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**Subject:** Energy Corridor Draft Programmatic EIS Comment WWECD50479

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Thank you for your comment, Gina Constant.

The comment tracking number that has been assigned to your comment is WWECD50479. Once the comment response document has been published, please refer to the comment tracking number to locate the response.

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Energy Corridor Draft Programmatic EIS  
Draft Comment: WWECD50479

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Questions about submitting comments over the Web? Contact us at:  
corridoreiswebmaster@anl.gov or call the Energy Corridor Draft Programmatic EIS Webmaster  
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and sent via USPS**

**TO: The United States Department of Energy  
The United States Department of the Interior Bureau of Land Management  
The United States Department of Agriculture Forest Service  
The United States Department of Defense**

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**RE: Comment on the West-wide Energy Corridor Programmatic EIS (PEIS)**

We represent Diamond Tail Estates I, L.L.C., the owner of a private residential development located north and east of the community of Placitas, New Mexico. Our written comment regarding the above referenced PEIS is submitted herewith and includes a summary of our understanding of the PEIS process to date, the legal problems associated with that process, and a map showing our recommended alternative to the proposed corridor location. See Attachment A.

We also attended and spoke at the public hearings in Albuquerque, held on January 24, 2008. Our spoken comment is attached hereto as Attachment B.

## SUMMARY

Section 368 of the Energy Policy Act of 2005 (the “EPAAct”) requires that the Secretaries of Agriculture, Defense, Energy, and the Interior (the “Secretaries”), in consultation with various stakeholders, including States, tribes, and other interested persons, designate energy corridors on Federal land (the “Corridors”). 42 U.S.C. § 15926 (2005). The Corridors are for oil, natural gas and hydrogen pipelines, and electricity transmission and distribution facilities. *Id* The EPAAct further requires the Secretaries to “perform any environmental reviews that may be required” to designate the Corridors and to “incorporate the designated corridors into the relevant agency land use and resource management plans.” *Id*

The Secretaries decided to prepare a Programmatic Environmental Impact Statement (PEIS) to examine region-wide environmental concerns, rather than evaluate site-specific environmental impacts through a detailed Environmental Impact Statement (EIS). See Draft PEIS Executive Summary, ¶ ES.8. The Secretaries reasoned that designating corridors would not result in any direct impacts on the ground that would significantly affect the quality of the human environment. *Id* Rather, site-specific EIS would be prepared when applications for permits to use the corridors are made. *Id* The only alternative examined at this Programmatic level, was the alternative of not designating corridors at all, but continuing to install electrical lines and pipelines in a piecemeal fashion, as is done today. See Draft PEIS Executive Summary, ¶ ES.12. Additionally, the Secretaries did not address corridors on state, tribal or private land since Section 368 only authorized

designation on Federal land and thus, they would be overstepping their bounds to designate corridors or evaluate environmental impacts on non-Federal land.

The Secretaries' approach is flawed in at least four ways: (1) amending resource management and land use plans significantly effects the human environment, therefore, a detailed EIS is required by NEPA, (2) the PEIS did not consider alternatives nor did it consider indirect impacts, (3) confining analysis to Federal land constitutes "segmented action", and (4) the practice of "tiering" means that alternative locations will not be evaluated at the local level either.

## DISCUSSION

### NEPA Background and Requirements:

The National Environmental Policy Act (NEPA) has "twin aims": (1) it requires government agencies to consider the environmental impacts of proposed actions, and (2) it mandates that agencies inform the public of environmental impacts and how their proposal addresses those environmental impacts. *Citizens' Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1021 (10th Cir. 2002). It does not require an agency to place environmental concerns above other considerations, just that the agency take a "hard look" at environmental consequences before taking major action. *Id.* at 1022. When agencies prepare to take actions that significantly effect the human environment, that "hard look" takes the form of an Environmental Impact Statement (EIS). *Id.*

In order to determine if the action will significantly affect the human environment, an Agency may perform a less detailed Environmental Assessment (EA). *Id.* If no significant impact is found, the agency will issue a Finding of No Significant Impact (FONSI), which is subject to administrative and judicial review. *Id.* If the agency finds significant impact(s), then an EIS will be prepared and the

process includes scoping, preparing a Draft EIS (DEIS), which is presented to the public, the states, and other agencies for notice and comment, and preparing a Final EIS (FEIS) after evaluating the feedback. *Id* A Supplemental (SEIS) is appropriate when the proposed action substantially changes after the DEIS or FEIS is prepared. *Id*

The Four (4) Ways the Secretaries' Approach to the PEIS is Flawed:

(1) AMENDING RESOURCE MANAGEMENT AND LAND USE PLANS AFFECTS THE HUMAN ENVIRONMENT; THEREFORE, A DETAILED EIS IS REQUIRED BY NEPA.

According to NEPA, all Federal agencies are required to include a detailed environmental impact statement when any major action is taken that significantly affects the quality of the human environment. 42 U.S.C. § 4332(2)(C). "Approval of a resource management plan (RMP) is considered a major Federal action significantly affecting the quality of the human environment." 43 C.F.R. 1601.0-6. See also *N.M. Wilderness Coal*, 129 IBLA 158, 158 (1994). Since "approval" of an RMP requires a detailed EIS, it follows that incorporating the designated Corridors into local RMPs also requires a detailed EIS rather than a high-level PEIS.

Here, the EPAct requires that the Secretaries incorporate the designated Corridors into the relevant agency land use and resource management plans. 42 U.S.C. 15926. Pursuant to the statute, the PEIS calls for the Carlsbad, Farmington, Fort Bliss, Mimbres, Rio Puerco, and Roswell RMPs to be amended to designate the energy Corridors. See *Volume 2, Appendix A*. The Bureau of Land Management (BLM) process for conducting plan amendments is similar to the process for creating RMPs, except that circumstances may allow for completing a plan amendment through the EA process, rather than through the EIS process. *BLM Land Use Planning Handbook*, H-1601-1, p.44

(2003). Due to the significant impacts of on-the-ground activity either process would result in an EIS. Therefore, amending RMPs to accommodate the energy Corridors requires a detailed EIS rather than a PEIS.

**(2) THE PEIS DID NOT CONSIDER ALTERNATIVES NOR DID IT CONSIDER INDIRECT IMPACTS.**

The scope of an EIS should also consider alternatives. 40 C.F.R. § 1508.25(b). In addition to the “no action” alternative, “other reasonable courses of action” and “mitigation measures” should be considered. *Id.* In determining the scope of an EIS, an agency should also consider “direct,” “indirect,” and “cumulative” impacts. 40 C.F.R. § 1508.25. The draft PEIS published here considered the “no action” alternative but did not consider “other reasonable courses of action” and “mitigation measures.” See *Executive Summary*, ES.7. Also the PEIS only considered direct impacts, not “indirect,” and “cumulative” impacts. See *Executive Summary*, ES.8. The locations of connecting corridors create indirect impacts that should have been considered. Alternative locations based on the locations of the connecting corridors should also have been considered.

**(3) CONFINING ANALYSIS TO FEDERAL LAND CONSTITUTES “SEGMENTED ACTION.”**

“NEPA instructs that significant cumulative impacts are not to be made to appear insignificant by breaking a project down into small component parts.” *Utahns For Better Transp. v. US Dept. of Transp.*, 305 F.3d 1152, 1182 (10th Cir. 2002) (*citing* 40 C.F.R. § 1508.27(b)(7)). The scope of an EIS should include closely-related “connected actions,” defined as those that (a) automatically trigger other actions that would require an EIS, (b) cannot proceed unless other actions are taken previously or

simultaneously, or (c) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. §§ 1508.25(a)(1), (3).

By examining each of these three definitions in turn, it is clear that the environmental impacts analyzed by the Secretaries in this case should have taken into consideration the segments in between the Federal land Corridors since the identification of those connecting corridors constitutes a closely-related connected action. First, the designation of the Corridors will automatically trigger permit applications which, the Secretaries admit, will require an EIS. Since the Corridors cannot stand alone and are useless for transmitting energy without pathways across non-Federal land, it follows that applicants for permits to use the Corridors, will, simultaneously, begin to identify and obtain rights-of-way (ROW) on private land, an activity that may also require an EIS. Therefore, Corridor designation on Federal land will automatically trigger the acquisition of non-Federal land to connect the Corridors and an EIS, and thus designating the Federal Corridors will automatically trigger other actions, the non-Federal Corridors, which require an EIS. The first definition of “connected action” applies here.

Second, designating Corridors on Federal land is connected to designating Corridors on non-Federal land since the transmission of energy using the Corridors as part of a national energy infrastructure cannot proceed unless and until corridors on non-Federal land are designated either previously or simultaneously. Therefore, the Federal Corridors cannot proceed as intended unless other actions are taken previously or simultaneously and the second definition “connected action” is met here as well.

Finally, the Federal Corridors are interdependent parts of a larger action, i.e., the national energy transmission infrastructure, and are only justified within the context of connecting, continuous corridors. Therefore, siting Corridors on non-Federal land are interdependent parts of a larger action and fit the third definition of “connected action.”

Because the location of non-Federal Corridors meets all of the definitions of a connected action, it is a violation of NEPA for the Secretaries to ignore the locations and environmental impacts of Corridors on non-Federal land. In fact, the draft PEIS published by the Secretaries can be said to make “significant cumulative impacts . . . appear insignificant by breaking [the Corridor] project down into small component parts.” See *Utahns For Better Transp.*, 305 F.3d 1152, 1182, *Supra*.

(4) “TIERING” MEANS THAT ALTERNATIVE LOCATIONS WILL NOT BE EXAMINED AT THE LOCAL LEVEL EITHER.

Agencies are encouraged to “tier” their environmental impact statements to eliminate repetition. 40 C.F.R. § 1502.20. “Tiering” means that subsequent environmental impact statements, such as a site-specific assessment, need only summarize the issues discussed in the broader program-wide statement and incorporate discussions from the broader statement by reference. *Id*

The purpose of “tiering” is avoid repeating the work that was done for the higher-level decision; thus, the earlier decision is not revisited. When the construction of pipelines and electrical transmission lines are being planned, it will naturally be presumed that the agencies completed the appropriate environmental analyses before deciding the locations of the corridors. Alternate locations will not be considered as that would defeat the purpose of tiering and result in repetitive efforts.



The Secretaries state in the draft PEIS that future individual projects will be subject to a complete environmental review and that statement is clearly misleading. *See Executive Summary*, ES.4. The environmental review will not be a fresh review but will incorporate by reference the PEIS. See Draft PEIS Executive Summary, ¶ ES.9 (“Individual project analyses . . . may tier off the PEIS, thus using and referencing the information, analyses, and conclusions presented in the PEIS...”). Therefore, the local permit approving bodies will not be empowered to change the locations of these energy Corridors. They may deny a permit, but they will not have the authority to move a corridor. This has tremendous land use impacts that must be assessed, in detail, before the proposed Corridor locations are approved.

Moreover, the misleading statement that future individual projects will be subject to a complete environmental review has the effect of reducing the public comment on the locations of the Federal Corridors until it is too late. NEPA seeks to inform the public about the environment. 42 U.S.C. §43.32(1)(G) (“[A]ll agencies of the Federal government shall . . . make available to . . . individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment”). It follows that leading the public to believe that there are no impacts to non-Federal land from designating locations of Corridors on Federal land, when there clearly are, flies in the face of the fundamental policy Congress articulated when it enacted NEPA.

## **RECOMMENDATIONS**

The contemplated power corridor through the Algodones and Placitas area will negatively affect many residents and natural amenities, including:

- Ø The Algodones and Las Colonias residential areas;
- Ø Numerous private homes and small farms north and east of Placitas;
- Ø The Diamond Tail Estates Master Plan;
- Ø The Montezuma Ridge Open Space area;
- Ø Numerous small residents and historic farms south of the Diamond Tail Ranch;
- Ø The San Pedro Creek Estates subdivision;
- Ø The Paako subdivision;
- Ø The Campbell Ranch Master Plan area;
- Ø The Indian Flats and Cedar Creek residential area;
- Ø The Las Huertas Creek stream course, an environmentally sensitive area.

We propose that a more logical alignment can be achieved on the Highway 22 corridor, from Interstate 25 to Highway 14 and then continuing south on Highway 14 in a manner similar to the proposed Placitas alignment. See Attachment A. This alternative avoids the significant and unavoidable impact of the Placitas corridor, and allows for a distribution of the right of way burden among large land holdings. Placing the corridor on the boundaries of these holdings minimizes the deleterious effect on any one of them, and provides a simplified, rational alternative to driving a corridor through many small residents and farming families.

The two routes, Alternatives A and B, are offered as possible corridors to access the Highway 22 alignment. Each has a feature that supports its consideration. For Alternative A, the extension of the corridor parallels the Plains highline to a point on the Highway 22 alignment and then continues south. While we have not consulted the Pueblos, particularly the San Felipe Pueblo, we maintain that

this proposal is no more objectionable than the PEIS corridor in terms of length and impact on the various Pueblos.

Alternative B is designed to reach the Highway 22 alignment using the boundaries of the various Pueblos. We offer that this may be less objectionable to them, as large and highly visible power line structures would be shared by adjoining Pueblos, and it avoids the need to cut through their lands in an arbitrary manner.

We acknowledge that there may be other routes that accomplish the goal of reaching and utilizing the Highway 22 alternative, and offer these as two examples, each with their unique attributes, as a basis to begin discussion and refinement of the general proposal.

Please feel free to contact our office for more information.

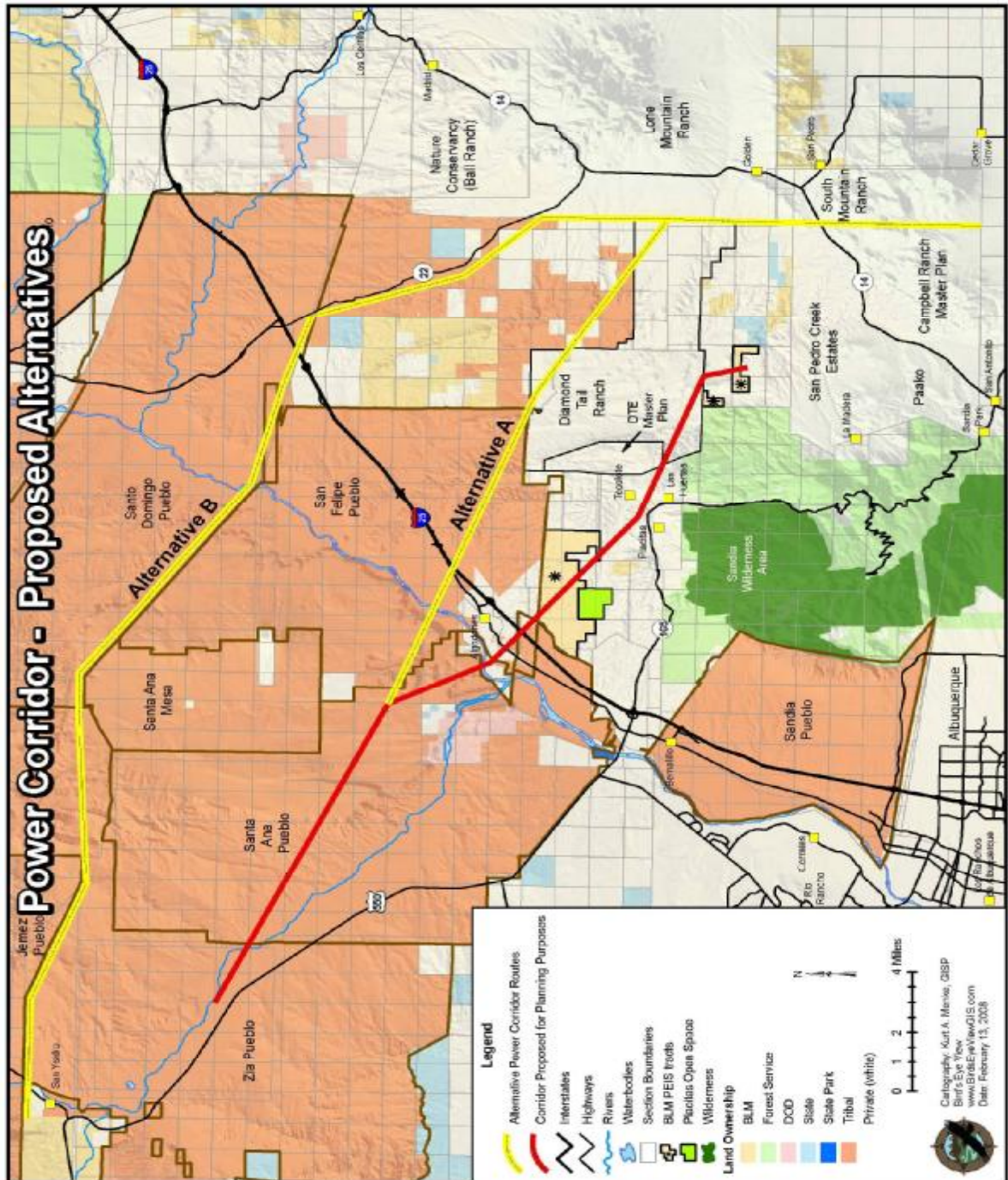
Best regards,

RODEY, DICKASON, SLOAN, AKIN & ROBB, PA

By

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Gina T. Constant

## Attachment A: Map of Proposed Alternatives



**Attachment B: Comments Spoken at Public Hearing January 24, 2008**

I'm Gina Constant, attorney with Rodey Law Firm, representing Diamond Tail Estates I, the owner of a private residential development located north and east of the village of Placitas.

I want to point out that there are two major legal problems with the designation of energy corridors proposed today. The first is that the assessment of environmental impacts to our state has NOT been adequately addressed under the National Environmental Protection Act, or NEPA, and the second is the violation of the Takings Clause of the 5<sup>th</sup> Am. of the Constitution which prohibits the taking of private land for public use without just compensation.

First the environmental concerns. Alternative locations for these corridors were not seriously examined with the goal of assessing the environmental impacts to our national parks, forests, wildlife refuges, open space, water supply, culturally and historically important lands, etc. The claim is that once ground work to bury these pipelines is imminent a complete study will be done but the fact is that by that time, these corridor locations will have been finalized and the local agencies and utility companies who will do those on the ground assessments won't have the authority to move them. So the time to balance the need of a national energy infrastructure – which is not necessarily a bad idea – with the need to protect the environment, wildlife and people of our beautiful state is now, BEFORE the locations are finalized, not later when there will be little we can do about it.

Further, the map of the proposed corridors shows dashed lines criss-crossing our state from the northwest corner to the southeast corner and from the southwest corner to central NM. In most

cases, unlike the Placitas area, no corridors on the private land between the dashes have been contemplated. How can you assess the best location on Federal land without considering the location of the corridors on private land that connects them? The answer is: you can't. So the environmental impacts to our state and its citizens have not been evaluated and the time to do so is now, before the locations are finalized.

The second legal problem is the inevitable taking of private land. It looks like the energy corridors were drawn criss-crossing our state in support of a national energy infrastructure – again not necessarily a bad idea – and then portions of the lines were erased where the corridors would cross tribal and private land. The energy corridors will not function, and not one watt of electricity will make it to California, without connecting the dots and connecting the dots is not addressed in this plan. (And remember, this is no ordinary 5 or 6 foot utility easement, this is a 3500 foot wide – that's two-thirds of a mile wide – swath of land.) A proposed plan that does not take into account a necessary requirement for its success is not a viable plan. This plan, which does not take into account how or when private land will be acquired, or how just compensation, which is required by the Constitution, will be calculated, is an incomplete plan that cannot stand on its own and must not be approved.

Additionally, if these Federal energy corridors are designated and approved, the land lying on a trajectory connecting the Federal corridors will effectively be condemned. There will be an instant depressing impact on that private land both as to value and use. People will be reluctant to develop the land, and buyers will be reluctant to buy the land with all of that uncertainty attached. Will the corridor on my property be a straight line? Will it curve north 10 miles? South? The tying up of

that land for potentially years to come is a government eminent domain of private property without just compensation and it is unconstitutional.

To summarize, there are at least two major problems: (1) the environmental impacts to our state have not been properly examined, and now is the time to do so, not later when we can't relocate the corridors, and (2) the plan ignores the Constitutional due process requirements related to the taking of private property. Both of these deficiencies make the proposed plan for locating the energy corridors unviable and unworkable and it should not be approved.

Thank you.