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November 28, 2005

**Via Mail and Facsimile**  
**(202) 586-1472**

Julia Souder  
 Office of Electricity Delivery and Energy Reliability  
 U.S. Department of Energy  
 1000 Independence Ave., S.W.  
 Washington, D.C. 20585

Re: Scoping Comments of the Southern Ute Indian Tribe – Corridor Designation on  
 Federal Lands – Programmatic Environmental Impact Statement

Dear Ms. Souder:

Our law firm serves as general legal counsel for the Southern Ute Indian Tribe (“Tribe”), a federally recognized Indian tribe, organized under the Indian Reorganization Act of 1934, whose Reservation is located in southwestern Colorado. This letter constitutes the comments of the Tribe in response to the notice published at 70 *Federal Register* 56647 on September 28, 2005.

**A. The Southern Ute Indian Reservation**

The Southern Ute Indian Reservation contains approximately 710,000 acres of land, which, because of the vagaries of Federal Indian policy over the last 125 years, is owned in a checkerboard fashion by a number of different parties. The Reservation, the boundaries of which were confirmed by Congress in Public Law No. 98-290, includes approximately 300,000 surface acres held in trust by the United States on behalf of the Tribe, approximately 330,000 acres of privately held fee lands, approximately 70,000 acres of national forest lands, several thousand acres of individual Indian allotted lands subject to Federal restrictions on alienation, and several thousand acres of lands administered by the U.S. Bureau of Reclamation. The northern portion of the San Juan Basin extends into substantial portions of the Reservation, and, since the 1950s, natural gas exploration and development have been widespread. As a result of that energy

development, several thousand well-pads dot the Reservation, and roads and gathering pipelines crisscross much of the land of the Tribe and its neighbors. Several major interstate pipelines and electric distribution and transmission facilities also cross portions of the Reservation.

The Tribe is extremely active in regulating the use of its lands. As a result of its organization under the Indian Reorganization Act (25 U.S.C. 476), the Tribe has certain powers recognized and vested by Congress, including the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." The Tribe closely monitors the oil and gas development and other activities that take place on its lands, and, unless such activity appears to be in the Tribe's best interest, the Tribe will withhold its consent to proposals for tribal land use. In exercise of its powers, for example, the Tribe has resisted leasing sizeable, consolidated landholdings on the eastern third of its Reservation, and has largely preserved the undeveloped character to that land.

### **B. The Effect of Corridor Designation**

As a preliminary matter, the Tribe believes that the co-lead agencies should confirm whether the designation of energy transmission corridors authorized in Section 368 of the Energy Policy Act of 2005, is intended to include tribal trust lands. The Act addresses "Federal land," and directs that consultation with tribal governments occur "as appropriate." The public notice issued by the Department of Energy requesting these comments, similarly states that Section 368 "applies only to Federal lands." 70 *Federal Register* at 56648. Later in the same public notice, the Department of Energy appears to suggest that Section 368 involves "public lands." *Id.* Clearly, tribal lands are not "public lands." Nor are tribal lands the subject of "relevant agency land use and resource management plans" referenced in Section 368(a)(3).

Assuming that the co-lead agencies interpret the designation of corridors to extend to tribal trust lands, we believe that the co-lead agencies should specifically acknowledge that designation of corridors across tribal trust land, if any, does not constitute an encumbrance relative to such land and does not serve as a substitute for tribal consent to encumbrances burdening such lands. Nothing in Section 368 amends pre-existing statutes that require tribal consent for the issuance of rights-of-way crossing their lands. In fact, the study of Indian Land Rights-of-Way authorized in Section 1813 of the Energy Policy Act of 2005, implicitly recognizes that tribal lands are not subject to such disposition without tribal consent. Accordingly, even if the co-lead agencies interpret the designation of corridors to include tribal trust land, the co-lead agencies should confirm that such designations are meaningless unless tribal governments consent to easements or agreements that permit the use of tribal land by third parties.

The effect of corridor designation on tribal lands would appear to qualify such lands for expedited federal agency review and approval in the event that a tribe consented to use of such land for designated corridor purposes. In describing this effect the Department of Energy notice indicates that corridor designation does not authorize project activities and that proposed project

activities “would be analyzed in subsequent NEPA analysis which would also involve public notice and comment.” 70 *Federal Register* at 56648. With respect to Federal oil and gas exploration and development under the Mineral Leasing Act, however, Section 390(b)(4) provides that the placement “of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline” is subject to categorical exclusions under NEPA. While not applicable to oil and gas exploration on tribal lands, Section 390(b)(4) would appear to exempt many proposed pipeline activities from future NEPA review if the corridor designation under Section 368 constitutes approval of a “right-of-way corridor” under Section 390(b)(4). Clarification by the co-lead agencies of the relationship between Section 368 and Section 390(b)(4) would be helpful to all parties who are interested in commenting on the scope of the programmatic environmental impact statement (“PEIS”).

Clarification on these preliminary points may have a major impact on the nature of comments regarding the PEIS as it is developed. We respectfully urge the co-lead agencies to address these matters in the draft PEIS or the agency comments accompanying the draft PEIS.

### **C. Agency-Identified Alternatives**

The Tribe believes that the co-lead agencies have identified an appropriate array of proposed alternatives to the proposed agency action. Given the fact that Congress has directed that energy corridors be designated, the “No Action Alternative” is unlikely to be the alternative selected by the agencies. Because the “Increased Utilization Alternative” involves increasing efficiencies of facilities in existing corridors, it would appear to be the alternative with the least significant environmental and cultural impacts of corridor designation. However, significant residential and commercial development in the West has surrounded some existing electric transmission and interstate pipeline facilities, and expansion of facilities in those areas may pose significant difficulties. The Tribe believes that any designation of corridors across lands not currently used for such designated purposes, whether under the “New Corridor Alternative” or the “Optimization Criteria Alternative” is extremely difficult to analyze without particularized and site-specific review. Furthermore, because any rights-of-way issued in new corridors across tribal lands would require tribal consent (at least for those tribes organized under the Indian Reorganization Act), we believe the co-lead agencies should consult with affected tribes, if any, and obtain their consent to corridor designation of tribal lands before identifying tribal lands as potential new or expanded corridors. Such consultation could also include review of tribal consent requirements for new rights-of-way relative to such designated corridors. By way of illustration, it would make little sense for the co-lead agencies to designate a new corridor across the eastern third of the Southern Ute Indian Reservation without having first consulted with the Tribe, because, in the absence of tribal consent, it would be unlikely that a major new right-of-way would be permitted in that area.

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**Conclusion**

The Southern Ute Indian Tribe appreciates the opportunity to comment on the PEIS for energy corridor designation on Federal lands. Please include the undersigned in the list of recipients for the draft PEIS when it is issued.

Sincerely,



Thomas H. Shipps

cc: Clement J. Frost, Chairman