercise such veto under the existing regulations, would not be able to do so if the new regulations are adopted.

The Bureau of Indian Affairs recognizes the existence of 788 Indian tribes, bands, villages, pueblos, and other groups in the United States, including Alaska, which are eligible for its services. Of these, 169 are organized under the Indian Reorganization Act (including 68 in Alaska), and 17 under the Oklahoma Indian Welfare Act. Thus, there are 602 Indian tribes and groups not organized under either act. Of the 602, 96 (including 29 in Alaska) are organized for governmental purposes under some form of document. There are an additional 106 Alaska native villages and an unascertained number of groups in the lower 48 States (consisting largely of pueblos of New Mexico) having traditional organizations not reflected in charters or other documents.

Apparently a substantial number of the tribes and other groups recognized by the Bureau of Indian Affairs, including all but two of the 203 in Alaska, own no tribal land. The two tribes owning lands in Alaska have approximately 1,012 members, own 87,635 acres, and are both organized under the Indian Reorganization Act. There are also several landowning tribes organized for proprietary but not governmental purposes.

The Commissioner of Indian Affairs on September 3, 1968, supplied the following figures for the estimated populations of organized and unorganized tribes under the jurisdiction of the Bureau of Indian Affairs:

	Estimated population	
	All tribes	Non-IRA/OIWA tribes
<b>LOWER 48 STATES</b>		
Tribes organized under IRA.....	126,318	
Tribes organized under OIWA.....	22,671	
Subtotal, IRA and OIWA Tribes.....	147,989	
Tribes otherwise organized.....	185,208	185,208
Subtotal, organized tribes.....	333,197	185,208
Unorganized tribes (including those organized solely on traditional basis).....	54,353	54,353
Total for lower 48 States.....	387,550	239,561
<b>ALASKA</b>		
Aggregate of organized and unorganized tribes.....	54,221	
Total estimated tribal Indian population eligible for Bureau of Indian Affairs services.....	441,771	

<sup>3</sup> The Indian Reorganization Act, enacted on June 18, 1934, provides, among other things, in sec. 16 (25 U.S.C. 476), that any Indian tribe shall have the right to adopt a constitution, which, in addition to other powers, may vest in such tribe the right to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in land, or other tribal assets without the consent of the tribe. Sec. 16 (25 U.S.C. 476) provides that the act shall not apply to any reservation wherein a majority of the adult Indians vote against its application in a special election, which was required to be held by June 15, 1936 (see act of June 15, 1936, ch. 309, 49 Stat. 878). There appear to be several reservations where the Indians voted to accept the act, but nevertheless failed to organize under sec. 16.

The act of May 1, 1946, cited in amended sec. 161.1(b) of the right-of-way regulations, amended certain previously inapplicable sections of the Indian Reorganization Act to the Indians and Eskimos of Alaska. The Oklahoma Indian Welfare Act, enacted on June 26, 1906, provides, among other things, that certain Indian groups in Oklahoma to whom the Indian Reorganization Act was originally inapplicable may, at their option, organize and receive from the Secretary of the Interior a charter of incorporation entitling them to enjoy, among other powers, "any other rights or privileges secured to an organized Indian tribe under the act of June 18, 1934." Sec. 3 (25 U.S.C. 503).

There is no cutoff date for accepting or rejecting the Alaska or Oklahoma act.

The President's message on the American Indian of March 6, 1968 (H. Doc. 272, 90th Cong., second sess.), states that there are an additional 200,000 Indians living in cities and towns not on or near reservations.

As of June 30, 1967, the Bureau of Indian Affairs reported that there were 39,442,656 acres of Indian tribal land over which it exercised trust responsibilities. The Bureau publishes acreage figures by areas and reservations rather than by tribes. Moreover, some lands are held by tenancy-in-common of more than one tribe. The Bureau does not have an accurate breakdown between the acreage owned by IRA and OIWA tribes, over which the Secretary of the Interior is forbidden by law to grant rights-of-way without tribal consent, and the acreage owned by other tribes, over which he claims the right to make such grants regardless of tribal consent. The following figures, calculated by the committee staff from information supplied by the Bureau, however, appear to be reasonably accurate:

Statue of tribal owner:	Acres
Organized under IRA or OIWA.....	19, 706, 722
Otherwise organized <sup>1</sup> .....	19, 483, 846
Unorganized, or status unknown.....	252, 088
<b>Total.....</b>	<b>39, 442, 656</b>

<sup>1</sup> Included in this figure are the tribal lands totaling 802,878 acres, owned by those pueblos of New Mexico which are organized on a traditional basis only, and the tribal lands, totaling 39,359 acres, owned by the Five Civilized Tribes of Oklahoma, which are organized for proprietary but not governmental purposes.

Tribal Indian land is defined with reasonable accuracy in section 161.1(c) of the new regulations as "land or any interest therein, title to which is held by the United States in trust for a tribe \* \* \* or title to which is held by any such tribe subject to Federal restrictions against alienation or encumbrance \* \* \*." It is distinguished from allotted Indian land, which is held in trust by the United States for individual Indians, or held in the individual Indians' own names subject to restraints on alienation imposed by Federal law. Tribal land is similar to corporate property, particularly that of municipal corporations. Like the citizen of a town in his relationship to municipally owned real estate, an individual Indian has only the indirect interest in ownership of tribal land which derives from tribal membership or citizenship. The Indian, however, often has much more intense emotional ties to his community land than do most other Americans. Furthermore, in the frequent instances where he does not own an individual allotment he usually has the right, by formal assignment or by custom, to exclusive use of a portion of the tribal land for his home, farm, or range.

Tribal land is the property of the Indian tribe. It is not the property of the United States.

The basic restriction on alienation of Indian tribal land, which has been in effect continuously since 1790, now appears at 25 U.S.C. 177. Because of this statute, the abandonment of treaty-making, with Indians (see 25 U.S.C. 71), and the usual lack of State jurisdiction over Indian land, transfers of interests in such land can be made

<sup>1</sup> Indian land tenures form an exceedingly complex subject. See Cohen, "Handbook of Federal Indian Law," ch. 18, pp. 287-347 (1961). Cohen states, at p. 312, "A realistic analysis of the cases suggests that the only clear distinction between 'Indian title' and 'fee simple title' lies in the fact that Indian lands are subject to statutory restrictions upon alienation." See also "Federal Indian Law," 1968 ed., ch. IX, A, pp. 681-748.

only under authority of act of Congress. Of the many such acts now in force, probably the most important are the act of May 11, 1938 (52 Stat. 347, 25 U.S.C. 396a-396g), authorizing mineral leases; the act of August 9, 1955 (69 Stat. 539, 25 U.S.C. 415-415d), authorizing long-term leases for surface use, and the act of February 5, 1948 (62 Stat. 17, 25 U.S.C. 323-328), authorizing rights-of-way for all purposes. There is no general law authorizing sales of tribal land. The leasing statutes vest exclusive authority to lease tribal lands in the landowners—the tribes themselves—subject to approval of the Secretary of the Interior. The right-of-way statute departs from the pattern of these laws by authorizing the Secretary to make grants of the tribes' lands, subject to tribal consent in the case of certain organized tribes.

A right-of-way has been traditionally defined as:

\* \* \* the privilege which one person or particular class of persons may have of passing over the land of another in some particular line. It is an easement, but the term is used to describe either the easement itself or the strip of land which is occupied for the easement.<sup>4</sup>

In modern usage the term "right-of-way" means the right to construct, operate, and maintain on the land of another a transportation or communication facility, such as a railroad, highway, ditch, sewer, irrigation canal, oil or gas pipeline, electric transmission line, telephone or telegraph cable, etc. Frequently rights-of-way confer upon the grantee the additional right to use adjacent ground for purposes incidental to his transportation or communication facility, such as a railway station, gas compressor, electric substation, etc.

The act of February 14, 1948, which authorizes the Secretary of the Interior to grant rights-of-way for all purposes across Indian land, contains no restrictions on the width or term of years of such rights-of-way.

In 1957, the Interior Department construed the 1948 act as authorizing grants of rights-of-way over Indian tribal lands for water control project purposes, including use of the land as sites for dams, reservoirs, powerplants, and construction and operating camps,<sup>5</sup> that is, uses considerably more permanent and extensive than for passage or for transportation or communication. Under this interpretation, the Department granted, as a "right-of-way" for perpetual use, about 53,000 acres of the land of the Navajo Tribe—an area larger than many entire Indian reservations—to the Bureau of Reclamation for the site of the Glen Canyon Dam, reservoir, powerplant, and construction and operating townsite. (See S. Rept. 1867, 85th Cong., second sess., pp. 6-7.)

In 1966, the Department broadened its interpretation even further, by granting 50-year "rights-of-way" covering 3,928 acres of the same tribe's lands to a group of power companies<sup>6</sup> for purposes of locating

<sup>4</sup> 23 Am. Jur. 24, "Easements and Licenses," sec. 7, p. 422.

<sup>5</sup> Solicitor's Opinion M-3603, 64 I.D. 70 (Mar. 22, 1937). This opinion overruled a previous Solicitor's Opinion M-3502, Mar. 28, 1936, which had stated: "It would certainly be stretching the statute beyond reason to hold that a reservoir site covering thousands of acres is a right-of-way."

<sup>6</sup> The grantees receiving this "right-of-way" are Arizona Public Service Co., El Paso Electric Co., Public Service Co. of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Co., and Tucson Gas & Electric Co. These utilities are associated with Western Energy Supply and Transmission Associates (WEST).

thereon a thermal electric plant, dam, common use facilities, ash disposal, and reservoir. The grantees received exclusive use of the lands.<sup>7</sup>

Obviously, the proposed revision of section 161.3 of the rights-of-way regulation to abolish the requirements of tribal consent, affecting almost 20 million acres of Indian tribal land, would be an enormous shift of control away from the Indians' own local units of government to the Department of the Interior.

### III. Summary of Correspondence Between the Subcommittee and the Interior Department Concerning the Department's Proposal To Provide for Disposing of Rights in Indian Tribal Lands Without Tribal Consent

The views expressed in the subcommittee staff memorandum of November 2, 1967, concerning the Department's proposal to provide for disposing of rights in Indian tribal lands without tribal consent are summarized in the following extracts thereof:

\* \* \* \* \*

From the standpoint of Indian rights the most radical change proposed by the new regulations is abolition of the power of so-called unorganized Indian tribes to veto the granting of rights-of-way over their lands. This veto power is provided by section 161.3 of the present regulations, which requires prior written consent from the tribal council of any Indian tribe, organized or unorganized, before the Secretary of the Interior may grant a right-of-way, or even permission to survey or commence construction on a proposed right-of-way, over its lands. Such a requirement has been in force for 16 years. It has greatly enhanced the ability of unorganized tribes to manage their own property and has strengthened their bargaining position with oil and gas pipeline companies, electric power companies, and other applicants for rights-of-way on their reservations.

An organized tribe, in Indian Bureau parlance, is one that has adopted a constitution and bylaws in accordance with the Indian Reorganization Act (25 U.S.C. 461-473, 474-479) or the Oklahoma Indian Welfare Act (25 U.S.C. 501-509). All others are unorganized. The terms "organized" and "unorganized" used in this way are somewhat misleading, because some tribes which did not adopt constitutions and bylaws under one or the other of those acts nevertheless have highly developed governmental organizations, and some tribes which did adopt such constitutions and bylaws have scarcely any organization except on paper. The largest American Indian tribe, with probably the most elaborate governmental organization, the Navajo, for example, rejected the Indian Reorganization Act, and falls in the unorganized category. It has 100,000 members, about a fourth of all tribal Indians in the United States, and owns lands having an area about the size of the State of West Virginia.

<sup>7</sup>The Navajo Tribe is not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act; but its consent was obtained in both instances, pursuant to the present regulation 25 CFR 161.3.

The Indian Reorganization Act (25 U.S.C. sec. 476) and the Oklahoma Indian Welfare Act (25 U.S.C. sec. 503) confer on organized tribes the power to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without their consent. The general Indian right-of-way statute (act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-328), cited as authority for issuance of the proposed new regulations, explicitly requires consent only of "organized" tribes before the Secretary may grant a right-of-way across their lands (25 U.S.C. sec. 324). The proposed regulations do not affect the power of organized tribes to veto right-of-way grants. However, they would take away such power from unorganized tribes, upon whom it was conferred by regulation rather than by statute.

The legislative history of the 1948 Indian Right-of-Way Act, however, shows no congressional intent that consent ought not to be sought from unorganized tribes. The purpose of including the consent requirement for organized tribes was merely to prevent implied supersession of the Indian Reorganization Act and the Oklahoma Indian Welfare Act. See Senate Report 823, 80th Congress, second session.

\* \* \* \* \*

Some of the "unorganized" Indian tribes have been guaranteed by treaties that no non-Indian shall ever be permitted to settle upon or pass over their lands without their consent. Such treaty stipulations are entitled to equal recognition with the Indian Reorganization Act and the Oklahoma Indian Welfare Act as limitations on the Secretary's authority to grant rights-of-way. In addition, the principle expressed by Under-Secretary Black—that Indian lands are their private property—certainly deserves a greater recognition than is present in a regulation which purports to empower the Secretary to grant away interests in the Indians' lands without their consent.

There may be cases where overwhelming public necessity will justify the condemnation of rights-of-way over tribal Indian land despite the opposition of the Indian landowners. These cases are as apt to involve "organized" as "unorganized" tribes. In either case, we believe that involuntary disposal of the Indians' property rights ought not to be done by administrative action of the Interior Department, because the trust and guardianship responsibilities which the Secretary of the Interior has toward Indians ought to disqualify him from acting as referee between them and others seeking interests in their lands.

Present law generally requires a special act of Congress to condemn tribal Indian land. If there are frequent instances of Indian tribes' unreasonably refusing to consent to the Secretary's granting rights-of-way over their land which are essential to the fulfillment of public purposes and the public welfare, then Congress might consider enacting legislation authorizing the person or agency seeking the right-of-way to institute a suit for condemnation thereof in a Federal court. Such suit would be, of course, subject to the regular

safeguards of the judicial process. In such legislation, Congress might, in view of the special status of Indian reservations, require that the condemning agency establish the necessity for the taking by clear and convincing evidence.

At this stage of history we believe it is a backward step for the Secretary of the Interior, by amendment of the regulations, to authorize the granting of rights-of-way over the lands of the "unorganized" tribes without their consent.

Secretary Stewart L. Udall's response of January 27, 1968, disclaimed any intention "that the proposed regulations should work any substantive changes \* \* \* or be applied to diminish safeguards for the protection of the Indians or to their economic detriment." He acknowledged that the Department had received "generally adverse" comments concerning the proposal to amend section 161.3 to permit granting of rights-of-way, without tribal consent, over lands owned by tribes not organized under the Indian Reorganization Act or the Oklahoma Welfare Act. Because of the opposition to that proposal, he stated, the Department is "inclined to change the section to provide, in the case of tribes having a form of organization approved by the Secretary (whether pursuant to the above acts or otherwise), that rights-of-way will not be granted without the consent of the governing bodies."

However, the Secretary's letter of January 27 also stated as follows:

It has always been understood, not only by officers of the Department but by many who have represented parties desiring rights-of-way over tribal lands, that the Secretary has the authority, regardless of regulations, to grant the same on his own initiative in the case of tribes not organized under the above acts. Subject to further checking by the Bureau, we recall no modern instance in which a right-of-way has been granted over lands of a tribe organized outside of these acts except with the consent of its governing body, although from time to time we have been reminded by applicants that it would be competent for the Secretary to do so pursuant to a waiver of the regulations. See 25 CFR 1.2.

Our response has always been that while we recognize the Secretary has such authority, it will be exercised only in extraordinary situations where the tribe's refusal of consent is clearly contrary to its own best interests. No change in this policy was contemplated by the proposed regulations, but we are inclined to recast section 161.3 as indicated above.

Generally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent. The bargaining process usually produces agreements without unusual difficulties. In a very few situations involving negotiations for rights-of-way over lands of tribes organized other than under the I.R.A. or the O.W.A., the tribe's realization that the Secretary ultimately possessed authority to grant a right-of-way without its consent and the applicant's realization that the Secretary would not do so except as a last resort and only if the interests of the Indians compelled such action, may have been responsible

for getting the parties back to the bargaining table after initial failure to reach agreement.

Chairman Jones thereupon wrote to Secretary Udall on February 16, 1968, saying, in part, as follows:

While we are aware that the Department of the Interior has "recognized" many tribes not organized under an act of Congress, we know of no general authority of the Secretary, outside of the Indian Reorganization Act or the Oklahoma Indian Welfare Act, to "approve," or disapprove, tribal organizations.

\* \* \* \* \*

Your letter of January 27 presents no justification for changing the present language of section 161.3 in any particular. On the contrary, your letter states that (a) "Generally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent" (p. 2); and (b) "\* \* \* no case comes to mind where a State or local project has been frustrated or seriously held up by the lack of power to condemn tribal lands" and "\* \* \* this fact has not produced any mischief requiring general legislation" (p. 3). Moreover, your letter does not attempt to show, and we cannot imagine, why an unreasonable refusal of consent to a proposed right-of-way is more likely to occur in the case of a non-IRA tribe. What then is the justification for changing the present language of section 161.3 in any particular?

Your letter also states, on page 2, that "in extraordinary situations where the tribe's refusal of consent is clearly contrary to its own best interests," the Secretary would "waive" the regulations and issue the right-of-way over the Indian tribal lands without the tribe's consent. Even if there should be any justification for the Department to grant any right-of-way without tribal consent, it appears to us that to do so under a "waiver" of the regulations is a particularly undesirable way to do it.

*First.* It is illegal to waive a regulation over the objection of the person it was adopted to protect. *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959).

*Second.* To disregard the regulation would be to disregard the right of the Indians to make their own decision as to what is in their "own best interests," and would place the Secretary in a conflict of interest. If the Federal Government were the applicant for the right-of-way, the Secretary would be in a conflict of interest between his position as trustee for the Indians and his position as an officer of the beneficiary of the grant. If a State agency or private organization or person were the applicant, the Secretary would be acting in a controversy where his trust responsibilities toward the Indians impair his impartiality.

*Third.* The mere claim of power to act in disregard of published regulations creates an appearance of arbitrariness. Where general regulations impose a uniform requirement on

all applicants, but the Secretary waives such requirements for a particular applicant, such action suggests the possibility of favoritism, regardless of its true motive or justification. A Government agency should remain above suspicion.

*Fourth.* When the Secretary grants a right-of-way over tribal Indian land without the consent of the Indians, he acts as a condemning authority and gives rise to a claim for just compensation for whose prompt and impartial determination no established administrative procedure exists. The tribe would be relegated to protracted and costly litigation in the Court of Claims.

The second and fourth points above, of course, apply to any taking of an interest in tribal land authorized by the Secretary of the Interior without tribal consent, whether pursuant to regulation or under waiver of regulation. They suggest that any such action might violate due process of law. They attest the wisdom of insisting upon consent to right-of-way grants from all tribes alike, and of leaving it to Congress to decide when consent has been unreasonably withheld and tribal land ought to be condemned.

\* \* \* \* \*

We believe the Department's obligation to protect the rights of the Indian tribes should be embodied in regulations which clearly and emphatically preclude any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the act of Congress authorizing land leasing.

For all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations.

Secretary Udall's response of July 12, 1968, rejected Chairman Jones' suggestion that the universal requirement for tribal consent to right-of-way grants of tribal land be retained and strictly observed by the Department of the Interior.

The Secretary insisted that there are at least two kinds of situations in which the Interior Department, if it decided that such action would be in the Indians' best interest, ought to, and would, make right-of-way grants notwithstanding the absence of tribal consent.

*First.* He referred to the situation involving a few scattered Indian reservations, not under the Indian Reorganization or Oklahoma Indian Welfare Acts, where no tribal governing body exists. The present regulation requires tribal consent for the granting of a right-of-way. Under the revision of section 161.3 proposed in Secretary Udall's letter of January 27,<sup>4</sup> the regulation would permit the Department, in cases where no tribal governing body exists, to grant rights-of-way without tribal consent.

However, it is apparent that the problem can also be solved either by the Secretary's submitting the question to a referendum of the

<sup>4</sup> In his letter of Jan. 27, 1968, Secretary Udall stated: " . . . We are inclined to change the section to provide, in the case of tribes having a form of organization approved by the Secretary (whether pursuant to the above acts or otherwise), that rights-of-way will not be granted without the consent of the governing bodies."

members of the tribe, or by encouraging them to set up an organization capable of giving or withholding consent to right-of-way grants. Since the lack of tribal organization is detrimental to such Indian tribes in many ways, the latter course would incidentally result in strengthening the Indian community and assist its economic development. The very few cases where the owners of tribal land have become extinct or cannot be ascertained obviously present broader problems than mere inability to consent to right-of-way grants. Probably such rare problems cannot be solved by administrative action at all and require special remedial legislation. Examples of such legislation are the act of June 11, 1960 (Public Law 86-506; 74 Stat. 199), providing for leasing of Colorado River Indian reservation lands by the Secretary while beneficial ownership remained undetermined, and the act of August 11, 1964 (Public Law 88-419; 78 Stat. 390), providing in subsection (g) for sale by the Secretary of abandoned Indian rancherias in California.

*Second.* The Secretary's letter referred to the situation where a tribe does have a governing body but contrary to its own best interest withholds consent to a proposed right-of-way. In such a case, the Secretary's July 12 letter stated, "Situations may arise, albeit infrequently, in which the Secretary's obligation to act in the best interests of a tribe would demand that he exercise his authority to grant a right-of-way despite the absence of tribal consent," and apparently despite a consent requirement in the regulations. In justification of this position the Secretary's letter added:

As we have stated, in the case of tribes not organized under the IRA or the OWA the authority of the Secretary to grant rights-of-way over reservation lands is granted by statute and can neither be diminished nor enlarged by regulation.

That argument is misleading. The Secretary, of course, cannot by regulation confer powers upon himself that the law does not authorize. But he undoubtedly can provide by regulation that he will not exercise a discretionary power conferred upon him by law. And so long as such a regulation remains in force, it binds the Secretary as well as the public. He can revoke or amend the regulation, but he may not violate it. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Sheridan-Wyoming Coal Company v. Chapman*, 338 U.S. 621, 629 (1950); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 372-73 (1957).

The Secretary referred to a recent situation in the Four Corners area (where the boundaries of Arizona, Colorado, New Mexico, and Utah intersect) as one where the Interior Department "would probably have been irresponsible" if it had allowed the Navajo Tribe to block a proposed grant. He admitted that the April 4, 1967, version of section 161.3 (abolishing the consent requirement for "unorganized" tribes) was drafted with this situation in mind. The Secretary's letter stated:

\* \* \* The lands involved were either jointly owned by the Navajos and the Hopis or were lands in which the Hopis had some interest. The Hopis, who are organized under the IRA were anxious that the rights-of-way be granted and the interests of both tribes clearly required that they be.

The dispute involved was between the Navajos and the Hopis, and the position of the former was without support in reason. The Navajos quite simply refused to acknowledge that the Hopis had any interest in the lands which were the subject of *Healing v. Jones* (210 F. Supp. 125 (D.C. Ariz. 1962), affirmed 373 U.S. 758). The Navajos, for a time, indicated they might refuse to consent to the rights-of-way to prevent the Hopis from getting any benefits from the dependent developments. It was then that we began giving serious consideration to granting the rights-of-way irrespective of Navajo consent. Even if our responsibilities as trustee could be squared with allowing a tribe to cut off its own nose to spite its face, we submit that under no circumstances could they be squared with permitting one tribe to amputate the rights of another tribe for such purpose.

Whatever the nature of the dispute about rights-of-way between the Navajos and the Hopis,<sup>8</sup> the example cited by the Secretary is a peculiarly inapt one. The Secretary of the Interior could not possibly act in a fair and balanced manner in a right-of-way dispute between those two tribes. The Hopi Tribe is organized under the Indian Reorganization Act, while the Navajo Tribe is not. Consequently, the Secretary is forbidden by the 1948 act, as well as by the Indian Reorganization Act, from granting a right-of-way across Hopi tribal land without the Hopi Tribe's consent, even if the Navajos correctly claimed that the Hopis were acting unreasonably. But under his interpretation of the law, he could, simply by disregarding his own regulations, make such grants of Navajo land without Navajo consent. Thus, if he ruled, in a dispute between these two tribes concerning a right-of-way, in favor of the Hopis, he could in effect levy immediate execution against the Navajos; but if he ruled in favor of the Navajos he could give them no relief.

In any event, it seems paternalistic and arrogant for the Department to take unto itself the power to adjudicate disputes between tribes concerning their property rights. The trust obligations which the law imposes on the Department vis-a-vis Indian tribal property were intended for the protection of the Indian tribes, not for subjecting them to dictation by the Department. If the Department is faced with a dispute between tribes which cannot be resolved by negotiation, conciliation, and mutual agreement, the matter should properly be resolved by Congress, or by the courts under appropriate jurisdictional legislation,<sup>9</sup> not by the Interior Department's granting away a tribe's property rights without its consent.

Secretary Udall's letter, indeed, admits that the consent requirement of section 161.3 has not, during the 17 years it has been in force, adversely affected the public interest. Not once has that requirement created a need for judicial action or congressional referral. The committee therefore believes that there is no justification for the proposal to abandon the requirement of tribal consent as a condition for grant-

<sup>8</sup> The Secretary's letter does not clearly set forth the details of the dispute between the Navajos and the Hopis. The nearest corner of the land under dispute in *Healing v. Jones* is 63 miles from the Four Corners and more than 75 miles from the WEST right-of-way granted in 1960, mentioned above in footnote 8. The lands embraced in that right-of-way are exclusively and undisputedly Navajo property. The issue as to the right-of-way was resolved when the Navajo Tribe consented to the grant of the right-of-way. See footnote 9 above.

<sup>9</sup> Public Law 85-547, 72 Stat. 403, which authorized submission of a dispute to a district court. See *Healing v. Jones*.

ing rights-of-way over tribal lands. Moreover, the committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants, is contrary to law, as well as to good government, and should not be entertained.

**IV. The Bureau of Indian Affairs Vigorously Opposes Abolition of the Requirement for Tribal Consent to Right-of-Way Grants Over Lands of Tribes Having Governing Bodies but Not Organized Under the Indian Reorganization Act or the Oklahoma Indian Welfare Act**

The Bureau of Indian Affairs does not favor the proposal to revise section 161.3 of the regulations to eliminate the requirement for tribal consent to right-of-way grants over lands of all tribes not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act.

The Bureau prepared the revised draft of the Indian rights-of-way regulations principally in order to deal with the following problems:

(a) the difficulty of recording maps, which are the granting instruments under section 161.16 of the existing regulations;

(b) the lack of authority by State and Federal agencies to make indemnity agreements required under section 161.7 of the existing regulations; and

(c) opposition to the provisions for wheeling electricity over transmission facilities crossing Indian lands, as specified in section 161.27 of the existing regulations.<sup>11</sup>

The Bureau draft was transmitted to the Secretary of the Interior by the Commissioner of Indian Affairs on October 11, 1965, with a request that it be approved and published in the Federal Register as proposed rulemaking.<sup>12</sup> In regard to requiring consent from unorganized tribes, this draft provided as follows:

**Sec. 161.3. Consent of landowners to grants of rights-of-way**

(a) Except as otherwise provided in this part 161, no right-of-way shall be granted over and across tribal land nor shall any permission to survey be issued as to such lands without the prior written permission of the tribal governing body.

(b) The Secretary may without prior consent of the tribe issue permission to survey and grant rights-of-way over and across tribal land of tribes that are not organized under the provisions of the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-473 and 476-479); the act of May 1, 1936 (49 Stat. 1250; 25 U.S.C. 473a and 48 U.S.C. 358a and 362), and the act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 501-509), if such tribes do not have a tribal governing body recognized by the Secretary.

<sup>11</sup> This committee has long favored the wheeling regulations. See H. Rept. 1078, 84th Cong. (Mar. 28, 1956). However, as pt. V of the subcommittee staff memorandum of Nov. 2, 1967 (see appendix), points out, the reimbursement feature in sec. 161.37 which was inadvertently carried over from the regulations applicable to public lands (43 CFR 224.4-1(c)(3)) and national forests (24 CFR 261.22(d)) is not properly applicable to Indian lands and would in effect involve the Interior Department in a breach of trust toward the Indians by treating their land as federally owned land.

<sup>12</sup> The wheeling regulations were contained in sec. 161.10 of this draft, the Secretary's Office having earlier rejected the Bureau's proposal to eliminate them.

While the Bureau's proposed subsection 161.3(b) clearly represents a weakening of the consent requirement of the present regulations, it would not affect a tribe with a functioning organization which is not organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act. The intent, and effect, of the Bureau's proposed revision was to permit the Secretary to grant rights-of-way without tribal consent only over lands of completely unorganized tribes and abandoned reservations.

The Bureau's proposed draft was reviewed in the Office of the Solicitor of the Department of the Interior; and on March 25, 1966, Associate Solicitor Richmond F. Allan returned it to the Bureau suggesting various technical revisions and further suggesting that the last clause of 161.3(b) be stricken and replaced by the following:

If a tribe is not organized under the provisions of any of the above-mentioned acts but has a governing body recognized by the Secretary, the applicant for a right-of-way should seek the consent of such governing body to the grant before applying to the Secretary but the action of the tribal governing body in such case shall be advisory only and not binding on the Secretary.

The Commissioner of Indian Affairs, by memorandum dated April 11, 1966, responded to the Associate Solicitor as follows:

We do not agree that the change you suggested in 161.3(b) should be made. We are aware that as a matter of law the consent to a grant of right-of-way over tribal land by Indian Reorganization Act tribes is required and that as to non-IRA tribes the Secretary can grant rights-of-way on tribal land without consent. As a matter of general policy though we are of the firm opinion that tribal consent should be obtained in all instances where the tribe has an operating organization to express the tribal views. The regulation provision is written to reflect this as a general policy of the Department.

If a case occurs where a right-of-way is to be granted without tribal consent or over the objections of a tribe, it should be handled as an exception to general policy instead of making the rule to cover such a case which will undoubtedly occur only in isolated instances.

We are certain that the policy your suggested change would establish would be strongly opposed by non-IRA tribes as being paternalistic and authoritarian in the extreme.

The Solicitor's Office, however, disregarded the views of the Commissioner and revised the proposed regulation in accordance with Assistant Solicitor Allan's proposal (after the relatively immaterial deletion of the "advisory only—not binding" clause). The proposed regulations were then published in the Federal Register of April 4, 1967.

Thereafter numerous comments, protests, and objections concerning the proposed regulations were sent to the Interior Department by many persons and groups, including Indian tribes. Pursuant to regular departmental procedure, these comments and objections were re-

viewed by the Bureau of Indian Affairs,<sup>13</sup> which then proceeded to redraft the proposed regulations. On July 2, 1967, the Commissioner of Indian Affairs transmitted the revised regulations to the Assistant Secretary for Public Land Management, with a memorandum in which the Commissioner repeated the paragraphs from his memorandum of April 11, 1966, quoted above, and added:

The reaction of Indian tribes to the proposed consent provisions have been precisely what was anticipated. In fact, this proposal has engendered such great mistrust and apprehension on the part of Indians, that it threatens to erode Indian support for other programs of the Department. We are convinced that the consequences of this provision are much too great a price to pay for the insignificant advantages. Furthermore, the provision is contrary to the policies of Indian self-determination and maximum involvement in matters affecting their land.

**V. There Is No Sound Basis for Abandoning the Historic Principle That Indian Tribal Lands Should Not Be Disposed of Without Tribal Consent, and the Department's Proposal for Doing So Should Be Withdrawn. In Addition, Consideration Should Be Given To Amending the Right-of-Way Statute in Order To Prevent Future Disposal of Tribal Lands Without the Consent of the Tribe**

The Commissioner's views accord with one of the oldest principles of jurisprudence in America—that Indian tribes should not be deprived of rights in their land without their consent. That principle was first stated in 1532, in an opinion of Franciscus de Victoria, the most eminent theologian of Spain, who has been called the founder of modern international law. Victoria's opinion, rendered at the request of the Emperor Charles V, came to be generally accepted by European writers on international law long before American independence.<sup>14</sup>

The United States formally adopted this principle in article III of the Northwest Ordinance of 1787 (see vol. 1, U.S.C., p. XXXIX) in the following language:

\* \* \* The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Although the consent principle has often been dishonored by the Congress and the people of the United States, it was firmly reestab-

<sup>13</sup> Staff inquiry indicates that when the Bureau of Indian Affairs prepared its revision of July 2, 1966, neither its officials nor its working personnel had seen the correspondence between Chairman Jones and the Secretary of the Interior. The failure of the Secretary's Office to transmit to the Bureau the comments of a congressional subcommittee concerning a regulation which the Bureau was then reviewing and revising, may have been inadvertent, but it is nevertheless surprising. On Aug. 16, 1966, the subcommittee supplied copies of that correspondence to the Bureau of Indian Affairs for use in possible further consideration of the right-of-way regulations.

<sup>14</sup> Victoria, de Indis et de Iure Belli Relectiones (translated by John Pawley Bate, 1917), quoted and discussed in Cohen, "Handbook of Federal Indian Law," 46-47 (1941); "Federal Indian Law," 144-166 (1962).

lished in 1934 for those tribes which accepted the Indian Reorganization Act.

It was reaffirmed by President Johnson on March 6, 1968, in his message on "The American Indian—the Forgotten American" (H. Doc. 272, 90th Cong., second sess.), in which he proposed a new goal for our Indian programs:

A goal that ends the old debate about "termination" of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help.

The President further stated:

The program I propose seeks to promote Indian development by improving health and education, encouraging long-term economic growth, and strengthening community institutions.

Underlying this program is the assumption that the Federal Government can best be a responsible partner in Indian progress by treating the Indian himself as a full citizen, responsible for the pace and direction of his development.

But there can be no question that the Government and the people of the United States have a responsibility to the Indians.

In our efforts to meet that responsibility, we must pledge to respect fully the dignity and the uniqueness of the Indian citizen.

That means partnership—not paternalism.

We must affirm the right of the first Americans to remain Indians while exercising their rights as Americans.

We must affirm their right to freedom of choice and self-determination.

We must seek new ways to provide Federal assistance to Indians—with new emphasis on Indian self-help and with respect for Indian culture.

And we must assure the Indian people that it is our desire and intention that the special relationship between the Indian and his government grow and flourish.

For, the first among us must not be last.

It is ironic that at the very time the President's message was delivered the Interior Department was planning to take away from many Indian tribes their rights to prevent unwanted rights-of-way across their lands. The Department has not yet wholly abandoned that plan.

The Indian consent principle was strikingly endorsed by Congress in the act of April 11, 1968 (Public Law 90-284, 82 Stat. 73, 80), which provides, in section 406, that even the States of the Union may not assume jurisdiction over criminal offenses or civil actions in Indian country within their borders without the approval by majority vote of the adult Indians to be affected.

Though many Indians accepted the Reorganization Act (or its Alaska or Oklahoma counterpart) thus securing protection for their ancestral lands, the majority did not—perhaps because the act tended to restrict their right of self-government by giving the Secre-

tary of the Interior a veto power he would not otherwise have over all their legislation. As to these nonaccepting tribes the right-of-way statutes purport to authorize the Secretary of the Interior to grant rights-of-way over Indian tribal lands without Indian consent.<sup>16</sup> The Interior Department's adoption in 1951 of the present right-of-way regulation in 25 CFR 161.3 was an act of statesmanship, promising, even to those tribes not protected by the Indian Reorganization Act or the Oklahoma Indian Welfare Act, that no attempt would be made to grant rights-of-way across tribal Indian land without Indian consent.

That act of administrative restraint, embodying into regulation the historic principle of respect for the property rights of the Indians, has well stood the test of time. Secretary Udall's letters to Chairman Jones have shown no sound basis for abandoning it now. The committee therefore believes that the Department's proposal to amend the regulations to provide for granting rights-of-way over Indian tribal lands without tribal consent should be withdrawn, and the present section 161.3(a) should be retained without any modification whatever.

The fact that the massive protest against amendment of section 161.3, from the Indians, the public, and this committee, has not sufficed to secure any promise of withdrawal from the Department<sup>16</sup>—indeed the fact that the amendment was proposed at all—shows that present law is inadequate to protect Indian tribal land from possible spoliation by the overbearing paternalism of Federal officers.

The committee recommends that consideration be given to amending the first sentence of section 2 of the Indian Right-of-Way Act of February 5, 1948 (62 Stat. 18, 25 U.S.C. 324), to read as follows (add italicized words and delete words struck through):

SEC. 2. No grant of a right-of-way over and across any lands belonging to ~~a any~~ *any* tribe organized under the Act of June 18, 1934 (48 Stat. 934); ~~as amended, the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1067);~~ shall be made *pursuant to this or any other act of Congress*<sup>17</sup> without the consent of the proper tribal officials or, *if the Secretary of the Interior certifies that the tribe has no tribal officials, the approval of a majority of the adult members of such tribe.*

Only by enactment of such a provision into law can the United States in its dealings with Indian tribes raise from a platitude to a living reality the traditional American faith that all government derives its just powers from the consent of the governed.

<sup>16</sup> Such authority has been upheld even where it contravenes prior treaties. *Spalding v. Chandler*, 100 U.S. 394, 406-407 (1890); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641 (1900); *G. F.P.C. v. Tuscarora Indian Nation*, 263 U.S. 99, 120-121 (1923).

<sup>17</sup> Secretary Udall's letter of Jan. 27, 1968, stated only that he is "inclined to change" the draft published Apr. 4, 1967, in the Federal Register into a form which remains substantially weaker than the current regulations. Furthermore, his letter of July 12, 1968, continued to insist on a power to "waive" any consent requirement, despite the regulations, where he deems an unorganized tribe has acted contrary to its best interest in withholding its consent to the grant of a right-of-way.

<sup>18</sup> The phrase "pursuant to this or any other act of Congress" is needed to secure complete protection for the consent principle, since sec. 4 of the 1948 act saves from repeal all other laws providing for right-of-way grants of Indian land.

**VI. After Preparation of This Report, the Interior Department Abandoned Its Proposal To Abrogate the Requirement of Tribal Consent for Grants of Right-of-Way Over Any Indian Tribal Lands**

This report was prepared and approved by the Natural Resources and Power Subcommittee and transmitted to the full Committee on Government Operations shortly before the 90th Congress adjourned. After the chairman of the full committee, Hon. William L. Dawson, requested the Secretary of the Interior to defer action on the proposal until the committee could act on the report, the Department decided to abandon its proposal. (See letters of November 7 and December 18, 1968, from Chairman Dawson to the Secretary of the Interior, and the Interior Department's reply on January 23, 1969, from Deputy Assistant Secretary Robert E. Vaughan to Chairman Dawson, which appear in the appendix.)

The Department of the Interior subsequently published its revised Indian right-of-way regulations in the Federal Register of December 27, 1968 (33 F.R. 19,803). These regulations readopt the Department's previous rule (sec. 161.3), which since 1951 has required tribal consent for all right-of-way grants, whether the tribe is organized under an act of Congress or not. Thus, the committee's recommendation No. 1 (see p. 3, above) has been effectuated. The revised regulations also correct certain other provisions which had been included in earlier versions of the proposed regulations and were criticized by the subcommittee chairman in correspondence with the Secretary of the Interior (see appendix).

## APPENDIX

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., April 24, 1967.

HON. STEWART L. UDALL,  
*Secretary of the Interior,  
Department of the Interior,  
Washington, D.C.*

DEAR MR. SECRETARY: This refers to the notice of proposed rule-making concerning rights-of-way over Indian land (25 CFR pt. 161), which appears in the Federal Register for April 4, 1967 (32 F.R. 5512-14). Section 161.10, headed "Power Projects," concentrates on rights-of-way for transmission lines. In many respects, these provisions follow previously issued regulations relating to transmission lines over public lands (43 CFR 2234.4-1(b)(4) and 2234.4-1(c)).

As you know, this subject has been of particular concern to our committee for several years. We were especially interested, therefore, to compare the provisions of the existing regulations for public lands with the proposed regulations for Indian lands. We have noted many differences between the existing regulations and the proposed Indian lands regulations. A number appear to be differences of substance.

It would be appreciated if you would inform the committee of the reasons for these differences. Please explain fully, including discussion of such factors as basic statutory authority, existing regulations affecting Indian lands, new policy determinations, practical operating experience, special circumstances arising out of the nature of the Indian lands, need for clarity of language, and any others you deem significant.

Sincerely yours,

WILLIAM L. DAWSON, *Chairman.*

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D.C., September 12, 1967.

HON. WILLIAM L. DAWSON,  
*House of Representatives, Washington, D.C.*

DEAR MR. DAWSON: This is in response to your letter of April 24 which requested information about the reasons for differences between power project right-of-way regulations set out in 43 CFR 2234.4-1 and the proposed revised regulations covering Indian lands, 25 CFR 161, as published in the Federal Register on April 4.

(21)

The basic statutory authorities under which the regulations at 43 CFR 2234.4-1 were issued are the act of February 15, 1901 (31 Stat. 790), as amended (43 U.S.C. 959), and the act of March 4, 1911 (36 Stat. 1253), as amended (43 U.S.C. 961). The 1901 act provides for only a revocable permit and limits the width of powerline projects to 100 feet. The 1911 act provides for easements the term of which shall not exceed 50 years and the width of which shall not be more than 400 feet. These acts were superseded by the Federal Power Act of June 10, 1920 (41 Stat. 1063), as amended (16 U.S.C. 791-825r) where power projects for the generation and transmission of primary hydroelectric power are involved. The above acts, in addition to covering certain public lands of the United States, also applied to land on an Indian reservation. Prior to 1948, this was the only general authority existing under which electric project rights-of-way could be granted on Indian land. The act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), empowered the Secretary of the Interior to grant rights-of-way across tribal or allotted Indian land for any purpose. There are no limitations in this act concerning the width of particular types of rights-of-way or the term for which they can be granted. Although the 1948 act did not repeal other right-of-way acts, its practical effect was to eliminate the necessity and desirability of using such acts, with the exception of the Federal Power Act which still covers primary hydroelectric power projects on tribal lands.

The proposed revision of regulations published as 25 CFR 161.10, "Power Projects," is in most respects identical to the present regulations found at 25 CFR 161.27. The differences are as follows:

1. § 161.27(a) published as proposed 161.10(a) was changed for editorial purposes, to eliminate redundancy, and to remove procedural details which more appropriately belong in the Bureau of Indian Affairs manual. We do not believe a change of substance is involved.
  2. § 161.27(b) has been omitted from the proposed revision because it contemplates the submission of maps which may not always be required under the proposed 161.8, and because it specifies an optional maximum width which is not required by law.
  3. § 161.27(c) published as proposed 161.10(b) has had one minor editorial change made.
  4. § 161.27(d) published as proposed 161.10(c) has been revised to reflect a change in the numbering of a prior section and because stipulations which previously were mandatory (161.7) would now be optional (161.8).
  5. § 161.27(d)(1) published as 161.10(c)(1) has been changed only by addition of the number "161" at the end.
  6. § 161.27(d)(2) and subparagraphs (i) through (xi) have been published as 161.10(c)(2) and subparagraphs (i) through (xi) without any changes in the text.
  7. § 161.27 (e) and (f) have been omitted in the proposed revision because these subsections deal primarily with maps which may or may not be required as set out in the proposed 161.8.
- As requested in your letter the following is a comparison of the proposed revised 25 CFR 161 and 43 CFR 2234.4-1:

1. § 2234.4-1(a) (1) and (2) contain references to the 1901 and 1911 acts under which some types of rights-of-way can be granted

through public lands and certain reservations. The width and term limitations are statutory. Although these same laws apply to Indian reservations, it is contemplated that rights-of-way on Indian lands will be granted under the 1948 general right-of-way act.

2. Language similar to 2234.4-1(a)(3) is set out in the proposed 161.2(c). The differences that exist in these two sections stem from the fact that the Federal Power Act applies only to tribal Indian lands, not that which is allotted, and tribal approval of annual charges must be obtained when the tribe is organized under the Indian Reorganization Act. Also, the language in 43 CFR is directed at public lands of the United States and not at Indian reservations.

3. § 2234.4-1(a)(4) concerns acquired lands of the United States and similar language is not considered necessary in regulations covering Indian lands.

4. § 2234.4-1(b)(1) (i) and (ii) deal with rights-of-way applications in national forests and on lands not under the control of the Department of the Interior. Similar language is not pertinent to regulations covering Indian land.

5. § 2234.4-1(b) (2) and (3) relate to rights-of-way other than for power projects, or require information not needed in granting a right-of-way over Indian land.

6. § 2234.4-1(b)(4) prescribes requirements to be set out in transmission line rights-of-way applications. The proposed regulations 25 CFR 161 contemplate that applications for rights-of-way will contain such information and be accompanied by maps sufficient to permit the Secretary and the Indian landowners to evaluate the proposal. The detailed information which should be set out in applications is considered to be appropriate for the Bureau manual rather than the regulations. Also, much of the information required by 43 CFR 2234.4-1(b)(4) is not considered essential in evaluating a transmission line right-of-way application on Indian land.

7. § 2234.4-1(c) contains the terms and conditions to which an applicant for a power transmission line right-of-way must agree.

Subparagraph (1) is considered adequately covered by 161.8(a). The provisions of subparagraph (2) are covered by 161.10(b).

Subparagraph (3) is similar to 161.10(a). All of the detail set out in subparagraph (3) is not considered essential or pertinent for Indian regulations.

Subparagraph (4) is identical to 161.10(b) except for minor editorial changes.

Subparagraph (5) is substantially the same as 161.10(c); the substance of (5)(i) is in 161.10(c)(1); and that in (5)(ii) is in 161.10(c)(2).

The provisions of subsections (5)(ii) (a), (c), (d), (e), (f), (g), (h), (i) and (l) are substantially the same as 161.10(c)(2) (i), (ii), (iii), (iv), (vi), (vii), (viii), (ix) and (xi), respectively.

The language of subparagraphs (5)(ii)(b), (5)(ii)(j), (5)(ii)(k) are not considered necessary for Indian regulations.

The substance of subsection (6) insofar as it would pertain to Indian reservations is covered by 161.2 and 3.

The language in subsection (7) is not considered necessary in Indian regulations.

The provisions in subsection (8) are essentially covered in 161.6.

Two provisions in the proposed Indian regulations 161.10(c)(2) (v) and (x) are not in 43 CFR 2234.4-1, but they have been in the Indian regulations for many years. Subsection (x) is considered particularly appropriate for Indian regulations because it offers a degree of reciprocity which may offset to some extent the other conditions imposed.

There are several reasons for the differences which exist between the proposed revision of 25 CFR 161.10 and 43 CFR 2234.4-1. One of these is the statutory authority, which has already been mentioned. Another is the fact that the proposed regulations were developed from existing Indian regulations and not from the public land regulations.

The regulations in 43 CFR pertain primarily to lands in which the United States holds a proprietary interest while the regulations in 25 CFR relate to lands which are in essence private property belonging to Indians. As a matter of fact, a number of Indian groups have argued quite fervently that all of the proposed 25 CFR 161.10 should be eliminated from the regulations on the theory that it exacts a benefit for the United States at the expense of Indians.

From a policy standpoint it is our desire that full authority to approve rights-of-way be held at the operational levels of the Bureau of Indian Affairs. Consequently, the Indian regulations have been broadened to vest more discretion in operating officials. It is also a matter of policy that all Indian rights-of-way will be granted under the 1948 act. This, we believe, will greatly simplify and standardize right-of-way procedures.

Our experience demonstrates that granting rights-of-way on Indian land by endorsement of a map is unsatisfactory. Resort must be made to extraneous documents to discover all of the terms and conditions of the grant. For this reason the proposed regulations contemplate the use of a deed to grant easements and only those maps which are deemed necessary or desirable will be required.

A large number of comments on the proposed regulations have been received. At the request of several persons, the comment period has been extended for an additional 30 days.

At the time the comments we now have and any others which we may receive are evaluated, further consideration will be given to revisions or deletion of 161.10.

Sincerely yours,

DAVID S. BLACK,  
*Under Secretary of the Interior.*

CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
 NATURAL RESOURCES AND POWER SUBCOMMITTEE,  
 OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
 Washington, D.C., November 2, 1967.

To: Hon. Robert E. Jones, Chairman, Natural Resources and Power Subcommittee.

From: Subcommittee staff.

Subject: Proposed revisions in Interior Department's regulations governing rights-of-way over Indian lands (32 F.R. 5512, Apr. 4, 1967).

You have asked for a memorandum concerning the effect of revisions which the Interior Department proposes to make in the Department's regulations governing rights-of-way over Indian lands.

The present regulations are in 25 Code of Federal Regulations, part 161. The proposed revisions were published in 32 Federal Register 5512, on April 4, 1967.

On April 24, 1967, Chairman Dawson requested the Interior Department to furnish an explanation of the differences between the existing Interior Department regulations covering rights-of-way for power projects over public lands (43 CFR 2234.4-1) and the proposed revision of the regulations covering Indian lands. Under Secretary of the Interior David S. Black responded in a five-page letter dated September 12, 1967 (copy here attached), which Chairman Dawson referred to this subcommittee for further study.

The Under Secretary points out, in the third paragraph on page 4, that there is an essential difference between lands in which the United States holds a proprietary interest, and Indian lands which are the private property of the Indians. It appears to us, however, that this essential distinction is largely ignored in the proposed revision of these right-of-way regulations.

1

From the standpoint of Indian rights the most radical change proposed by the new regulations is abolition of the power of so-called "unorganized" Indian tribes to veto the granting of rights-of-way over their lands. This veto power is provided by section 161.3 of the present regulations, which requires prior written consent from the tribal council of any Indian tribe, organized or unorganized, before the Secretary of the Interior may grant a right-of-way, or even permission to survey or commence construction on a proposed right-of-way, over its lands. Such a requirement has been in force for 16 years. It has greatly enhanced the ability of "unorganized" tribes to manage their own property and has strengthened their bargaining positions with oil and gas pipeline companies, electric power companies, and other applicants for rights-of-way on their reservations.

An "organized" tribe, in Indian Bureau parlance, is one that has adopted a constitution and bylaws in accordance with the Indian Reorganization Act (25 U.S.C. 461-473, 474-479) or the Oklahoma Indian Welfare Act (25 U.S.C. 501-509). All others are "unorganized." The terms "organized" and "unorganized" used in this way are somewhat misleading, because some tribes which did not adopt constitu-

tions and bylaws under one or the other of those acts nevertheless have highly developed governmental organizations, and some tribes which did adopt such constitutions and bylaws have scarcely any organization except on paper. The largest American Indian tribe, with probably the most elaborate governmental organization, the Navajo, for example, rejected the Indian Reorganization Act, and falls in the "unorganized" category. It has 100,000 members, about a fourth of all tribal Indians in the United States, and owns lands having an area about the size of the State of West Virginia.

The Indian Reorganization Act (25 U.S.C. sec. 476) and the Oklahoma Indian Welfare Act (25 U.S.C. sec. 503) confer on "organized" tribes the power to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without their consent. The general Indian right-of-way statute (act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323-328), cited as authority for issuance of the proposed new regulations, explicitly requires consent only of "organized" tribes before the Secretary may grant a right-of-way across their lands (25 U.S.C. sec. 324). The proposed regulations do not affect the power of "organized" tribes to veto right-of-way grants. However, they would take away such power from "unorganized" tribes, upon whom it was conferred by regulation rather than by statute.

The legislative history of the 1948 Indian Right-of-Way Act, however, shows no congressional intent that consent ought not to be sought from "unorganized" tribes. The purpose of including the consent requirement for "organized" tribes was merely to prevent implied supersession of the Indian Reorganization Act and the Oklahoma Indian Welfare Act. (See S. Rept. 823, 80th Cong., second sess.)

The 1948 statute was, in fact, one in a series of congressional enactments, starting with the Indian Reorganization Act in 1934, which gave increasing encouragement to Indian tribes to manage their own property. Previous Indian right-of-way acts<sup>1</sup> had not contained any requirement for tribal consent before the Secretary of the Interior made grants across tribal land.

Similarly, the act of May 11, 1938 (25 U.S.C. 396a-396g) conferred authority on the Indian tribes themselves, whether "organized" or "unorganized," to refuse to lease their lands for mining purposes, whereas the prior law had empowered the Secretary without tribal consent to lease such land for mining hard minerals. See act of June 30, 1919, as amended by acts of March 3, 1921, and December 16, 1926 (25 U.S.C. 399).

The various termination acts of the Eisenhower administration likewise enlarged the responsibility of the Indian tribes affected for the management of their own property and correspondingly diminished the Secretary's authority. See generally 25 U.S.C. 564-564x, 677-677aa, 691-708, 741-760, 791-806, 826-828, 841-853, 891-901.

At the time of enactment of the 1948 Indian right-of-way statute, Interior Department regulations did not require consent of "unorganized" tribes to enable the Secretary to make right-of-way grants

<sup>1</sup> Act of Mar. 2, 1899, ch. 374, 30 Stat. 990; amended by acts of Feb. 28, 1902, ch. 134, 32 Stat. 80; June 21, 1906, ch. 3504, 34 Stat. 336; June 25, 1910, ch. 431, 36 Stat. 659. See 25 U.S.C. 312-318.

Act of Mar. 3, 1901, ch. 832, 31 Stat. 1084. See 25 U.S.C. 311, 319.

Act of Mar. 11, 1904, ch. 305, 32 Stat. 65; amended by act of Mar. 2, 1917, ch. 146, 39 Stat. 973. See 25 U.S.C. 321.

Act of Apr. 21, 1928, ch. 400, 45 Stat. 442. See 25 U.S.C. 322.

over their reservations. See 25 CFR, 1939 ed., 256.83. In the first revision of the regulations following the act, however, the Department imposed a blanket requirement of consent applicable to "unorganized" as well as "organized" tribes. See 16 F.R. 8578 at 8579 (Aug. 25, 1951). This requirement has remained in effect unchanged to the present day, and has never been disapproved by Congress. It currently appears at 25 CFR 161.3.

An analogous administrative requirement for tribal consent to timber sales, whether the tribe is "organized" or "unorganized," appears at 25 CFR 141.7(a), despite the fact that the act of Congress authorizing sales of tribal timber has no consent requirement. See act of June 25, 1910 (25 U.S.C. 407).

The removal of the consent requirement and reassertion by the Secretary of power to grant rights-of-way across lands of "unorganized" tribes over their opposition, as contemplated by section 161.3 of the proposed regulations, therefore, is a surprising reversal of the trend of more than 30 years duration of increasing the authority of the tribes over disposition of their assets and correspondingly diminishing that of the Secretary. For this reason alone it requires clear and convincing justification.

An involuntary taking of interests in tribal Indian land almost invariably gives rise to emotional publicity, bitter litigation, and protracted work by Congress on relief legislation. Because of its extremely disruptive effect on Government operations as well as the Indians, it should be considered only as a last resort, and then only in a framework of unusually thorough procedural safeguards. The proposed regulations do not have such safeguards for unorganized Indian tribes. For example, the proposed section 161.3(b) contains the following sentence:

If a tribe is not organized under the provisions of any of the above-mentioned acts but has a governing body recognized by the Secretary, the applicant for a right-of-way should seek the consent of such governing body to the grant before applying to the Secretary.

This sentence states only that the applicant "should seek" the Indians' consent, but he is apparently not required to do so, or even to give them notice of his application before the Secretary grants a right-of-way over their lands. Furthermore, the new regulation contains no provision for a hearing to the tribe on its objections before the grant is made.

Some of the "unorganized" Indian tribes have been guaranteed by treaties that no non-Indian shall ever be permitted to settle upon or pass over their lands without their consent. Such treaty stipulations are entitled to equal recognition with the Indian Reorganization Act and the Oklahoma Indian Welfare Act as limitations on the Secretary's authority to grant rights-of-way. In addition, the principle expressed by Under Secretary Black—that Indian lands are their private property—certainly deserves a greater recognition than is present in a regulation which purports to empower the Secretary to grant away interests in the Indians' land without their consent.

There may be cases where overwhelming public necessity will justify the condemnation of rights-of-way over tribal Indian land despite the opposition of the Indian landowners. These cases are as apt

to involve "organized" as "unorganized" tribes. In either case, we believe that involuntary disposal of the Indians' property rights ought not to be done by administrative action of the Interior Department, because the trust and guardianship responsibilities which the Secretary of the Interior has toward Indians ought to disqualify him from acting as referee between them and others seeking interests in their lands.

Present law generally requires a special act of Congress to condemn tribal Indian land. If there are frequent instances of Indian tribes' unreasonably refusing to consent to the Secretary's granting rights-of-way over their land which are essential to the fulfillment of public purposes and the public welfare, then Congress might consider enacting legislation authorizing the person or agency seeking the right-of-way to institute a suit for condemnation thereof in a Federal court. Such suit would be, of course, subject to the regular safeguards of the judicial process. In such legislation, Congress might, in view of the special status of Indian reservations, require that the condemning agency establish the necessity for taking by clear and convincing evidence.

At this stage of history we believe it is a backward step for the Secretary of the Interior, by amendment of the regulations, to authorize the granting of rights-of-way over the lands of the "unorganized" tribes without their consent.

## II

The proposed section 161.4 would authorize the Secretary to make a right-of-way grant of Indian tribal lands for a consideration of less than its fair market value plus severance damages, without the consent of the Indians. The present section 161.4 now requires payment to the landowners on the basis of an appraisal which the law specifies must provide "just" compensation (25 U.S.C. 325). The Indians may, of course, choose to waive compensation, and there may be instances in which it will be in their interest for the Secretary, with their consent, to grant rights-of-way for nominal or no consideration, under circumstances similar to those listed in 25 CFR 131.5(b)(2) which authorizes rent-free leases for public and religious purposes and to tribal members. However, the latter section is very different from the proposed section 161.4 in at least two respects: (1) Indian tribal land leases are granted by the tribes themselves subject to the approval of the Secretary, whereas the rights-of-way are granted by the Secretary, and if the new regulations become law, without any requirement for tribal consent in the case of "unorganized" tribes. (2) The proposed section 161.4 does not define the circumstances in which the Secretary will grant rights-of-way for less than fair market value and severance damages, whereas section 131.5(b)(2) spells out the circumstances in which lease rentals may be at less than the fair market value. We suggest that the proposed section 161.4 should be amended to specify, as does section 131.5(b)(2), the instances where rights-of-way may, with Indian consent, be granted for reduced consideration.

## III

The proposed section 161.7, entitled "Permission to Survey," omits the following requirements in the present section 161.4:

- (1) Written application;
- (2) Filing with the local superintendent of the reservation;
- (3) Adequate description of the proposed project;
- (4) Written consent of the landowner (if the tribe is "unorganized");
- (5) Evidence of the applicant's good faith and financial responsibility;
- (6) Mandatory deposit to pay for damages which may result from the survey.

Thus the new regulation would permit the Department to grant permission to survey the lands of an Indian tribe:

- (1) Upon oral application;
- (2) Presented in its Washington office and not on file in the field;
- (3) Without adequate description of the proposed project;
- (4) Without consent of or even notice to the tribe if it is an "unorganized" tribe;
- (5) To an irresponsible applicant;
- (6) Without any deposit for damages.

Such a regulation seems both inadequate to protect the Indians and unduly loose as a basis for administrative management of other's property.

#### IV

The new section 161.8 makes a substantial change by providing that the Secretary *may, in his discretion*, require the applicant to agree to the following stipulations, which are *mandatory* under the present section 161.7:

- "(a) To construct and maintain the right-of-way in a workman-like manner;
- "(b) To indemnify the landowners against any liability for damages to life or property arising from the occupancy or use of the lands by the applicant;
- "(c) To restore the lands as nearly as may be possible to their original condition upon the completion of construction;
- "(d) That the applicant will not interfere with the use of the lands by or under authority of the landowners for any purpose consistent with the primary purpose for which the right-of-way was granted."

The corresponding section of the public land regulations, 43 CFR 2234.1-3(c), prescribes 13 mandatory conditions for all rights-of-way.

The only justification for the Government's requiring lesser protections for Indian trust property than it deems necessary for its own property is when the Indians request such lesser protections. However, the proposed new regulations do not provide for waiver of mandatory conditions upon request of the Indians. Instead, they merely state the conditions which may be imposed in the discretion of the Secretary. This change appears to disregard the Department's trust responsibilities and the rights of the Indians.

#### V

The last sentence of proposed section 161.10(c)(1) provides that if the Government acquires the applicant's transmission line, the compensation paid to the applicant shall not include any value for the

right-of-way. This provision is similar to one in the existing regulation 161.27(d)(1), and is derived from similar regulations applicable to public lands (43 CFR 2234.4-1(c)(5)(i)). An applicant necessarily will pay less to acquire a right-of-way which is subject to uncompensated taking by the Government than to acquire one which can be taken only upon payment of just compensation. Such a provision therefore depresses the value of the assets the landowner seeks to grant for right-of-way purposes. In the public land regulations such a provision is an appropriate exercise of discretion, because the property whose current value is being depressed is the Government's own and the Government reserves in itself a right of recapture of equivalent value. However, in the case of Indian lands, which, as Under Secretary Black has emphasized, are property of the Indians, such a provision amounts to the Government's depressing the current value of someone else's property, its Indian wards', for its own benefit. The last sentence of proposed section 161.10(c)(1) is thus clearly inconsistent with the Government's trust obligation to the Indians. Presumably it was copied over into the Indian regulations from the public land regulations by inadvertence. It ought to be deleted.

## VI

Another major deficiency in the proposed new regulations is that they omit the requirements of the present sections 161.7 through 161.16. These sections now specify the following matters:

Section 161.7 specifies the contents of applications.

Section 161.8 requires maps of definite locations.

Section 161.9 deals with the field notes.

Sections 161.10 and 161.11 require right-of-way surveys to be tied into the cadastral survey, or in the case of unsurveyed land, to readily identifiable natural objects.

Section 161.12 requires the survey map to show intersections with township and section lines.

Section 161.13 requires engineers' certificates of accuracy of right-of-way surveys.

Section 161.14 requires appraisal and scheduling of damages.

Section 161.15 provides for deposit of damages by the applicant.

Section 161.16 states the time and manner for approval of an application, and requires prompt notice to the applicant of such approval.

Except for service lines (as to which sec. 161.21 in the present regulations allows simpler procedures), we think that mandatory and explicit mapping and survey requirements are essential for effective real property management. The elimination of such requirements opens the door to creating clouds on title to Indian lands of unascertainable extent—floating rights-of-way, which in the case of unsurveyed Indian land, may constitute prior servitudes not merely on entire legal subdivisions but entire reservations.

The omission in the new regulations of language describing the time and manner in which right-of-way grants become effective may cause hardship to the grantees in establishing title to their facilities on Indian land for mortgage financing purposes, and to the tribes in maintaining accurate land records.

While the proposed new regulations eliminate the requirement for maps they do not specify what instruments will be used in their place. Under Secretary Black's letter to the chairman of September 12 states that rights-of-way will be granted by deed. This is particularly surprising since the legislative history of the 1948 Right-of-Way Act shows that the inconvenience of using deeds in the case of allotted Indian lands was one of the principal reasons urged by the Department for adopting the present Indian right-of-way statute. See Senate Report 823, 80th Congress, second session, quoting letter dated June 22, 1947, from Secretary of the Interior to President pro tempore of Senate.

## VII

The disregard for the Indians' rights is further indicated by the fact that the introductory paragraph of the proposed Indian right-of-way regulations as published in the April 4 issue of the Federal Register fails to mention that the proposed regulations take away the right of "unorganized" tribes to give or withhold consent to the right-of-way grant and in other respects diminish the rights of the Indians vis-a-vis the Department of the Interior and persons seeking rights-of-way over their land.

## CONCLUSION

The proposed new Indian right-of-way regulations appear substantially more disadvantageous to the Indians than the present regulations.

We suggest that the subcommittee ask the Department to supply the information concerning rights-of-way over Indian land, as outlined in the attached draft of letter prepared for your consideration.

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
NATURAL RESOURCES AND POWER SUBCOMMITTEE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., November 6, 1967.

HON. STEWART L. UDALL,  
*Secretary of the Interior,*  
*Department of the Interior, Washington, D.C.*

DEAR MR. SECRETARY: Chairman William L. Dawson of the House Government Operations Committee has referred to this subcommittee the letter of September 12, 1967, from Under Secretary David S. Black concerning the proposed regulations on rights-of-way over Indian land.

The subcommittee staff has furnished to me a memorandum dated November 2, indicating that the proposed regulations adversely affect the rights of the Indians. Enclosed is a copy of the subcommittee staff memorandum. I would appreciate receiving your comments on the points raised in the subcommittee staff memorandum.

In addition, it would be appreciated if you would provide to us the following information:

1. With respect to the Department's experience in being unable to obtain Indian consent to the granting of rights-of-way over

Indian lands, please provide the information requested on the enclosed table A (organized tribes), and table B (unorganized tribes).

2. In what circumstances generally does the Department intend to use its authority to grant rights-of-way without tribal consent, if the proposed regulations become effective?

3. In what circumstances, if any, does the Department contemplate granting rights-of-way across tribal lands without tribal consent for a consideration less than fair market value plus severance damages?

4. Does 25 CFR part 161 (either in the current version or the proposed version) apply to acquisition of rights-of-way across Indian land by the United States or any of its agencies—

(a) in order to provide services to the Indians of the reservation involved (e.g., domestic water and sewer facilities)?

(b) for purposes unconnected with providing services to the Indians (e.g., Bureau of Reclamation power lines which cross but do not serve an Indian reservation)?

5. If your answer to either part of the preceding question is "No," please—

(a) describe the procedures which are followed in lieu of compliance with 25 CFR part 161;

(b) furnish us a copy of the documents which prescribe such procedures;

(c) state the provisions for payment of compensation to the Indian landowners by the Government; and

(d) state the circumstances, if any, in which less than full market value may be paid to the Indian landowners by the Government.

6. The notice of proposed rulemaking refers to "methods of conveyance used in the commercial world" which will be used under the proposed revised regulation, but the regulation does not describe them:

(a) What methods of conveyance will be used under the proposed regulation?

(b) What particular administrative act will make the grant effective for title-search purposes?

7. If the Department contemplates granting rights-of-way (other than for service lines) that have not been surveyed, how will such rights-of-way be described in the granting documents?

8. Please provide the information requested on the enclosed table C concerning applications now pending for rights-of-way over Indian lands.

9. Would the Department support legislation to authorize condemnation of rights-of-way over Indian tribal land in the Federal courts, as an alternative to authority in the Secretary to grant rights-of-way without tribal consent?

10. If your answer to question 9 is "Yes," to what type of persons should such condemnation powers be made available and what conditions and safeguards should be included in such legislation?

As you know, this committee has for a long time been interested in the regulations concerning rights-of-way, especially with respect to power lines. The committee's hearings and report concerning the Department's wheeling regulations (see H. Rept. 1975, 84th Cong.) led to the adoption of the present regulations in 43 CFR 2234.4-1(c)(5) concerning public lands, 36 CFR 251.52(d) concerning forest lands, and 25 CFR 161.27(d) concerning Indian lands; and our committee staff participated in the preparation of those regulations. The comments which, according to Under Secretary Black's letter, you have already received from numerous sources concerning the proposed revised regulations and the views expressed in the enclosed subcommittee staff memorandum may result in considerable changes in the regulations. We would therefore appreciate your sending to us the revised regulations, as amended, before they are adopted.

Sincerely,

ROBERT E. JONES,  
*Chairman, Natural Resources and Power Subcommittee.*

TABLE A - APPLICATIONS FOR RIGGS-OF-WAY OVER INDIAN TRIBAL LANDS  
 FILED WITH THE SECRETARY OF THE INTERIOR SINCE JANUARY 1, 1960,  
 TO WHICH TRIBAL CONSENT WAS DENIED

ORGANIZED TRIBES

(1) Reservation	(2) Date of Application	(3) Name of Applicant	(4) Class of Application 1/	(5) Purpose of Application (Oil Pipeline, Electric Transmission Line, Etc.)

1/ S. For permission to survey.  
 C. For permission to commence construction.  
 O. For final grant.

TABLE A - APPLICATIONS FOR RIGHT-OF-WAY OVER INDIAN LAND, FILED WITH THE SECRETARY OF THE INTERIOR SINCE JANUARY 1, 1960, TO WHICH TRIBAL CONSENT WAS REFUSED

ORGANIZED TRIBES

(6) Holds or Right-of-Way on Tribal Land	(7) Reason for Refusal	(8) Does Interior Department Consider the Refusal Unreasonably (If Yes, Please Explain)	(9) Present Status of Application

R - Rejected.  
 W - Withdrawn.  
 P - Pending.  
 AP - Accepted and still pending.  
 AA - Accepted and approved.

Page 1 of 2

TABLE 3 - APPLICATIONS FOR RIGHT-OF-WAY OVER INDIAN TRIBAL LAND FILED WITH THE SECRETARY OF THE INTERIOR SINCE JANUARY 1, 1960, TO WHICH TRIBAL CONSENT WAS REFUSED

UNORGANIZED TRIBES

(1)	(2)	(3)	(4)	(5)	(6)
Reservation	Date of Application	Name of Applicant	Class of Application	Purpose of Right-of-Way (Oil Pipelines, Electric Transmission Line, Etc.)	Yield of Right-of-Way on Tribal Land

1/ S - For permission to survey.  
 C - For permission to commence construction.  
 G - For final grant.

**TABLE B - APPLICATIONS FOR RIGHT-OF-WAY OVER INDIAN TRIMAL LAND  
FILED WITH THE SECRETARY OF THE INTERIOR SINCE JANUARY 1, 1960,  
TO WHICH TRIBAL CONSENT WAS REFUSED**

UNORGANIZED TRIBES

(7) Reason for Tribal Refusal	(8) Does Interior Department Consider the Refusal Unreasonable (If Yes, Please Explain)	(9) Present Status of Application <sup>2/</sup>	(10) If Consent Required from Regulations, Does Department Intend to Grant Right-of-Way Even if Tribe Refuses Consent?	(11) If Column 1 is Answered Yes Has Tribe Been Informed of Department's Intention to Grant Right-of-Way

2/ R - Rejected.  
W - Withdrawn.  
P - Pending.  
AP - Amended and still pending.  
AA - Amended and approved.

TABLE C - APPLICATIONS FOR RIGHT-OF-WAY OVER INDIAN TRIDAL  
LAND NOW PENDING IN DEPARTMENT OF INTERIOR

(1) Reservation	(2) Date of Application	(3) Name of Applicant	(4) Class of Application	(5) Purpose of Right-of-Way (Oil Pipeline, Electric Transmission Line, Etc.)

A - For permission to survey.  
 C - For permission to commence construction.  
 G - For final grant.

TABLE C - APPLICATIONS FOR RIGHT-OF-WAY OVER INDIAN TRIBAL  
LAND NOW PENDING IN DEPARTMENT OF INTERIOR

(6) Miles of Right-of-Way on Tribal Lands	(7) Has Tribe Consented to the Right-of-Way	(8) Is Tribe Organized Under Indian Reorganization Act or Oklahoma Indian Welfare Act?	(9) Present Status and Comments

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D.C., January 27, 1968.

Hon. ROBERT E. JONES,  
*Chairman, Natural Resources and Power Subcommittee of the Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. JONES: This is in response to your letter of November 6, 1967.

First, let me say that the central purpose of the proposed regulations is to simplify the procedures for granting rights-of-way over Indian lands; to bring such procedures in line with those generally used and understood in the jurisdictions where the lands are located. For example, in most jurisdictions the grant of a right-of-way is evidenced by a deed. Under existing regulations the grant of a right-of-way over Indian lands is usually evidenced by endorsements on a map which frequently does not disclose all of the terms, conditions, et cetera, of the grant. To discover the entire agreement it is not unusual to have to refer to extraneous materials.

It is not intended that the proposed regulations should work any substantive changes; particularly, it is not intended that they should operate or be applied to diminish safeguards for the protection of the Indians or to their economic detriment. They are essentially intended only to dispense with cumbersome procedures which are not required for the protection of Indian interests and which serve only to burden commerce.

Because the comments we have received to the proposed regulations have been generally adverse to section 161.3, insofar as it provides, in the case of tribes not organized under the Indian Reorganization Act or the Oklahoma Welfare Act, that the Secretary may grant rights-of-way without their consent, we are inclined to change the section to provide, in the case of tribes having a form of organization approved by the Secretary (whether pursuant to the above acts or otherwise), that rights-of-way will not be granted without the consent of the governing bodies. (The staff memorandum submitted with your letter is in error in suggesting that in the parlance of the Bureau of Indian Affairs tribes organized outside of the provisions of the above mentioned acts are "unorganized." This term is applied to groups which are without any form of organization recognized by this Department. We recognize many tribal organizations established outside of the provisions of these acts.)

We cannot agree, however, that the change from existing regulations contemplated by this section was "radical." Indeed, the proposed provisions were intended to do nothing more than bring the regulations more precisely in line with the statutes. As the staff memorandum recognizes, the statutes authorizing grants of rights-of-way over tribal lands make clear that tribal consent is required only in the case of

tribes organized under the Indian Reorganization Act or the Oklahoma Welfare Act. It has always been understood, not only by officers of the Department but by many who have represented parties desiring rights-of-way over tribal lands, that the Secretary has the authority, regardless of regulations, to grant the same on his own initiative in the case of tribes not organized under the above acts. Subject to further checking by the Bureau, we recall no modern instance in which a right-of-way has been granted over lands of a tribe organized outside of these acts except with the consent of its governing body, although from time to time we have been reminded by applicants that it would be competent for the Secretary to do so pursuant to a waiver of the regulations. See 25 CFR 1.2.

Our response has always been that while we recognize the Secretary has such authority, it will be exercised only in extraordinary situations where the tribe's refusal of consent is clearly contrary to its own best interests. No change in this policy was contemplated by the proposed regulations, but we are inclined to recast section 161.3 as indicated above.

Generally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent. The bargaining process usually produces agreements without unusual difficulties. In a very few situations involving negotiations for rights-of-way over lands of tribes organized other than under the IRA or the OWA, the tribe's realization that the Secretary ultimately possessed authority to grant a right-of-way without its consent and the applicant's realization that the Secretary would not do so except as a last resort and only if the interests of the Indians compelled such action, may have been responsible for getting the parties back to the bargaining table after initial failure to reach agreement. As stated, the proposed regulations are not intended to effect substantive changes in the granting of rights-of-way but rather to simplify procedures and forms.

We can think of no case in which the Department would grant or approve the grant of a right-of-way for less than just compensation as that term is interpreted by Federal courts in eminent domain proceedings brought by the United States.

Agencies of the United States desiring rights-of-way over tribal lands are generally subject to the same statutes and regulations as other applicants, except that such agencies may also exercise the power of eminent domain to acquire such rights-of-way in proper cases. The staff memorandum states that generally special acts of Congress are required to condemn tribal lands. This is not true when the United States is the condemnor. Federal agencies may condemn such lands under general authorities to acquire lands for governmental purposes. See, e.g., *United States v. 5,677.94 Acres*, 152 F. Supp. 861 (D.C. Mont. 1957), 162 F. Supp. 103 (D.C. Mont. 1958); *Seneca Nation v. Brucker*, 162 F. Supp. 580 (D.C.D.C. 1958). When it con-

demns land title to which is in an Indian tribe the United States is held to the same standards of compensation as are applied in other cases where it acquires private property for a public use.

Generally, it is anticipated that grants of rights-of-way under the proposed regulations will be evidenced by deeds on forms similar to those customarily employed for such purposes in the jurisdictions where the lands are located. As at present, a grant will be effective when executed by the Secretary or his designee and made a part of the official records of this Department. The Indians and the grantee will usually receive duplicate originals which can be recorded locally if they desire to do so.

The rights-of-way will be described by the most convenient means commensurate with the accuracy required in a particular case, e.g., by metes and bounds, by reference to a center or subdivision line, by depiction on maps, or by an appropriate combination of such means. The fact that under the proposed regulations maps will no longer be required does not mean that in appropriate situations they will not continue to be used.

As noted, the Federal Government has the power to condemn Indian tribal lands. State and local units of government possessed of the power of eminent domain are authorized to condemn allotted, but not tribal, lands. Again, no case comes to mind where a State or local project has been frustrated or seriously held up by the lack of power to condemn tribal lands. As the staff memorandum recognizes, Congress can authorize condemnation of tribal lands under State authority when the need arises in particular cases. Undoubtedly, the absence of general power in the States to condemn tribal lands puts Indian tribes in a strong bargaining position vis-a-vis the States whenever the latter have need of such lands, but, in our view, this fact has not produced any mischief requiring general legislation. The issues posed by attempting generally to subject tribal lands to local condemnation would go very deep, right to the heart of the concepts of tribal autonomy and sovereign immunity.

We would reiterate that the proposed regulations were not drafted to obviate any particular substantive problems that have been encountered in connection with rights-of-way over Indian lands, but only to streamline the procedures and forms for the granting of such rights-of-way. Particularly, the regulations are not intended to add or detract from the powers of the Secretary as, indeed, they could not because these powers are statutory. Neither are they intended to diminish safeguards designed for the protection of the Indians, nor to permit others to acquire rights in their lands for less than full and just compensation.

We have received a number of comments on the proposed regulations which we are now considering. We will keep you advised.

Sincerely yours,

STEWART L. UDALL,  
*Secretary of the Interior.*

CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
 NATURAL RESOURCES AND POWER SUBCOMMITTEE  
 OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
 Washington, D.C., February 16, 1968.

HON. STEWART L. UDALL,  
 Secretary of the Interior,  
 Department of the Interior,  
 Washington, D.C.

DEAR MR. SECRETARY: Thank you for your letter of January 27 partially answering mine of November 6, concerning the Department's proposal to revise part 161 of title 25, Code of Federal Regulations (rights-of-way over Indian lands—published in the Federal Register of April 4, 1967).

We are pleased that you intend to abandon the April 4 version of section 161.3, which proposed to permit grants of rights-of-way over Indian tribal land without the tribe's consent (unless the tribe was organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act).

However, we are puzzled by your new proposal to provide for consent only from tribes having a form of organization "approved" by the Secretary. While we are aware that the Department of the Interior has "recognized" many tribes not organized under an act of Congress, we know of no general authority of the Secretary, outside the Indian Reorganization Act or the Oklahoma Indian Welfare Act, to "approve," or disapprove, tribal organizations. It would be unfortunate to introduce such a far-reaching concept upon the occasion of a revision of the right-of-way regulations, which you say is intended "only to streamline the procedures and forms for the granting of such rights-of-way."

In this connection, we would appreciate your providing to us a list of Indian tribes which own lands subject to the rights-of-way regulations and whose form of tribal organization has been:

- (a) "approved" by the Secretary under any act other than the Indian Reorganization Act or the Oklahoma Indian Welfare Act;
- (b) "recognized" but not "approved" by the Secretary;
- (c) neither "recognized" nor "approved" by the Secretary.

Your letter of January 27 presents no justification for changing the present language of section 161.3 in any particular. On the contrary, your letter states that (a) "Generally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent" (p. 2); and (b) " \* \* \* no case comes to mind where a State or local project has been frustrated or seriously held up by the lack of power to condemn tribal lands" and " \* \* \* this fact has not produced any mischief requiring general legislation" (p. 3). Moreover, your letter does not attempt to show, and we cannot imagine, why an unreasonable refusal of consent to a proposed right-of-way is more likely to occur in the case of a non-IRA tribe. What then is the justification for changing the present language of section 161.3 in any particular?

Your letter also states, on page 2, that "in extraordinary situations where the tribe's refusal of consent is clearly contrary to its own best

interests," the Secretary would "waive" the regulations and issue the right-of-way over the Indian tribal lands without the tribe's consent. Even if there should be any justification for the Department to grant any right-of-way without tribal consent, it appears to us that to do so under a "waiver" of the regulations is a particularly undesirable way to do it.

*First.*—It is illegal to waive a regulation over the objection of the person it was adopted to protect. *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959).

*Second.*—To disregard the regulation would be to disregard the right of the Indians to make their own decision as to what is in their "own best interests," and would place the Secretary in a conflict of interest. If the Federal Government were the applicant for the right-of-way, the Secretary would be in a conflict of interest between his position as trustee for the Indians and his position as an officer of the beneficiary of the grant. If a State agency or private organization or person were the applicant, the Secretary would be acting in a controversy where his trust responsibilities toward the Indians impair his impartiality.

*Third.*—The mere claim of power to act in disregard of published regulations creates an appearance of arbitrariness. Where general regulations impose a uniform requirement on all applicants, but the Secretary waives such requirement for a particular applicant, such action suggests the possibility of favoritism, regardless of its true motive or justification. A Government agency should remain above suspicion.

*Fourth.*—When the Secretary grants a right-of-way over tribal Indian land without the consent of the Indians, he acts as a condemning authority and gives rise to a claim for just compensation for whose prompt and impartial determination no established administrative procedure exists. The tribe would be relegated to protracted and costly litigation in the Court of Claims.

The second and fourth points above, of course, apply to any taking of an interest in tribal land authorized by the Secretary of the Interior without tribal consent, whether pursuant to regulation or under due process of law. They attest the wisdom of insisting upon consent to right-of-way grants from all tribes alike, and of leaving it to Congress to decide when consent has been unreasonably withheld and tribal land ought to be condemned.

The third point above—that tampering with the consent requirement raises the possibility of needless suspicion of the Department's motives—is illustrated by a potential issue that may arise under the central Arizona project bill (S. 1004, 90th Cong.) which was passed by the Senate and is now pending before the House of Representatives.

Section 2(b) of this bill contemplates construction by private industry of a large thermal electric powerplant which will probably be adjacent to Lake Powell in Arizona. See summary report of February 1967 by Interior Department "Central Arizona Project with Federal Prepayment Power Arrangements," reprinted in hearings before House Interior Committee on Colorado River Basin project (H.R. 3300, etc., 90th Cong., first sess., March 1967, at pp. 70, 86-87, 89; S. Rept. 408, 90th Cong., pp. 28, 43). The Arizona Public Service Co., and perhaps the Salt River project, and other utilities associated as WEST

Associates, will probably be participating owners of that plant, and contemplate negotiating the necessary arrangements including the use of coal and rights-of-way on Indian reservations. (Hearings, supra, p. 287.)<sup>1</sup>

During a previous right-of-way dispute between the Arizona Public Service Co. and the Navajo Tribe, a departmental official stated publicly that the Department might waive the consent requirement. An assertion of such power—or indeed any proposal to modify section 161.3—while the central Arizona project is pending may give rise to questions as to whether the Department's revision of the right-of-way regulation may be intended to weaken the bargaining position of the Navajos when negotiations are begun by the private owners of the proposed powerplant.

We believe the Department's obligation to protect the rights of the Indian tribes should be embodied in regulations which clearly and emphatically preclude any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.

For all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations.

Aside from the question of Indian consent, it is difficult to understand, in view of your statement that the proposed regulations are not intended to "work any substantive changes," why you contemplate such extensive revision of part 161 as that published in the Federal Register of April 4, 1967.

While your letter denies any intention to diminish Indian rights, it does not negate the possibilities of abuse under the proposed regulations which are discussed on pages 6-10 of the subcommittee staff memorandum of November 2, 1967. Nor can assurances in a letter, though made in the highest good faith, provide an adequate substitute for protective provisions duly adopted and published as regulations.

Right-of-way grants can be of perpetual duration and under the departmental Solicitor's Opinion M-36395 of March 22, 1957 (64 I.D. 70), may be of immense extent. They may include reservoir or powerhouse sites, for example, as well as roads, pipelines, and the other traditional purposes of rights-of-way.

In view of the numerous deficiencies which appear to be in the April 4 revision of 25 CFR part 161, it would seem best to withdraw that draft entirely. If the present regulations impose any specific undue burdens, particular sections can be amended following publication of a new notice of proposed rulemaking. When such amendments are drafted we request that you consider deleting the last sentence of the present section 161.27(d)(1), as suggested on page 9 of the subcommittee staff memorandum of November 2, 1967.

Your letter of January 27 did not transmit the data requested in items No. 1 and No. 8 of our letter of November 6. We would appreciate receiving such data.

<sup>1</sup> COMMITTEE NOTE.—The House passed its own bill, H. R. 3300 (see H. Rept. 1312, 89th Cong.), and substituted it for S. 1004 on May 16, 1968. Thereafter the House and Senate agreed to the Conference Report on the amended bill S. 1004, H. Rept. 1861, 90th Cong., Sept. 4, 1968. Section 2(b), mentioned in the text above, as amended, became sec. 303(b) of the revised bill. It was signed by the President on September 30, 1968. Public Law 90-537.

We would also appreciate receiving (a) three copies of all correspondence received by the Department or the Bureau of Indian Affairs commenting upon or suggesting the revision of 25 CFR part 161 which appeared in the Federal Register of April 4, 1967; and (b) a statement as to what extent the Department's experience with the Arizona Public Service Co., the Salt River project, or the WEST project suggested that procedures under the present right-of-way regulations are cumbersome and serve only to burden commerce.

As stated in our letter of November 6, we would appreciate your sending to us a copy of any revised Indian right-of-way regulations before they are adopted.

Sincerely,

ROBERT E. JONES,  
Chairman, Natural Resources and Power Subcommittee.

U.S. DEPARTMENT OF THE INTERIOR,  
Washington, D.C., July 12, 1968.

Hon. ROBERT E. JONES,  
Chairman, Natural Resources and Power Subcommittee, Committee on  
Government Operations, House of Representatives, Washington, D.C.

DEAR MR. JONES: This responds to your letter of February 16, concerning the proposed revision of regulations covering rights-of-way over Indian lands, 25 CFR 161, as published in the Federal Register of April 4, 1967.

First, with regard to the comment in our letter of January 27 that we were inclined to amend section 161.3 to provide, in the case of tribes having a form of government approved by the Secretary (whether pursuant to the Indian Reorganization Act, Oklahoma Welfare Act, or otherwise), that rights-of-way would not be granted without the consent of their governing bodies, "approved" was not used as a term of art to be distinguished from "recognized." We did not intend to introduce any novel, far-reaching concept into the jurisprudence of Indian affairs but only to distinguish, for purposes of the regulations, between lands held or reserved for the use and benefit of "organized" groups and those held or reserved for the use of "unorganized" groups, as those terms were defined in our letter of January 27.

There are some cases where Indian lands are not associated with any organized, recognized or even identifiable Indian group. For instance, with respect to certain rancherias in California, there is no Indian entity, *de jure* or *de facto*, empowered to act on behalf of the Indians for whose benefit the lands are held or reserved. Similarly, the Kiowa, Comanche, and Apache Tribes and the Chemehuevi Tribe, neither of which is organized under the IRA or Oklahoma Welfare Act, have no recognized tribal governments authorized to act for them with respect to reservation lands in Oklahoma and California. The only authority outside of the Congress, to issue rights-of-way over such lands is in the Secretary. Even in these cases, efforts are made to consult any Indians who can be located in the area before rights-of-way are granted. Under present regulations, such grants must be made as exceptions to the regulations. The proposed amendment would simply eliminate the need for obtaining exceptions in such situations.

As we have stated, in the case of tribes not organized under the IRA or OWA, the authority of the Secretary to grant rights-of-way over reservation lands is granted by statute and can neither be diminished nor enlarged by regulations. Past experience has shown that situations may arise, albeit infrequently, in which the Secretary's obligation to act in the best interests of a tribe would demand that he exercise his authority to grant a right-of-way despite the absence of tribal consent.

While I was not aware that any officer of the Department stated publicly that we were prepared to waive the requirements of the present regulations and grant rights-of-way to developers in the Four Corners area without the consent of the Navajo Tribe, the possibility of taking such action was considered within the Department.

The situation which would have caused us to take such action did not mature as the developers concerned were ultimately successful in obtaining Navajo consent. Had this not been the case, however, the situation would have been a good example of one where the Department would probably have been irresponsible had it allowed the Navajos to block the grants because the interests of the Hopi Tribe were equally involved.

First of all, there was no dispute between the Navajos and any of the developers who required the rights-of-way. The Navajos had negotiated and were satisfied with the terms of the proposed grants and the compensation provided. Second, the lands involved were either jointly owned by the Navajos and the Hopis or were lands in which the Hopis had some interest. The Hopis, who are organized under the IRA, were anxious that the rights-of-way be granted and the interests of both tribes clearly required that they be.

The dispute involved was between the Navajos and the Hopis, and the position of the former was without support in reason. The Navajos quite simply refused to acknowledge that the Hopis had any interest in the lands which were the subject of *Healing v. Jones*, 210 F. Supp. 125 (D.C. Ariz. 1962), affirmed 373 U.S. 758. The Navajos, for a time, indicated they might refuse to consent to the rights-of-way to prevent the Hopis from getting any benefits from the dependent developments. It was then that we began giving serious consideration to granting the rights-of-way irrespective of Navajo consent. Even if our responsibilities as trustee could be squared with allowing a tribe to cut off its own nose to spite its face, we submit that under no circumstances could they be squared with permitting one tribe to amputate the rights of another tribe for such purpose.

The Department's experience with the Salt River project figured in no way in the conclusion that the right-of-way regulations should be revised. Its experience with developments in the Four Corners area figured in no way that is still vital. Only section 161.3 of the proposed regulations which, as we have indicated, we are now inclined to change, was drafted with our experience at Four Corners in mind. As we have said, the proposed change represented by section 161.3 as published was intended to bring the regulations in line with the statutes. The thought was that the regulations should be so cast as to permit the Secretary to exercise authority he clearly has under the law in accord with, rather than as an exception to, his regulations. As a matter of fact, the need to revise the regulations had been recognized and the preparation of the new regulations had been commenced before the Salt River or Four Corners situations arose.

We are not persuaded by your assertion that any proposal to modify section 161.3 will weaken the bargaining position of Indians during negotiations for rights-of-way sought in connection with projects such as the proposed thermal electric plant to be built near Lake Powell, Ariz., under section 2(b) of the central Arizona project bill (S. 1004, 90th Cong., H.R. 3300, 90th Cong.). The tribes concerned in the Lake Powell plant negotiations, the Navajos and Hopis, have recognized tribal governments and their positions under the now proposed revision of section 161.3 would not differ in the slightest from that under present regulations.

With regard to your question concerning the need for amendment of part 161, we note, as we did more fully in our letter of January 27, that the proposed regulations are intended largely to simplify the procedures for granting rights-of-way to eliminate certain provisions which have proved cumbersome and unnecessary. We stated that the proposed regulations were not meant to work any "substantive" changes, merely to emphasize that the changes contemplated were procedural in nature and not to imply that they were in any way insignificant or unnecessary.

Since publication of the proposed rulemaking on April 4, 1967, we have received a substantial number of comments upon the suggested revision of part 161. Because of the volume of this material it is not practical to make copies of all of it. We would be happy, however, to assist a member of your staff in going through the material and in securing copies of such parts of it as are of special interest.

In answer to your question concerning the number of applications for rights-of-way across Indian land, the Bureau of Indian Affairs reports that during the year ending June 30, 1967, there were a total of 2,531 rights-of-way issued, while 4,141 applications remained pending. We shall send you the data for the year ending June 30, 1968, when it is compiled.

We are presently in the process of analyzing the comments we have received on the proposed rulemaking of April 4, 1967, and anticipate publication within the near future of revised regulations evidencing whatever modifications in the former version of the regulations seem advisable. We shall keep you advised in this regard.

Sincerely yours,

STEWART L. UDALL,  
*Secretary of the Interior.*

NINETIETH CONGRESS,  
 CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON GOVERNMENT OPERATIONS,  
 Washington, D.C., November 7, 1968.

HON. STEWART L. UDALL,  
 Secretary of the Interior,  
 Department of the Interior,  
 Washington, D.C.

DEAR MR. SECRETARY: Shortly before Congress adjourned, the Natural Resources and Power Subcommittee unanimously approved and recommended to the full House Committee on Government Operations a proposed report entitled, "Disposal of Rights in Indian Tribal Lands Without Tribal Consent." The proposed report deals with the Interior Department's proposals to amend the Indian right-of-way regulations (25 CFR, pt. 161). The committee was considering this report at the time Congress adjourned and will resume consideration of it when Congress reconvenes.

It is requested that the Department defer action on the proposals to amend the aforesaid regulations until the committee has completed its consideration and action on the proposed report.

Sincerely,

WILLIAM L. DAWSON, Chairman.

NINETIETH CONGRESS,  
 CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON GOVERNMENT OPERATIONS,  
 Washington, D.C., December 18, 1968.

HON. STEWART L. UDALL,  
 Secretary of the Interior,  
 Department of the Interior,  
 Washington, D.C.

DEAR MR. SECRETARY: Assistant Secretary Anderson's office has informally inquired whether this committee would object to publication in final form in the Federal Register of proposed amended Indian right-of-way regulations if present 25 CFR 161.3 is retained without change. In a letter to you dated November 7, 1968, I requested that the Department defer action on amending these right-of-way regulations until the full Committee on Government Operations had an opportunity to complete its consideration and action on a proposed report presented by the Natural Resources and Power Subcommittee.

The underlying ground for my request that action be deferred will be removed if section 161.3 is retained in its present form. I understand that you wish to publish in the Federal Register before the end of this calendar year, so that the revised regulations will appear in next year's bound volume of the Code of Federal Regulations. I am happy to cooperate with that purpose, and you may consider my request to defer action withdrawn if section 161.3 is retained without change in the new regulations.

Sincerely,

WILLIAM L. DAWSON, Chairman.

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D.C., January 23, 1969.

HON. WILLIAM L. DAWSON,  
Chairman, Committee on Government Operations,  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On November 7, 1968, you requested deferring publication, in final form, of the revised proposed amendments to the Indian rights-of-way regulations, pending the Committee on Government Operations further consideration of the Natural Resources and Power Subcommittee report entitled "Disposal of Rights in Indian Tribal Lands Without Tribal Consent."

Following receipt of your request, a meeting was held with Mr. Indritz, chief counsel, and Mr. Davis, assistant counsel for the subcommittee, in an attempt to resolve the conflicts reflected in the subcommittee report. The principal concern revolved around the changes in 25 CFR 161.3, particularly as the section applied to grants across certain tribal lands without tribal consent. These grants would only apply to a very few situations; therefore, section 161.3 was not revised except to change the word "Superintendent" to "Secretary" for consistency with the definitions. The change of designated official does not materially change section 161.3 and thus is consistent with your December 18 letter withdrawing the deferment request.

We have proceeded with amending CFR 161, as revised, and the new regulations were published in the *Federal Register* December 27, 1968.

Sincerely yours,

ROBERT E. VAUGHAN,  
Deputy Assistant Secretary of the Interior.

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