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May 15, 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: Section 1813 Study of Energy Rights-of-Way on Tribal Land

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 Right-Of-Way Study currently being conducted jointly by the Departments of Interior and Energy as required by Section 1813 of the Energy Policy Act of 2005 ("Study").

On June 29, 1882, an Executive Order issued by the President of the United States established the Pechanga Indian Reservation ("Pechanga Reservation"), which is located within the ancestral and aboriginal lands of the Tribe. Additional acreage has been added over the years, for a total of 4,396.44 acres. The Pechanga Reservation consists of federal trust property held for the beneficial use of the Tribe. The Reservation is intended to be a permanent homeland in order to further the federal policy of Indian self-determination, including economic development and self-sufficiency.

I. The Rainbow-Valley Line

Before proceeding with the Tribe's general comments on the study, we wish to first address a mischaracterization of the Tribe's position (concerning SDG&E's proposed Rainbow-Valley transmission line) that was made by certain electric utility industry representatives during the Study meeting in Denver on April 18, 2006. During that meeting, it was suggested by those representatives that the

Tribe had intervened in San Diego Gas & Electric's Rainbow-Valley Transmission Line ("Line") proceeding and had, for commercial purposes, sought to interfere (and had successfully prevented) the construction of that Line. These industry representatives were apparently attempting to utilize the Tribe's intervention in the Line proceeding to depict tribes generally as taking commercially unreasonable positions on utility right-of-way requests. This is a total mischaracterization of the Tribe's position in the Rainbow-Valley matter, and totally misstates the facts behind the termination of the Valley-Rainbow Line.

In 2001, SDG&E submitted an application for a Certificate of Public Necessity and Convenience ("CPNC") to the California Public Utilities Commission ("CPUC" or "Commission") for the Rainbow-Valley line. In this Application, SDG&E sought to obtain the approval of the CPUC to build a 500-kV transmission line between the proposed Rainbow substation, (which was to be south of the Pechanga Reservation) and the existing Valley interconnect station (which is north of the Reservation). SDG&E alleged that the line was necessary to serve and maintain the reliability of service for loads in San Diego.

While the Tribe did intervene in the Line proceeding (for reasons that will be discussed below), its intervention did not have the effect of terminating the CPUC's consideration of the Line. As the utility representatives in Denver failed to note, the Line was also opposed by many parties in addition to the Tribe, including municipalities, community groups, and the California Office of Ratepayer Advocates ("ORA"). The ORA is an office within California Public Utilities Commission that is given delegated authority to act in the protection of the State's electricity Ratepayers. Among other things, the opposing parties contended that the line was not necessary, and that SDG&E had alternative resource opportunities available to it that could meet SDG&E's resource and reliability requirements.

The California Public Utilities Commission ("CPUC"), in Decision 02-12-066 (Rehearing Denied in Decision 03-06-030) refused to grant SDG&E's request for a Certificate of Public Convenience and Necessity ("CPCN") for the Line because it determined that SDG&E would continue to meet established reliability criteria in the relevant time period without the line. The CPUC further determined that the line could only be cost-effective to ratepayers under one set of "extreme" circumstances. Accordingly, it was not the Tribe's intervention that prevented the construction of the Line, but rather SDG&E's failure to demonstrate to the CPUC that the Line was needed or could be economically justified.

The Tribe's intervention in the Rainbow-Valley matter related to its purchase and the incorporation into the reservation of property that had always been part of

its aboriginal lands. This property, known as the Great Oak Ranch, consisted of thirty-one parcels totaling 688.73 acres. The Great Oak Ranch contains numerous invaluable and irreplaceable tribal cultural resources as well as other resources such as the Earle Stanley Gardner Ranch (home of the author of the Perry Mason novels) and the Great Oak (the oldest oak tree in California at approximately 1500 to 2000 years old). The Oak is sacred to the Tribe. The Tribe acquired the property in 2001. However, it had, prior to that date, already begun the necessary process to bring this property into trust and incorporate it into the reservation

It should also be recognized that SDG&E submitted several alternative routes for the Line. One of the routes submitted for the Line (SDG&E's "preferred route") would have run through the Great Oak Ranch. Because of the extreme historical, cultural, and religious significance of the Great Oak Ranch and the Great Oak to the Tribe, the Tribe informed SDG&E that it would not accept the placement of the Line on the Great Oak Ranch. However, contrary to the implications suggested by the electric utility representatives at the Denver meeting, the Tribe *never* discussed (or even considered) commercial terms for a right-of-way over the Great Oak Ranch. While (as proved ultimately to be the case) the Tribe doubted that the Line was actually required by SDG&E, the primary basis the Tribe stated for its position was that the placement of the Line on the Great Oak Ranch would be offensive to the Tribe's culture, history and religious traditions.

Ultimately, the Great Oak Ranch was taken into trust by the United States and incorporated into the reservation. Under current law, tribes have the jurisdiction to determine whether right-of-ways will be permitted on their reservations, and therefore the Tribe was able to protect the sensitive resources of the Great Oak Ranch against SDG&E's incursion on the Tribe's sovereign territory.

From the foregoing, it is apparent that the representations made in Denver by utility representatives concerning the Tribe's involvement in the Rainbow-Valley line were deceptive and misrepresented the facts relating to the construction of the Line. This is clearly demonstrable from the public record. Therefore, the suggestion that the Tribe's actions in the context of the Rainbow-Valley Line provide an example of an unreasonable attempt by a tribe to prevent (for commercial purposes) the construction of a needed transmission line, must be rejected. Instead, this action should be seen for what it was, an attempt by a utility to destroy or damage the Tribe's cultural and historic resources in order to construct what ultimately proved to be an unnecessary facility. These events illustrate why tribes must continue to possess the right to approve or disapprove such right-of-ways.

The Tribe currently has a very positive relationship with its serving electric utility, Southern California Edison, and looks forward to the continuation of that relationship. Moreover, the Tribe has never stated that it would, on a blanket basis, prevent the construction of utility facilities on its reservation, as long as its sovereignty and its cultural and religious resources are respected.

The tribe also believes that this mischaracterization illustrates why DOI and DOE should be very cautious in evaluating utility assertions on these issues, and should carefully fact check all statements such entities make in this proceeding. DOI and DOE should confirm that any data upon which the Study relies is verifiable and should make that data available to all parties so that it can be confirmed.

II. Comments On The Study

Under the terms of Section 1813 of the Energy Policy Act of 2005, the Study is to address the following issues:

- an analysis of historic rates of compensation paid for energy rights-of-way on tribal land,
- recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land,
- an assessment of tribal self-determination and sovereignty interests, implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land, and
- an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.

The Tribe has the following comments relating to these areas:

1. Analysis of Historic Rates of Compensation

The first requirement for the Study is to provide an analysis of historic rates of compensation paid for energy rights-of-way on tribal land. The Tribe has great concern whether this requirement can be fulfilled in the time frame authorized. Such a study would ideally consider all right-of-ways granted on all reservations and should, at the very least, consider a large sampling of tribal rights-of-way. However, data in this area has been and remains very difficult to obtain. The Tribe is aware of many cases where such information has been requested by tribes (for their own reservations) and such information has not been provided by BIA. There is no reason to believe that

such information will suddenly become available at this time. Consequently, it is extremely difficult to believe that a meaningful sample of data can be accumulated in the time allotted so that a valid Study can be completed on historic rates of compensation.

Further, the Tribe is aware of many anecdotes relating to Tribes that have received no (or very little) compensation for their energy rights-of-way. Tribes that find themselves in these situations are generally not in a position to present case studies for inclusion in this Study. Failure to adequately identify such situations (and include them in the sample) will potentially lead to the overvaluation of historic rights-of-way. This is unfair and inequitable to the tribes. Moreover, we see no evidence that DOE or DOI is doing anything to compel the production of such data.

Finally, the Tribe believes that it is crucial that any historic study of right-of-way compensation must identify the methodology that was utilized for the calculation for each right-of-way, and state whether or not the relevant tribe was involved in the actual calculation of such compensation. Again, the Tribe is highly concerned whether such information can be accumulated for a meaningful sample of rights-of-way in the time that has been allotted for the Study.

2. Recommendations For Appropriate Standards and Procedures for Determining Fair and Appropriate Compensation

Before proceeding with a discussion of this area, it should be noted that it is the Tribe's 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.

The Tribe continues to believe that the appropriate method for determining an appropriate valuation is solely through negotiation between the tribe and the relevant 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 the 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.

Pechanga is not aware of any situation where a tribe has unfairly or inappropriately attempted to extract excessive compensation from any energy company in exchange for a right-of-way. In our experience, the incentive presented by the compensation for the right-of-way has motivated tribes to act reasonably (when they desire to grant the right-of-way) in the negotiation process. No further standard or formula is required.

3. Assessment of Tribal Self-Determination and Sovereignty Interests

It appears that the Study anticipates the imposition of a system that would direct tribes to accept the imposition of energy right-of-ways, and would impose a compensation formula that establishes what the tribes must accept for such right-of-ways. Such a change is totally inconsistent with the system of laws that has developed to govern real properties that are located on reservations.

Tribes have a basic self-determination and sovereignty interest in retaining the right to approve (or disapprove) of rights-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 1934.¹ 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."²

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).³ 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.

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

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

³ Energy Policy Act of 2005, tit. V, §503, *codified at* 25 U.S.C. §3504.

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. As demonstrated by the Great Oak Ranch example, tribes are in the best position to determine the value 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 a grants. However, they must retain their right to prevent such development when it would destroy or damage their cultural and historic resources.

4. Relevant National Energy Transportation Policies

Finally, the Tribe is concerned that, while the utilities participating in this proceeding may suggest that national energy transportation policies support the unilateral imposition of an obligation to provide rights-of-way upon tribes at predetermined valuations, they have totally ignored the fundamental inequity presented by the fact that existing rights-of-way serve populations that are often hundreds of miles distant from reservations, while inhabitants of the reservation remain underserved.

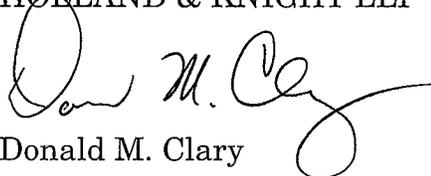
In the United States, utility policy is generally designed so that utility service can be provided to the broadest possible population on a non-discriminatory basis. However, such policy has failed to assure that individuals on reservations obtain even the bare minimum levels of service.

Therefore, it is the Tribe's position that any study considering rights-of-way on reservations, and the compensation for such rights-of-way, must also confirm the reasonableness of tribes' requiring that utilities seeking to obtain rights-of-way also provide assurances that such tribes will be able to provide basic utility services to their own populations. Such basic assurances are relevant to the issue of whether a right-of-way should be granted, as well as to the compensation that should be provided for such rights-of-way. The Tribe believes that the issues behind this historic failure to serve cannot be separated from those involved in this Study.

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

Sincerely yours,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "Donald M. Clary". The signature is fluid and cursive, with a large loop at the end.

Donald M. Clary