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Via E-Mail and First Class Mail

Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
1849 C Street, N.W.
Mail Stop 2749 – MIB
Washington D.C. 20240
IEED@bia.edu

Re: Quechan Tribe's Comments on Section 1813 Study of Energy Rights-of-Way on Tribal Lands

Dear Officials of the Departments of Interior and Energy:

On behalf of the Quechan Indian Tribe ("Tribe"), we are filing the following comments on the study of energy rights-of-way on tribal lands under § 1813 of the Energy Policy Act of 2005.

1. Consultation. The government has failed to engage in government-to-government consultation with Indian tribes, which is required by the federal trust responsibility and applicable executive and secretarial orders. *See, e.g.* Executive Order 13175 (Nov. 6, 2000). Instead, the government is merely conducting public scoping meetings, open to the general public, to collect comments from the energy industry and others. This does not constitute meaningful government-to-government consultation, and fails to meet Indian tribes' specific needs. The need for specific consultation is particularly acute where, as here, tribal real property interests and tribal sovereignty over their lands are directly at stake.

2. True Agenda. It appears that the real agenda is to obtain eminent domain over tribal lands in favor of private energy companies. Energy-related rights-of-way run through many tribal reservations, including the Quechan's Fort Yuma Reservation. These rights-of-way traverse both tribal and allotted lands. Parties desiring a complete right-of-way usually need rights across both categories of lands. Congressional authority for condemning allotted lands already exists. 25 U.S.C. § 367. This study addresses only tribal lands, even though allotted lands are also affected. Congressional authorization to condemn tribal lands for private energy purposes would be a blatant violation of the United States' trust responsibility to the tribes and

the promise that tribal lands and tribal reservations will remain under the control and beneficial ownership of the tribes in perpetuity.

3. Tribal Consent to Rights-of-Way. Nothing in the comments submitted by non-tribal organizations, including the energy industry and others, address the fundamental issue of the tribes' right to deny rights-of-way across tribal lands. That right is inherent in due process and in the tribes' beneficial interest in tribal lands. The right is a function of tribal sovereignty and the right to self-governance. The United States cannot force Indian tribes to grant or deny a right-of-way. Congress should not overturn over 200 years of Indian policy and law to permit forced taking of tribal lands for private or governmental purposes.

4. Calculating Fair Compensation. Fair compensation for rights-of-way, when granted by the tribes, must include many factors beyond simply the fair market value of the lands taken. For example, in the case of pipelines, the government must consider the cost of environmental response, including personnel and equipment; the cost of degrading the reservation; the cost of destroying or impacting cultural resources; the comparative cost of alternate routes that would bypass tribal lands and tribal reservations; and the profits reaped by the government or energy companies. Further, in calculating compensation for future rights-of-way, tribes must take into consideration the unconscionable compensation paid in the past for many energy and other rights-of-way across Indian reservations.

5. Other Considerations. Money is not the only issue for tribes. Indian reservations are not for sale. There are impacts beyond the narrow strip of land comprising the right-of-way, such as impacts on tribal culture, tribal history, tribal society, tribal community, tribal sovereignty and tribal self governance. Indian tribes must remain in control of their lands, not private industry. The tribes must continue to have the right to withhold consent to rights-of-way when the non-monetary costs outweigh the benefits as perceived by the tribes.

6. The Study is Unnecessary. To our knowledge, no tribe has ever disrupted the flow of energy by failing to grant a necessary right-of-way across tribal lands. We are also unaware of an energy company having suffered serious economic harm because of right-of-way payments made to Indian tribes. In fact, the opposite is probably true.

7. Cost of Reservation Rights-of-Way. One industry commentator at the Denver meeting argued that energy companies pay more for Indian rights-of-way than for rights-of-way over state and private lands. If that is the case, the energy companies should simply bypass reservations and operate energy facilities on state, federal, or private land.

8. Experiences of the Quechan Indian Tribe. The Tribe has experienced negative past experiences from energy rights-of-way across the Fort Yuma Reservation. For example, it is unclear as to whether the Western Area Power Administration ever compensated the Tribe and allottees for constructing a power transmission line that crosses the Reservation. Moreover, Western's unsupervised maintenance of the powerline has destroyed the Tribe's cultural resources, *See, e.g., Quechan Indian Tribe v. United States,* No. 02cv1096 (S.D. Cal.).

Accordingly, it is not only the initial construction that harms Reservation lands, but also the continuing impacts throughout the life of the rights-of-way.

Thank you for your consideration. The Tribe reserves the right to supplement these comments as more information becomes available. Please include our office on all future notices and distributions of documents.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

Frank R. Jozwiak
Attorneys for the Quechan Indian Tribe

cc: President Mike Jackson Sr.
Vice President Keeny Escalanti Sr.
Members of the Quechan Tribal Council

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