

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD NATION

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Joseph E. Dupuis - Executive Secretary  
Vern L. Clairmont - Executive Treasurer  
Leon Bourdon - Sergeant-at-arms

**TRIBAL COUNCIL MEMBERS:**  
James Steele, Jr. - Chairman  
Carole Lankford - Vice Chair  
Lloyd D. Irvine - Secretary  
Ron Trahan - Treasurer  
Joe Durglo  
Mike Kenmille  
Steve Lozar  
Jim Malatare  
Reuben A. Mathias  
Sonny Morigeau

**April 25, 2006**

**Honorable Samuel W. Bodman**  
**Secretary of Energy**  
**U.S. Department of Energy**  
**1000 Independence Avenue, SW**  
**Washington, D.C. 20585-1000**

**Honorable Gail A. Norton**  
**Secretary of the Interior**  
**U.S. Department of the Interior**  
**1839 C Street, NW, MS 7229**  
**Washington, D.C. 20240**

**Re: Tribal Policy Regarding Section 1813 of the Energy Policy Act of 2005**

Dear Secretaries Bodman and Norton:

The Tribal Council of the Confederated Salish and Kootenai Tribes took action on April 25, 2006 to establish a Tribal policy regarding Section 1813 of the Energy Policy Act of 2005. The Tribal Council took this action after reviewing Section 1813, considering its potential impacts to the Tribes, consulting with representatives of your Departments, and consulting with representatives from other tribal governments.

The enclosed Tribal Resolution and attached statement of Tribal Principles is the formal policy statement of the Confederated Salish and Kootenai Tribes regarding the Section 1813 right of way study. Please add it to the materials included in your study.

To further assist with the study, the Tribes will soon submit a letter describing energy rights of way on the Flathead Reservation, discussing the history of negotiations and settlement regarding those rights of way, discussing actions the Tribes intend to take in the future regarding those rights of way, and explaining the importance of those rights of way to the Tribes.

We trust that you will take this information into account in your study.

Sincerely,

James Steele, Jr.  
Chairman - Tribal Council

**RESOLUTION  
OF THE GOVERNING BODY OF  
THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION**

**COPY**

**RESOLUTION ESTABLISHING THE TRIBAL POLICY STATEMENT REGARDING  
SECTION 1813 OF THE ENERGY POLICY ACT OF 2005**

**BE IT RESOLVED BY THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND  
KOOTENAI TRIBES (“TRIBES”) THAT:**

**WHEREAS**, the Tribes are a federally recognized Indian tribe organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq.;

**WHEREAS**, Tribal Council is empowered and authorized to act on behalf of the Tribes pursuant to Article VI of the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana;

**WHEREAS**, the Tribes have a unique interest in the lands located within the Flathead Indian Reservation as the Tribal homeland as guaranteed by the Treaty of Hellgate, 12 Stat. 975, July 16, 1855;

**WHEREAS**, Section 1813 of the Energy Policy Act of 2005 requires the United States Departments of Energy and Interior to prepare a study on the compensation practices and policy implications associated with the issuance of Indian tribal consent for energy-related rights-of-way crossing tribal lands (“Right-of-Way Study”);

**WHEREAS**, the United States Departments of Energy and Interior, as federal agencies, have a trust responsibility to the Tribes, which includes the protection of the sovereignty of the Tribal government and preservation of Tribal lands, culture, and other trust resources.

**WHEREAS**, the United States Departments of Energy and Interior, as federal agencies, are obligated to protect and promote tribal self-governance pursuant to the Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa-458hh;

**WHEREAS**, the United States Department of Energy has recognized its trust responsibility and obligation to protect and promote tribal self-governance pursuant to the agency’s American Indian & Alaska Native Tribal Government Policy,  
<http://www.em.doe.gov/public/tribal/policy2.html>.

**WHEREAS**, the United States Department of the Interior has recognized its trust responsibility and obligation to protect and promote tribal self-governance pursuant to the agency’s Secretarial Order No. 3175 – Departmental Responsibilities for Indian Trust Resources, November 19, 1993;

**WHEREAS**, the Right-of-Way Study is a matter of great importance to the Tribes and to all tribes and may have significant implications regarding future legislation and tribal sovereignty;

**WHEREAS**, under longstanding law, the consent of the governing body of a tribe must be obtained as a condition for the grant or renewal of a right-of-way across tribal lands;

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**WHEREAS**, the tribal consent requirement is a critical aspect of tribal sovereignty that allows tribal governments to negotiate acceptable terms, including those related to duration and compensation, for the use of tribal lands;

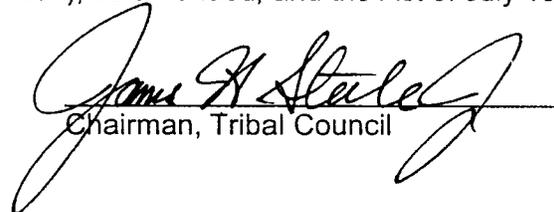
**WHEREAS**, the Tribal Council has reviewed the attached statement of principles and has determined that these principles should be incorporated in the Right-of-Way Study and maintained as a matter of federal law and policy.

**THEREFORE, BE IT RESOLVED** that the Tribal Council hereby approves the attached statement of principles and authorizes distribution of this Resolution as an official policy statement of the Tribes;

**BE IT FURTHER RESOLVED** that the Tribal Council directs that a copy of this resolution be forwarded to the Departments of Energy and Interior for inclusion in the record related to the Right-of-Way Study.

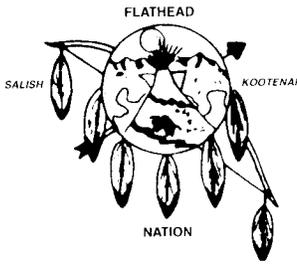
#### CERTIFICATION

The foregoing resolution was adopted by the Tribal Council on the 25th day of April, 2006, with a vote of 9 for, 0 opposed, and 1 not voting, pursuant to the authority vested in the Tribal Council by Article VI, Section 1 (a), (c), (d), (e), (f) and (u) and by Article VIII, Section 1, as amended, of the Tribes' Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, and the Act of July 18, 1968 (82 Stat. 356).

  
Chairman, Tribal Council

ATTEST.

  
Executive Secretary



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April 27, 2006

**Honorable Samuel W. Bodman  
Secretary of Energy  
U.S. Department of Energy  
1000 Independence Avenue, SW  
Washington, D.C. 20585-1000**

**Honorable Lynn Scarlett  
Secretary of the Interior (Acting)  
U.S. Department of the Interior  
1839 C Street, NW, MS 7229  
Washington, D.C. 20240**

**Re: CS&K Tribes' Submission Regarding Section 1813 of the Energy Policy Act  
of 2005 on the Flathead Indian Reservation**

Dear Secretaries Bodman and Scarlett:

Please accept this letter as a statement by the Confederated Salish and Kootenai Tribes ("Tribes") regarding energy rights of way on the Flathead Indian Reservation in relation to Section 1813 of the Energy Policy Act of 2005 and add this letter to the materials included in your study. The Tribes earlier submitted a Tribal Resolution establishing a general Tribal policy statement regarding the Section 1813 study. This letter contains information and discussion specific to energy rights of way on the Flathead Indian Reservation. It is formatted to comport with issues that Congress directed to be addressed in the Section 1813 study.

**Analysis of Historic Rates of Compensation Paid for Energy Rights of Way on  
Tribal Land.**

The United States Department of the Interior, Bureau of Indian Affairs ("BIA") was custodian for land titles and records for Indian land transactions that occurred prior to 1997. Over time, those records were maintained by many different federal employees in at least three different sites. The United States and the Tribes entered into a compact agreement on September 28, 1990, pursuant to the terms of the Indian Self-Determination Act, 25 U.S.C. § 450 et seq. for Tribal assumption of federal duties regarding land titles and records. Pursuant to that compact agreement, the Tribes were to take possession of all Flathead Indian Reservation land titles and records held by the BIA, and did so on

February 14, 1997. The Tribes received several boxes of energy rights of way records that are not organized so that analysis of historic rates of compensation can be readily performed. As a result, we are not able to submit such analysis with the resources available to us at this time.

**Recommendations for Appropriate Standards and Procedures for Determining Fair and Appropriate Compensation to Indian Tribes for Grants, Expansions, and Renewals of Energy Rights-of-Way on Tribal Lands.**

The Tribes have a long history regarding establishment of rights of way on the Flathead Reservation. From 1855 to 1947 the negotiation process for rights of way was handled exclusively by the BIA pursuant to process established by federal law and regulation. The Tribes had no direct involvement. From 1947 to 1970, circumstances were similar, in that the BIA conducted all negotiations and conveyancing, the Tribes only involvement was providing consent at the end of negotiations. Since 1970, the Tribes have been self-represented in those negotiations. Although the recent history has at times been contentious, negotiations have been largely successful, resulting in establishment of an extensive network of transportation and utility corridors. The Flathead Reservation hosts rights of way for 1,600 miles of state and local public roads, 40 miles for a national railway line, 35 miles for a local railway line, 325 miles for eleven regional electrical transmission lines, 150 miles for local electrical transmission lines, 2000+ miles for local electrical distribution lines, and 56 miles for one regional refined fuels pipeline. Recent history shows that the Tribes are responsibly asserting their rights as a sovereign government to successfully negotiate all aspects of transportation and energy rights of way and we are doing so within the structure of law provided to us by Congress. I offer four examples in support of this point.

My first example is with regard to transportation rights of way: Congress created the State of Montana by passing the Act of February 22, 1889. The Tribes' exclusive right and title to Flathead Reservation lands is expressly recognized in the text of this Enabling Act. Montana, in the first article of both its 1889 and 1972 State constitutions, saw fit to subsequently declare that it had no jurisdiction or control over such lands. Although this is the case, the State and Tribes have forged an excellent relationship for establishing, constructing, operating and maintaining state-owned rights of way for roads and highways through the Flathead Reservation. Currently, the State has over forty state highway projects under design and/or construction with an anticipated value in excess of \$200 million. The Tribes participate directly in the environmental review, right of way acquisition, design, and construction phases of each project. Most notably, we are in the midst of the US93 Evaro to Polson Project; a 56 mile National Highway System reconstruction project that has been designated as a priority transportation project under Executive Order 13274 and is subject to Cabinet level oversight by the President's Interagency Transportation Streamlining Task Force. The Montana Department of Transportation and the Tribes have worked closely and successfully since 2003 to timely convey necessary right of way for the project across numerous Tribal water bodies and over 170 individual Tribal and/or Indian parcels. To facilitate conveyance of these rights of way, we have negotiated numerous complex transactions by both sale and exchange, and have shared the burden for completing transaction functions including: survey,

appraisal, environmental assessment, relocation assistance, production of documents, and recordation. Along the way we have also restored ownership of two significant pre-historic spiritual sites to the Tribes so that the sites can be appropriately managed and cared for in perpetuity, have jointly created a successful wetlands mitigation bank in consultation with numerous state and federal agencies and have jointly received a Strive for Excellence Team Award from the U.S. Department of Transportation / Federal Highway Administration. None of these shared benefits would have resulted from negotiations if the Tribes had been excluded or if the Tribes had been stripped of consent authority for rights of way.

My second example is with regard to federally-license hydropower project rights of way: Congress created the law governing private hydropower projects by passing the Federal Power Act and establishing the Federal Energy Regulatory Commission (“FERC”). In 1985 the FERC granted a license jointly to the Montana Power Company and the Tribes for continued operation of the Kerr Project, a 180 megawatt hydropower project, located on the Flathead River and partially on lands within the Flathead Reservation. The Project included a dam, powerhouse, reservoir, transmission lines, substations, access roads, and rights of way related thereto that occupy over fifty thousand of acres of Tribal land. The Tribes and Montana Power Company successfully negotiated terms for use and occupancy of the Tribes’ land in a FERC approved settlement. In the joint license arrangement, MPC had the right to operate the Project for the first thirty years of the license term and the Tribes have the right to acquire the Project and operate it for the last twenty years. During MPC’s term, the corporate interest holders in the Project lobbied for and achieved governmental deregulation, that initiated a still-evolving series of changes, including: reapportionment of Project assets, sale of the Project assets, transfer of license, corporate merger, corporate reorganization, two corporate sales and two corporate bankruptcies. The Tribes have been a stable and reliable partner, as co-licensee, to all of these rapidly evolving corporate entities. The Tribes have repeatedly and successfully negotiated terms for transfer of all rights of way and in so doing have developed good working relationships with Pennsylvania Power and Light and its subsidiary PPL Montana, and with Babcock and Brown and its subsidiary Northwestern Energy. These two subsidiary companies are the current interest holders in all Kerr Project facilities and rights of way. We are currently active with PPL Montana in advocating to FERC for replacement of a worn turbine wheel in the Project powerhouse. We have just completed a jointly performed appraisal, and independently preparing for negotiations, with NorthWestern Energy for renewal of right of way on forty parcels containing approximately 12 miles of the Kerr-Anaconda “B” 161 KV transmission line.

My third example is with regard to regional electrical transmission lines: Congress created the Bonneville Power Administration, in part, to transmit large amounts of federal and non-federal electricity. BPA owns and operates five high capacity regional electrical transmission lines on the Flathead Indian Reservation occupying 105 miles of right of way. All of those lines were granted rights of way for fifty-year terms at the time of construction for the sections of line occupying Tribally-owned land. Several of those terms are now expired and subject to annual extension while the Tribes and BPA negotiate toward renewal of right of way for all lines simultaneously. The parties have decided to do this to facilitate efficiency in negotiations and uniformity in treatment of

the several rights of way. The Tribes and BPA will complete a jointly performed appraisal in the next several weeks to establish a baseline value for negotiations purposes and are scheduled to resume negotiations toward renewal of all BPA transmission lines on the Flathead Reservation during the third week of May. We anticipate successful conclusion of those negotiations this year.

My fourth example is with regard to a regional refined fuels pipeline: The Flathead Reservation contains 56 miles of right of way for the Yellowstone Pipe Line ("YPL"), an interstate transmission line for refined petroleum fuels. The line was placed in service in 1954 and was operational on the Flathead Reservation from 1954 through 1995. The Tribes and the YPL Company engaged in negotiations toward renewal of the right of way in 1995. The backdrop to those negotiations was not conducive to a successful outcome. During negotiations, the Company repeatedly engaged in tactics that the Tribes perceived to be calculated to undermine the Tribal negotiating team, including: providing free community dinners for Tribal members during which Company proposals were presented, providing gifts to Tribal members, attempting to negotiate with unelected Tribal members as surrogate Tribal representatives, threatening to utilize powers of eminent domain against the Tribes which were not available to the Company, lobbying Montana Congressional representatives to legislatively impose renewal of right of way on the Tribes, and placing advertisements detrimental to the Tribal negotiating position in regional media outlets. More directly, there were critical issues of substance in negotiations that the Company could not, or would not, adequately address. The Company was unwilling to provide operational and economic information to the Tribes regarding the pipeline that the Tribes perceived to be necessary for accurately assessing the economic potential of the pipeline. While operational, the line incurred leaks at more than twice the industry average. At least eight of those leaks were on the Flathead Reservation, resulting in the release of more than 170,000 gallons of product to Reservation lands and waters. At the point in time when negotiations were underway, two of the spill sites were still unremediated and unrestored. The Tribes were unable to successfully negotiate with the Company regarding environmental clean up, pipeline repair, and facility upgrade. Against such an adversarial backdrop and with such lack of substance, those right of way negotiations failed.

Since termination of right of way, the pipeline's parent company, Conoco, Inc., (now Conoco-Phillips) has found alternative means of transport for its product, including rail transport across the Flathead Reservation. Conoco has also become directly involved in managing the abandoned pipeline. The relationship between Conoco and the Tribes is much improved over the earlier relationship between the YPL Company and the Tribes. The Tribes and Conoco have successfully negotiated and performed abandonment of the old pipe line, restoration of two major spill sites, successfully rehabilitated the abandoned right of way, worked cooperatively with the U.S. Environmental Protection Agency to produce a spill response plan for the Clark Fork River Basin, consulted with the rail transporter that is now providing alternative transportation of fuel products across the Flathead Reservation in lieu of the pipeline, and have remained in contact regarding potential renewal of pipeline operations in the future.

From these experiences, it is the Tribes' perception that negotiations for establishment, renewal, and/or expansion of rights of way over Indian land on the Flathead Reservation is best accomplished by direct two-party arms length negotiating

between the Tribes and the right of way applicant. In the past, all but one of our major right of way negotiations resulted in settlements acceptable to both parties. The single failed negotiation was fraught with problems, including environmental clean up problems, that are gradually being resolved. The single failure should not be viewed as a negative event, but simply an appropriate outcome in a free market system that allows landowners to resist renewing rights of way for applicants who failed to responsibly perform during their initial right of way term and who failed to address their deficiencies in renewal negotiations for a subsequent term. In the present, we are actively engaged in right of way renewal negotiations cooperatively with one government agency and one private utility. Both negotiations are going well and we anticipate successful outcomes within the year.

### **Assessment of the Tribal Self-Determination and Sovereignty Interests Implicated by Applications for the Grant, Expansion, or Renewal of Energy Rights-of-Way on Tribal Land.**

The Tribes are a sovereign government that formalized its relationship with the United States by entering into the Treaty of Hellgate on July 16, 1855. By the terms of the Treaty the Tribes ceded control of over 20 million acres of our Rocky Mountain aboriginal territory to the United States in exchange for certain reservations and guarantees. Preeminent among them was reservation of a designated homeland for the exclusive use and benefit of the Tribes, now referred to as the Flathead Indian Reservation. By Article II of the Treaty, the U.S. promised to allow the Tribes to keep the Flathead Reservation homeland for their exclusive use and benefit. Great nations, like great men, should keep their word. Accordingly, the Section 1813 Study should reflect that any action to divest the Tribes of their right to control rights of way on Indian lands within the Flathead Indian Reservation would be diminishment of Tribal sovereignty and an abrogation of the Hellgate Treaty.

The Tribes are the primary owner, trustee, and manager for the land and natural resources of the Flathead Indian Reservation. The Reservation is located in the west central portion of territory that is now recognized as the State of Montana. It contains 1.3 million acres of mountains, valleys and waters that support rich forest, prairie, and aquatic ecosystems. Between 1906 and 1934, over one million acres of the Reservation land base had slipped from Tribal control by way of federal allotment and homesteading. Since 1935 the Tribes have worked diligently to regain control of those lands. Today we are proud to report that just over 800,000 acres, or approximately 62% of the Reservation land base, is again owned and managed by the Tribes. In reacquiring this land, we prioritize and aggregate our purchases so that we can cost effectively protect and manage our property. Federal law imposes significant management burdens on all trust lands. The Tribes need authority to direct and control establishment of energy rights of way on these lands in order to assure that the Tribes can continue to effectively protect and manage them.

The Tribal government is fully capable of negotiating right of way agreements that reflect the values of the local tribal community. The Confederated Salish and Kootenai Tribal government, in its contemporary form, was established pursuant to the terms of the Indian Reorganization Act of 1934. By the terms of the Tribal Constitution,

the Tribal Council has established fifteen Tribal government agencies and nine enterprises with over 2,000 employees. There are approximately 7,000 Tribal members and the Flathead Reservation has approximately 26,000 residents. Since enactment of the Indian Self-Determination and Education Assistance Act of 1975, the Tribes have assumed management, with very few exceptions, of programs, services, functions and activities previously provided by federal agencies. In 2004, Harvard University's Kennedy School of Government recognized the Tribes' self-governance successes by awarding the Tribes with the Honoring Nations Program – High Honors Award (one of only eight awarded annually). Notably, with regard to energy rights of way, the Tribes have compacted with the United States to assume Flathead Reservation management functions for transfer of Indian land, recordation of land titles and documents, and for operation of Mission Valley Power, a regional electrical utility. Please note in your study, that the Tribes are fully capable of identifying, surveying, appraising, negotiating, documenting, recording, and abandoning rights of way. Please further note that only the Tribes have the knowledge and capability to do these tasks in a way that promotes local control and promotes Indian tribal self-governance.

The Tribes are co-licensee for the Kerr Hydropower Project (The Montana Power Company, 32 FERC ¶ 61,070 (1985)). The Kerr Project includes a dam, powerhouse, and related facilities with electrical generation capacity of 170.875 megawatts. The Project boundaries, which encompass all of Flathead Lake in northwest Montana, overlap with the external boundaries of the Flathead Indian Reservation. The south half of the Lake and all of the generation facilities are located within the Reservation. The Project is licensed by the Federal Energy Regulatory Commission jointly to the Tribes and PPL Montana, L.L.C.. The license was issued in 1985 for a fifty-year term. PPL Montana has the right to own and operate the Project for the first thirty-years of the license term at which time the Tribes, at their option and upon payment of a specified conveyance price, may take over the Project for the remaining twenty-years of the license term. Presently, the Tribes receive funding for performance of environmental mitigation activities for Project-related impacts and receive payment of an annual charge for use and occupancy of the Tribes' lands. In the future, the Tribes intend to exercise their option so as to own and operate the Project to generate electricity for sale. The Tribes have commercial interests as a co-licensee for a hydropower project, with an option to become an electrical power generator as early as the year 2015.

Mission Valley Power is a federally-owned electrical utility that is charged with distributing electrical power to the residents of the Flathead Indian Reservation. The Tribes operate MVP pursuant to the terms of a contract with the United States. Accordingly, the Tribes as an electrical utility operator, have a commercial interest in assuring continued fair and open access to market via the regional electrical transmission grid.

### **Analysis of Relevant National Energy Transportation Policies Relating to Grants, Expansions, and Renewals of Energy Rights-of-Way on Tribal Land.**

In 1969, the House Committee on Government Operations issued a Committee Report in response to regulations proposed by the Interior Department that would allow it to grant rights-of-way without the consent of tribes if such tribes were not organized

under the Indian Reorganization Act. The Report, House Report No. 91-78, was titled “Disposal of Rights in Indian Tribal Lands Without Tribal Consent”. This Departmental effort resulted in a “massive protest” by tribes against the proposed regulations. (Report at p. L 805). The proposed regulations were also opposed by the Bureau of Indian Affairs, whose Commissioner noted that the Department’s proposal was “contrary to the policies of Indian self-determination and maximum involvement in matters affecting their land.” (*Id.* at p. L 819). The Committee Report noted that the BIA’s insistence on tribal consent was in “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.” (*Id.*).

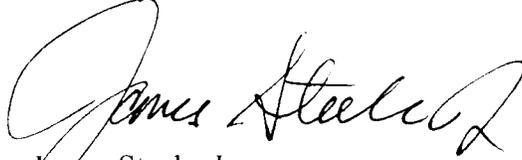
The House Report emphasized that the Interior Secretary admitted that the tribal consent requirement “has not, during the 17 years it has been in force, adversely affected the public interest.” (*Id.* at p. L 816). The Interior Secretary also acknowledged that “[g]enerally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent. The bargaining process usually produces agreements without unusual difficulties.” (*Id.* at p. L 812). The same can generally be said of energy rights-of-way today.

Noting that “Tribal Indian land is the property of the Indian tribes, not of the United States,” the Committee Report concluded that the Interior Secretary’s proposal for granting rights-of-way over tribal land without the consent of the tribal owner “violates property rights, democratic principles, and the pattern of modern Indian legislation.” (*Id.* at L 805). It also quoted from a staff memorandum which recognized that the tribal consent requirement “has greatly enhanced the ability of . . . 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.” (*Id.* at L 810). This continues to be the case today, with tribes being better able to manage and protect their lands due to their consent being required for any rights-of-way across those lands.

The House Committee was so disturbed by the proposed regulations that it recommended “that 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.” (*Id.* at L 806). The parties within the energy industry who are now requesting the polar opposite of this and, are requesting Congress to take a gigantic step backwards in the areas of Indian self-determination and property rights.

We trust that you will take the foregoing information into account in your study.

Sincerely,



James Steele, Jr.  
Chairman – Tribal Council