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September 1, 2006

Attention: Section 1813 ROW Study  
Office of Indian Energy and Economic Development  
1849 C Street, NW  
Mail Stop 2749-MIB  
Washington, D.C. 20240

Re: Comments on Draft Section 1813 Study

Dear Sir/Madam:

On behalf of the Pechanga Band of Luiseño Mission Indians ("Tribe" or "Pechanga Band"), we provide the following comments relating to the Draft Right-Of-Way Study ("Draft Study") that has been released by the Departments of Interior and Energy as required by Section 1813 of the Energy Policy Act of 2005 ("Study").

The Tribe believes that the Draft Study constitutes a reasonable effort to characterize the current status of Right-Of-Way ("ROW") negotiations. We believe that DOI/DOE have demonstrated sensitivity to tribal concerns and have attempted to fairly address the concerns that the tribes have raised in their comments and public forums. However, the Tribe also takes exception to several features of the Draft Study. Most notably, the Tribe objects to two of the "Options" offered to Congress in the Draft. It is the Tribe's position that these "Options" are unjustified (based upon the conclusions contained in the Draft Study), and the Tribe believes that, if implemented, these "Options" would have potentially devastating impacts upon tribal sovereignty and tribal economies.

Unless revisions are made in the Draft that correct and clarify these "Options," the Tribe believes that there is a strong probability that the conclusions contained in the Draft Study will be misrepresented to Congress by industry, and that any legislation resulting from the Draft Study will not accurately reflect the Draft Study's conclusions.

## **I. The Draft Study's Conclusions**

Section 4.3 of the Draft Study contains the following significant conclusions concerning the question of whether ROW disputes between tribes and energy companies constitute a potential problem for the delivery of energy resources to consumers:

First, total energy transportation costs are a small component of overall energy costs...

Second, the fraction of energy transportation infrastructure that is on tribal lands is also small. Although some tribes require compensation for energy ROWs on their lands in excess of the lands' market value for other purposes, the effects are not large enough to have a significant effect on overall energy transportation costs and the total cost of delivered energy paid by consumers.

Third, apart from price impacts, there is no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers. The conditions cited above concerning the relatively small economic impacts of existing or potential disputes over energy ROWs on tribal lands also imply that, except in unusual geographic circumstances, the effects of any future potential ROW disputes on the reliability of security of energy supplies to consumers are also likely to be small.

Fourth, the problem may be essentially self-limiting. That is, most tribes need additional revenue sources and have reasons to seek economic development opportunities, including productive relationships with energy companies. At the same time, many energy companies have commented that they now find negotiations with tribes so difficult that with respect to new pipelines or transmission lines, they will "build around" tribal land if possible.

A reasonable conclusion that could be drawn from the foregoing findings would be that tribal ROW issues have not reached a significant level of concern, and that there is not (certainly at the present time) any condition that would justify action on the part of the federal government that would disrupt the status quo concerning the tribes' right to consent to the granting of energy related ROWs, or the

current manner in which such ROWs are negotiated between tribes and energy companies.

## **II. The Proposed “Options”**

However, the Draft Study does not, after reaching the above-stated conclusions, state the obvious conclusion, that no further action is required. The Draft Study continues (in section 4.4.2) to suggest (but not to recommend) “Options” to Congress to address the undefined “issues” presented, “if it concludes that these difficulties merit a legislative solution.” The “Options” discussed include:

- Congress requiring binding valuation; and
- Congress specifically authorizing condemnation of tribal lands for “public necessity.”

## **III. These Options Are Not Justified By The Conclusions Of The Draft Study, Are Inconsistent With Existing Law And Practice, and Would Have Potentially Devastating Impacts Upon Tribal Sovereignty**

The first problem with the inclusion of the foregoing “Options” in the Draft Study is that they are not supported by the Study’s conclusions. If (as noted in the Draft Study) energy transportation costs are small, if the amount of ROWs that are on tribal lands is small, and if there is no evidence of historic problems with the negotiation of such energy ROWs with tribes, why would the implementation of such draconian measures as binding valuation or the condemnation of tribal lands be justified? The answer is that they are not, and such “Options” should be removed from the Draft Study.

Moreover, as is recognized in the Draft Study, the imposition of such involuntary alternatives as those outlined above is contrary to the consensual legal framework that has existed for many years. Tribes have a basic self-determination and sovereignty interest in retaining the right to approve (or disapprove) of right-of-way grants that may exist on their reservations. Tribes are sovereign governments. The right to consent to such grants is a basic attribute of that tribal sovereignty. This fact was recognized in the Indian Reorganization Act of 1934.<sup>1</sup> That Act specifically confirms the tribes’ right to “prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.”<sup>2</sup> These rights were further recognized in the Indian Right-of –

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<sup>1</sup> Ch. 576, §1, 48 Stat. 984, *codified at* 25 U.S.C. §461 *et seq.*

<sup>2</sup> Section 16 of the IRA, currently 25 U.S.C. §476(e).

Way Act of 1948.<sup>3</sup> Without any evidence that conditions exist that mandate a change in these laws (and the Draft Study has provided no such evidence), it would be erroneous for the Final Report to contain suggestions that such laws should be changed.

Finally, as a tribe's control over the property it possesses is one of the hallmarks of tribal sovereignty, the implementation of either of the above-described options would directly contravene tribal consent and would therefore potentially undermine tribal sovereignty. Such "Options" are therefore not really options, and must be completely rejected.

#### **IV. The Status Quo Provides Necessary ROWs, Preserves Tribal Sovereignty, and Enables Tribes to Protect Cultural and Historic Resources**

It is the Tribe's continued position that any right-of-way grant should only be granted with the involved tribe's consent. Without the tribe's consent, such grant should not be provided. Such an involuntary grant would constitute a violation of the federal government's trust responsibility and violate the tribe's sovereignty. It would appear from the foregoing excerpts, that the DOI/DOE's research supports this conclusion.

This is particularly the case as the Draft Report has provided no evidence that any needed ROWs are in any way being impeded by the retention of the current system which enables tribes to consent to such grants. To the contrary, we are aware that a number of tribes have submitted case studies for DOI/DOE's consideration that document the successful completion of such ROW negotiations.

Therefore, the Tribe continues to believe that the appropriate method for determining an appropriate valuation is solely through negotiation between the tribe and the relevant energy company. Unlike other types of property owners (to whom valuation formulas may currently apply), the Tribe is a sovereign that possesses governmental responsibilities and must appropriately manage its resources for the benefit of its people. Moreover, unlike other property owners, tribes are currently developing energy resources themselves, and may require such right-of-ways for their own use. Therefore, unilaterally imposing the obligation upon tribes to forego such opportunities (particularly for any amount calculated in accordance with a formula) would be inappropriate and would constitute a violation of the trust responsibility that the federal government owes to the tribes.

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<sup>3</sup> Indian Right-of-Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323-328

As was stated in the Tribe's opening comments, reversing this principle (and depriving tribes of their right to consent to such grants) would be counter to the developing federal policy of acknowledging tribes' sovereignty and self-determination. Indeed, in the Energy Policy Act of 2005, the Congress adopted provisions that authorized tribes to enter into Tribal Energy Resource Agreements (TERAs).<sup>4</sup> TERAs will enable tribes to enter energy agreements without the Secretarial consent that is currently required, thus *increasing* tribal self-determination in this area. Reversing this policy (by imposing the obligation upon tribes to grant rights-of-way) would totally undermine the tribes' ability to successfully negotiate TERAs in which right-of-way issues are involved.

Requiring tribes to accept right-of-ways in accordance with pre-ordained pricing formulas would also prevent the tribes from negotiating in circumstances where unique conditions may render such predetermined compensation formulas inequitable. Diminishing the tribes' bargaining flexibility in this manner would be contrary to the federal government's trust obligation to the tribes, and would, given the historic inadequacy of compensation for energy right-of-ways, be particularly unjust.

Finally, imposing the obligation to accept right-of-ways on the tribes would severely damage the tribes' ability to protect their cultural and historic resources. Tribes are in the best position to determine the importance of these resources. When confronted with a possibility of compensation for such rights-of-way, they can be expected to rationally weigh the benefits of such grants. However, they must retain their right to prevent such development when it would destroy or damage their cultural and historic resources.

The Tribe appreciates the opportunity to provide these comments, and looks forward to its additional participation in this proceeding.

Sincerely yours,

HOLLAND & KNIGHT LLP



Donald M. Clary

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<sup>4</sup> Energy Policy Act of 2005, tit. V, §503, *codified at* 25 U.S.C. §3504.