

1 Michael K. Kennedy (Bar No. 04224)  
2 Jerald C. Thompson (Bar No. 09324)  
3 Bradley J. Glass (Bar No. 22463)  
4 GALLAGHER & KENNEDY, P.A.  
5 2575 East Camelback Road  
6 Phoenix, Arizona 85016-9225  
7 Telephone: (602) 530-8000  
8 Facsimile: (602) 530-8500  
9 Email: mkk@gknet.com

10 Attorneys for Defendants Arizona Clean Fuels Yuma, LLC and Glenn McGinnis

11 **UNITED STATES DISTRICT COURT**

12 **DISTRICT OF ARIZONA**

13 QUECHAN INDIAN TRIBE OF THE  
14 FORT YUMA INDIAN RESERVATION, a  
15 federally recognized Indian Tribe,

16 Plaintiff,

17 v.

18 U.S. DEPARTMENT OF THE INTERIOR;  
19 DIRK KEMPTHORNE, as Secretary of the  
20 Interior; U.S. BUREAU OF  
21 RECLAMATION; ROBERT W.  
22 JOHNSON, as Commissioner, Bureau of  
23 Reclamation, U.S. Department of Interior;  
24 LARRY WALKOVIK, as Acting Regional  
25 Director, Lower Colorado Region, Bureau of  
26 Reclamation, U.S. Department of Interior;  
27 JAYNE HARKINS, as Acting Regional  
28 Director, Lower Colorado Region, Bureau of  
29 Reclamation; JIM CHERRY, as Area  
30 Manager, Yuma Area Office, Bureau of  
31 Reclamation; WELLTON-MOHAWK  
32 IRRIGATION AND DRAINAGE  
33 DISTRICT; CHARLES W. SLOCUM; as  
34 General Manager, Wellton-Mohawk  
35 Irrigation and Drainage District; ARIZONA  
36 CLEAN FUELS YUMA, LLC; GLENN  
37 MCGINNIS, as Chief Executive Officer,  
38 Arizona Clean Fuels Yuma, LLC,

39 Defendant.

CV 07-0677-PHX-JAT

**ARIZONA CLEAN FUELS YUMA,  
LLC'S AND GLENN MCGINNIS'  
MOTION FOR SUMMARY  
JUDGMENT**

1 Defendants Arizona Clean Fuels Yuma, LLC and Glenn McGinnis (collectively  
2 “ACF”), through their attorneys and pursuant to Fed. R. Civ. P. 56(b), respectfully move  
3 for judgment in their favor and against Plaintiff Quechan Indian Tribe of the Fort Yuma  
4 Indian Reservation (the “Tribe”). There is no genuine issue as to any material fact and  
5 ACF is entitled to judgment as a matter of law.

6 **I. NATURE OF THE CASE**

7 In this action, the Tribe seeks judicial review under the Administrative Procedure  
8 Act, 5 U.S.C. §§ 701-706 (“APA”), of the March 26, 2007 *Record of Decision of the*  
9 *Lower Colorado Region for the Wellton-Mohawk Title Transfer, Yuma County* (“ROD”)  
10 issued by the United States Bureau of Reclamation (“BOR”), as well as actions taken by  
11 BOR after the ROD had been issued. Specifically, the Tribe alleges BOR violated the  
12 National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (“NEPA”), and the  
13 National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (“NHPA”), in connection  
14 with the transfer of lands and various works (the “Title Transfer”) to the Wellton-  
15 Mohawk Irrigation and Drainage District (the “District”) under the Wellton-Mohawk  
16 Transfer Act, Pub. L. No. 106-221, 114 Stat. 351 (June 20, 2000) (the “Transfer Act”).

17 The Tribe has conceded in open court, and the Court has ruled, that the Tribe has  
18 no cause of action against the District or ACF. Order of July 12, 2007 (Doc. # 86) at 6  
19 (“Clearly, since Plaintiff cannot state a cause of action against the non-federal  
20 Defendants, its claim for injunctive relief against the non-federal Defendants must fail  
21 under Rule 12(b)(6) of the Federal Rules of Civil Procedure”). Regardless, the District  
22 and ACF have been joined in the action as “persons needed for just adjudication” under  
23 Fed. R. Civ. P. 19(a). *Id.* at 13.

24 The Court addressed the Tribe’s claims in its Findings of Fact and Conclusions of  
25 Law dated June 29, 2007, which denied the Tribe’s Application for a Preliminary  
26 Injunction (Doc. # 85); and in the Court’s Order of July 12, 2007, which granted in part,  
and denied in part, Motions to Dismiss filed by the District and ACF (Doc. # 86).

1 **II. BACKGROUND**

2 In 1998, BOR began the process of transferring title to 47,626 acres of federal land  
3 (the “Transfer Lands”) to the District.<sup>1</sup> The Title Transfer was mandated by the  
4 *Memorandum of Agreement between United States Department of the Interior Bureau of*  
5 *Reclamation Lower Colorado Region Yuma Area Office and Wellton-Mohawk Irrigation*  
6 *and Drainage District to Transfer Title to Works, Facilities, and Lands in the Wellton-*  
7 *Mohawk Division of the Gila Project, Arizona*, dated July 10, 1998 (the “MOA”),<sup>2</sup> as well  
8 as the Transfer Act.

9 In August of 2003, BOR published a Draft Environmental Impact Statement  
10 (“DEIS”) for the Title Transfer.<sup>3</sup> On November 17, 2003, ACF notified BOR that ACF  
11 had selected a portion of the Transfer Lands as one of two possible sites for the  
12 development of an oil refinery project.<sup>4</sup>

13 In order to obtain the required air quality permit from the State of Arizona,<sup>5</sup> ACF  
14 and the Arizona Department of Environmental Quality (“ADEQ”), published notice of  
15 the availability of a draft permit and the dates and times of public meetings regarding the  
16 refinery in the *Arizona Republic* (on September 14 and September 21, 2004), the *Yuma*  
17 *Daily Sun* (on September 17 and September 24, 2004) and the *Bajo El Sol* (Yuma) (also  
18 on September 17 and September 24, 2004) newspapers.<sup>6</sup> Public meetings and hearings  
19

---

20 <sup>1</sup> Final Environmental Impact Statement (“FEIS”) at ES-1 – ES-3, 1-1 – 1-4. The FEIS may be  
21 found in its entirety in Vol. 11, pp. 006575 – 007133 of the Administrative Record (“AR”) filed with the  
Court on August 14, 2007 (Doc. # 109).

22 <sup>2</sup> AR000056 - 000066.

23 <sup>3</sup> 68 Fed. Reg. 52,613 (Sept. 4, 2003).

24 <sup>4</sup> Letter from John Greenbank, Managing Director, ACF, to Margo Selig, BOR (Nov. 17, 2003)  
25 (AR003259).

26 <sup>5</sup> A.R.S. §§ 49-421 – 467.

<sup>6</sup> Declaration of Glenn McGinnis ¶ 5 (Oct. 15, 2007), Exhibit A.

1 were held to discuss the refinery in Wellton (on October 5 and November 9, 2004),  
2 Phoenix (on October 6 and November 10, 2004) and Yuma (on October 7 and November  
3 16, 2004).<sup>7</sup> The public was allowed until January 10, 2005 to submit written comments.<sup>8</sup>  
4 The Tribe did not participate in the process or submit any questions or comments  
5 regarding the refinery.<sup>9</sup>

6 An Air Quality Class I Permit was issued to ACF on April 14, 2005.<sup>10</sup> The Permit  
7 originally required the construction of the refinery to commence by September 13,  
8 2007.<sup>11</sup> That date has now been extended to April 20, 2008.<sup>12</sup>

9 While ACF was taking the steps necessary to secure the air quality permit, the  
10 Yuma County Board of Supervisors considered changes to its comprehensive plan.<sup>13</sup> In  
11 December of 2004, pursuant to a public process that had begun months earlier, the Yuma  
12 County Board of Supervisors approved a comprehensive plan amendment changing the  
13 land use designation for approximately 3,300 acres of the Transfer Lands from  
14 agriculture to heavy industrial.<sup>14</sup> The public process and resulting comprehensive plan  
15  
16  
17

---

18 <sup>7</sup> *Id.*

19 <sup>8</sup> *Id.*

20 <sup>9</sup> *Id.*, ¶ 6.

21 <sup>10</sup> *Id.*, ¶ 7. Letter from Nancy Wrona, Director, Air Quality Division, ADEQ, to Glenn McGinnis,  
22 Chief Executive Officer, ACF (April 14, 2005). The Permit itself consists of 499 pages, while the  
23 *Technical Support Document and Statement of Basis for Construction of Arizona Clean Fuels Yuma, LLC  
Petroleum Refinery* supporting document contains an additional 449 pages of analysis. FEIS at RL-1; see  
40 C.F.R. § 1502.21 (2007) (directing incorporation of material into an FEIS by reference).

24 <sup>11</sup> Exhibit A, ¶ 8.

25 <sup>12</sup> *Id.*

26 <sup>13</sup> *Id.*, ¶ 9.

<sup>14</sup> *Id.*

1 amendment were targeted directly at allowing the oil refinery project to proceed on the  
2 Transfer Lands.<sup>15</sup> Again, the Tribe did not participate in the process.<sup>16</sup>

3 To implement the NHPA process, BOR “in consultation with the SHPO<sup>17</sup> *and the*  
4 *tribes*, . . . designed and implemented a cultural resources program to determine the  
5 nature and extent of cultural resources on lands proposed for transfer, in accordance with  
6 36 CFR 800.4.”<sup>18</sup> The program was conducted by an outside archaeological consulting  
7 firm, Statistical Research, Inc. (“SRI”).<sup>19</sup> The first phase included a Class I inventory  
8 (literature and archival search) to identify known archeological sites and cultural  
9 resources in the vicinity of the proposed title transfer.<sup>20</sup> The original proposed action  
10 involved approximately 57,000 acres.<sup>21</sup> SRI analyzed those 57,000 acres plus a 2.5 mile  
11 buffer around the perimeter of those lands.<sup>22</sup>

12 The second phase of the program involved a Class II or III inventory of  
13 approximately 5,900 acres of undisturbed land utilizing pedestrian surveys.<sup>23</sup> BOR and  
14 SRI focused the survey on undisturbed lands most likely to contain eligible sites.<sup>24</sup> BOR  
15

---

16 <sup>15</sup> *Id.*

17 <sup>16</sup> *Id.*, ¶ 10.

18 <sup>17</sup> Arizona State Historic Preservation Office.

19 <sup>18</sup> Final Environmental Impact Statement (“FEIS”) at 3-36 (emphasis added). A detailed  
20 description of the efforts to locate and identify cultural resources is contained in Section 3.7 of the FEIS.

21 <sup>19</sup> See Letter from Sheila Logan, Project Manager, Bookman-Edmonston, to Jeff Altschul, SRI  
(May 7, 2003) (AR001936 - 001937).

22 <sup>20</sup> FEIS at 3-36.

23 <sup>21</sup> FEIS at 3-1.

24 <sup>22</sup> FEIS at 3-36.

25 <sup>23</sup> FEIS at 3-36 – 3-37.

26 <sup>24</sup> FEIS at 3-37. The 1,460 acres purchased by ACF was previously disturbed farmland. Exhibit  
A, ¶ 13. Accordingly, ACF’s land was not part of the Class II or III surveys.

1 determined that the majority of the Transfer Lands, including the lands purchased by  
2 ACF, were unlikely to have intact cultural resources due to extensive prior usage and  
3 disturbance.<sup>25</sup> SRI also conducted a geomorphic analysis of the project area utilizing  
4 Landsat-based remote sensing imagery, limited subsurface testing (using backhoe  
5 trenches), radiocarbon dating and optically stimulated luminescence dating.<sup>26</sup> In  
6 February of 2005, the District and BOR removed 2,124 acres of culturally sensitive lands  
7 from the Title Transfer.<sup>27</sup> Based on the continued concerns of certain consulting tribes,  
8 BOR agreed to inventory the remainder of the undisturbed lands.<sup>28</sup> The additional Class  
9 III inventory of 4,833 acres on over 93 parcels was completed in December of 2005.<sup>29</sup>  
10 As a result, *all* undisturbed lands in the Title Transfer area have been subject to either  
11 Class II or III level inventories.<sup>30</sup>

12 As ultimately configured, the Title Transfer involves 47,538 acres,<sup>31</sup> containing 19  
13 historic properties (five historic, thirteen prehistoric, and one multi-component).<sup>32</sup> The  
14 SHPO concurred with BOR's eligibility determinations by letters dated November 28,  
15 2005, and May 1, 2006.<sup>33</sup>

---

17 <sup>25</sup> FEIS at 3-37.

18 <sup>26</sup> FEIS at 3-36 – 3-37.

19 <sup>27</sup> FEIS, Table 3-4.

20 <sup>28</sup> FEIS at 3-38.

21 <sup>29</sup> *Id.*

22 <sup>30</sup> *Id.*

23 <sup>31</sup> ROD at 3.

24 <sup>32</sup> FEIS at 3-40.

25 <sup>33</sup> FEIS at 3-40; Letter from Jo Anne Medley, Compliance Specialist/ Archaeologist, SHPO, to  
26 Deanna J. Miller, Director, Resource Management Office, BOR (Nov. 28, 2005) (FEIS, App. G); Letter  
from Jo Anne Medley, Compliance Specialist/Archaeologist, SHPO, to William J. Liebhauser, Acting  
Director, Resources management Office, BOR (May 1, 2006) (AR006346 – 006348).

1 In a letter dated January 22, 2007, the Advisory Council on Historic Preservation  
2 (“ACHP”) approved BOR’s cultural resource investigation and specifically determined:

3 Based on information we have reviewed, it is our view that the BOR has  
4 made a “reasonable and good faith effort” to identify archaeological  
5 properties listed on or eligible for the National Register. A 100 percent  
6 survey of affected lands, or locating all historic properties within the Area  
of Potential Effects, is *not* a requirement of the ACHP’s regulations.<sup>34</sup>

7 BOR determined that “the surveys conducted for this project constitute the most  
8 comprehensive cultural resources inventory conducted in this region to date.”<sup>35</sup> “Based  
9 on the overall survey results, approximately 92.5 percent of significant cultural resources  
10 were identified in the project area.”<sup>36</sup>

11 Throughout the NHPA process, BOR and the District consulted the Tribe and  
12 requested the identification of eligible sites.<sup>37</sup> The FEIS notes:

13 Reclamation has regularly consulted with interested groups since 2002;  
14 meetings have been held on a monthly basis since 2004. More than 30  
15 formal government-to-government and tribal information meeting[s] have  
16 been held to explain the proposed title transfer and to provide an update on  
17 the status of the [NHPA] Section 106 process. Reclamation has requested  
tribal input regarding cultural resources or information on traditionally  
important places in the project area at meetings and during field visits.<sup>38</sup>

18 In spite of the years of meetings and consultations, the Tribe has not identified any  
19 specific Traditional Cultural Properties (“TCPs”) or other eligible sites in the Title  
20 Transfer area that BOR failed to investigate or consider.<sup>39</sup>

---

21 <sup>34</sup> Letter from Reid J. Nelson, Assistant Director, Federal Property Management Section, Office  
22 of Federal Agency Programs, ACHP, to Jim Cherry, Area Manager, BOR (Jan. 22, 2007) (AR007156 –  
007158) (emphasis added).

23 <sup>35</sup> FEIS at 3-35.

24 <sup>36</sup> FEIS at 3-38.

25 <sup>37</sup> FEIS at 5-4.

26 <sup>38</sup> FEIS at 5-4.

<sup>39</sup> ROD at 11.

1 In December of 2006, BOR issued the FEIS for the Title Transfer.<sup>40</sup> On March  
2 26, 2007, BOR issued the ROD, approving the land transfer pursuant to the MOA and the  
3 Transfer Act.<sup>41</sup>

4 After the ROD had been issued on March 26, 2007, BOR conveyed 39,142.21  
5 acres of the Transfer Lands to the District, in accordance with the MOA, the Transfer Act  
6 and the ROD.<sup>42</sup> Subsequently on March 26, 2007, the District sold approximately 1,460  
7 acres of the Transfer Lands it had received from BOR to ACF in exchange for a purchase  
8 price of \$14,681,100.00.<sup>43</sup>

### 9 **III. DISCUSSION**

10 In order to save the Court from having to review the same discussion from the  
11 Defendants in multiple presentations, the District has agreed to present the discussion  
12 regarding the Tribe's claims under NEPA, and ACF has agreed to discuss the Tribe's  
13 claims under NHPA. Accordingly, ACF hereby adopts and incorporates the District's  
14 Motion for Summary Judgment by this reference.

#### 15 **A. BOR Complied With Its Obligations Under NHPA**

##### 16 **1. NHPA**

17 While the obligations imposed by NHPA are separate and independent from those  
18 mandated by NEPA, "the two statutory schemes are closely related." *Apache Survival*  
19 *Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994).

20 Both acts create obligations that are chiefly procedural in nature; both have  
21 the goal of generating information about the impact of federal actions on  
22 the environment; and both require that the relevant federal agency carefully  
23 consider the information produced.

---

24 <sup>40</sup> 72 Fed. Reg. 1,239 (Jan. 10, 2007).

25 <sup>41</sup> AR007398 – 007409.

26 <sup>42</sup> Exhibit A, ¶ 12.

<sup>43</sup> *Id.*



1 *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005), citing  
2 *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982).

3 Section 106 of NHPA requires planners of a federally supported project to “take  
4 into account the effect of the undertaking” on any area eligible for inclusion in the  
5 National Register of Historic Places. 16 U.S.C. § 470f; *see id.* § 470a(a) (guidelines and  
6 criteria for National Register regulations). At the same time, NHPA directs the agency  
7 involved to “consult with any Indian tribe . . . that attaches religious and cultural  
8 significance” to an affected area. *Id.* § 470a(d)(6)(B).

9 The NHPA explicitly delegates authority to ACHP to promulgate regulations  
10 interpreting and implementing Section 106. 16 U.S.C. § 470s. ACHP has issued detailed  
11 regulations giving substance to the consultation requirements of § 106. 36 C.F.R. pt. 800  
12 (2006). The “complex consultative process” includes specific steps and time limits. *Save*  
13 *Our Heritage, Inc. v. Fed. Aviation Admin.*, 269 F.3d 49, 62 (1st Cir. 2001).

14 Under the regulations promulgated by ACHP, BOR is responsible for initiating  
15 consultations with both the Tribe and SHPO. 36 C.F.R. § 800.3(c) (2006). The Tribe  
16 may become a consulting party when it considers a site that might be affected to have  
17 religious or cultural significance. 36 C.F.R. § 800.2(c)(2)(ii) (2006). Such a consulting  
18 tribe is then entitled to:

19 [A] reasonable opportunity to identify its concerns about historic properties,  
20 advise on the identification and evaluation of historic properties, including  
21 those of traditional religious and cultural importance, articulate its views on  
22 the undertaking’s effects on such properties, and participate in the  
23 resolution of adverse effects.

24 36 C.F.R. § 800.2(c)(2)(ii) (2006). Each stage of the consultation process – initiating the  
25 process, advising on the identification of properties, expressing views on assessing the  
26 undertaking’s effects on the properties, and participating in resolving those effects – is  
spelled out in detail in 36 C.F.R. §§ 800.3 – 800.7 (2006).

1 Section 106 requires that agency decision makers “stop, look, and listen,” but not  
2 that they reach particular outcomes. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177  
3 F.3d 800, 805 (9th Cir. 1999); *Bus. & Residents Alliance v. Jackson*, 430 F.3d 584, 591  
4 (2d Cir. 2005) (NHPA “does not itself require a particular outcome, but rather ensures  
5 that the relevant federal agency will, before approving funds or granting a license to the  
6 undertaking at issue, consider the potential impact” on historic places). The key in  
7 evaluating an agency’s compliance with NHPA, is whether the agency conducted a  
8 “reasonable and good faith effort” to identify and locate cultural resources in the affected  
9 area. 36 C.F.R. § 800.4(b)(1) (2006); see *Native Americans for Enola v. U.S. Forest*  
10 *Serv.*, 832 F.Supp. 297 (D. Or. 1993), *vacated on other grounds*, 60 F.3d 645 (9th Cir.  
11 1995) (if a federal agency makes a good faith effort to find historic properties, considers  
12 an undertaking’s effects on those properties and consults with the SHPO, the decision to  
13 proceed with the undertaking is not arbitrary and capricious).

14 It should also be recognized that the Tribe is entitled to “identify its concerns,” to  
15 “advise,” to “articulate,” and to “participate.” 36 C.F.R. § 800.2(c)(2)(ii)(A). But  
16 consultation is not the same thing as “control” over a project. See *Save Our Heritage*,  
17 269 F.3d at 62 (“[T]he choice whether to approve the undertaking ultimately remains  
18 with the agency”).

## 19 2. The Quechan Tribe

20 In this case, BOR went through extraordinary lengths to identify and locate any  
21 cultural resources in the Transfer Lands. The use of Class II and III surveys of one  
22 hundred percent (100%) of the undisturbed properties resulted in the removal of several  
23 thousand acres of the lands initially included in the transfer. The extensive consultations  
24 with not only the Plaintiff Tribe, but all affected tribes in the area; close coordination  
25 with the SHPO and ACHP; and years of studies, resulted in the identification of over  
26 ninety percent (90%) of the significant cultural resources in the project area.

1           Importantly, despite years of meetings and requests, the Tribe involved in this  
2 litigation did not identify any specific Traditional Cultural Properties or other eligible  
3 sites in the Title Transfer area that BOR failed to investigate or consider. Where no  
4 historic property has been identified, the Tribe has no basis under NHPA to demand  
5 particular actions by BOR. *See Morongo Band of Mission Indians v. Fed. Aviation*  
6 *Admin.*, 161 F.3d 569, 582 (9th Cir. 1998) (tribal concurrence not necessary under NHPS  
7 where finding of no possible effect on historic properties is properly made); *Apache*  
8 *Survival Coal.*, 21 F.3d at 907 – 908 (applying the doctrine of laches when an objecting  
9 tribe failed to timely participate in the NHPA process); *Narragansett Indian Tribe v.*  
10 *Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003) (dismissing a challenge under  
11 NHPA when the objecting tribe provided only scant specific information regarding any  
12 potential cultural resources).

13           In short, BOR initiated a thorough, scientific program to identify any potential  
14 cultural resources in the project area; extensively consulted with the Tribe, all potentially  
15 affected tribes, the SHPO and ACHP; and minimized any potential impact to cultural  
16 resources by removing the affected lands from the transfer. ACHP specifically found that  
17 BOR “has made a ‘reasonable and good faith effort’ to identify archaeological properties  
18 listed on or eligible for the National Register.” BOR clearly met its obligations under  
19 NHPA, and those efforts are entitled to deference. *Chevron U.S.A. v. Natural Res. Def.*  
20 *Council*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

21                           **a.       Consultation**

22           The Tribe’s initial objections to the NHPA process concern BOR’s perceived  
23 failure to “meaningfully” consult with the Tribe throughout the Section 106 process.  
24 First Amended Complaint, ¶¶ 147 – 155. According to the Tribe, BOR failed to  
25 “consult” with the Tribe, and, when BOR did consult with the Tribe, BOR failed to do so  
26 in recognition of the “sensitive nature” of potential cultural resources. *Id.*, ¶¶ 150 – 152.  
The objections are not supported by the facts.

1 Regular meetings with interested tribes had taken place since 2002. FEIS at 5-4.  
2 *Monthly* meetings had taken place since 2004. *Id.* BOR held more than 30 formal  
3 government-to-government and tribal information meetings. *Id.* BOR addressed the  
4 Plaintiff Tribe’s specific concerns. *See, e.g.*, Letter from Jim Cherry, Area Manager,  
5 BOR, to Michael Jackson, President, Quechan Indian Tribe (July 25, 2005) (AR005716 –  
6 005724). Finally, when confidential, sensitive issues were involved, BOR treated the  
7 information accordingly. Letter from William J. Liebhauser, Director, Resources  
8 Management Office, BOR, to Michael Jackson, President, Fort Yuma-Quechan Indian  
9 Tribe (Dec. 8, 2006) (“We appreciate the confidential information provided in your letter  
10 dated May 25, 2006. [BOR] safeguards all such information and the letter will remain in  
11 this office”) (AR006562 – 006562-A). It is difficult to imagine what additional steps  
12 BOR could have taken under the circumstances.

13 It is most telling that the Tribe failed to identify a single Traditional Cultural  
14 Property that has not been investigated or considered by BOR during years of  
15 consultations. ROD at 11. The inability of the Tribe to identify a single TCP  
16 demonstrates that the Tribe’s intent in this litigation has less to do with protection of  
17 cultural resources of importance to Tribal members, and more to do with acquiring the  
18 land, or control over the land, once owned by BOR.

19 **b. Good Faith Efforts**

20 The Tribe also objects to the efforts made by BOR to identify “affected cultural  
21 resources.” First Amended Complaint, ¶¶ 156 – 159. According to the Tribe, conducting  
22 a “Phase II/Phase III” field survey on “only” 17% of the lands proposed for transfer is  
23 insufficient. *Id.*, ¶ 158. Interestingly, the Tribe does not suggest a percentage which  
24 *would* be sufficient. Nonetheless, the Tribe’s repeated citation to the bare numbers is  
25 misleading.

26 The most important issue is not the percentage of lands surveyed, but rather the  
methodology employed by BOR. First, BOR conducted a Class I survey using *all*

1 *available* studies. Second, one hundred percent (100%) of *all undisturbed* lands included  
2 in the Title Transfer *were* the subject of Class II or Class III surveys. FEIS at § 3.7. Both  
3 SHPO and ACHP found the process a “reasonable and good faith effort” to identify  
4 potential cultural resources. *See* n. 33 and 34, *supra*.

5 The approximately 1,460 acres purchased by ACF has been disturbed and used for  
6 farming for decades. Exhibit A, ¶ 13. The Tribe has not even suggested that any of  
7 ACF’s property contains any cultural resources. If a picture is worth a thousand words,  
8 the Court is invited to look at the aerial photographs of ACF’s property which are  
9 attached to Mr. McGinnis’ Declaration.<sup>44</sup> As can be seen by the photographs, these are  
10 not lands containing the remains of an ancient civilization, but rather abandoned farmland  
11 that is being slowly reclaimed by the desert. This is the very type of land that is the least  
12 likely to contain any type of artifact. FEIS at 3-37.

13 In short, there has been an elaborate, good faith effort by BOR to identify which  
14 lands may potentially hold cultural resources, and in-depth evaluations of one hundred  
15 percent (100%) of those lands. The Tribe’s claims to the contrary are not supported by  
16 the facts contained in the Administrative Record.

### 17 **c. Transfers**

18 The Tribe next contends that BOR failed to comply with NHPA by transferring  
19 some of the lands proposed for transfer prior to the completion of a Memorandum of  
20 Agreement, that ACHP disagreed with the decision, and that BOR failed to document its  
21 reasons for disregarding ACHP’s conclusions. First Amended Complaint, ¶¶ 160 – 164.  
22 Again, the Tribe misunderstands the requirements of NHPA and its claims are without  
23 merit.

24  
25  
26 

---

<sup>44</sup> The aerial photographs are offered for illustrative purposes only. *See S. Utah Wilderness Alliance v. Norton*, 277 F.Supp.2d 1169, 1176-1177 (D. Utah 2003), *appeal dismissed as moot*, 116 Fed. App’x 200 (10th Cir. 2004).

1 The requirements of NHPA apply only to “historic properties.” As stated in 36  
2 C.F.R. § 800.3(a)(1) (2006):

3 If the undertaking is a type of activity that does not have the potential to  
4 cause effects on historic properties, assuming such historic properties were  
5 present, the agency official has no further obligations under section 106 or  
6 this part.

7 *See Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d at 168 (“Where no  
8 historic property has been identified, the Tribe has no basis under the NHPA to demand  
9 particular actions by the Authority”).

10 In this case, *none* of the lands which have been transferred include “historic  
11 properties.” As explained by BOR:

12 We respectfully restate that because no historic properties were included in  
13 the lands transferred to date, we do not consider a segmentation to have  
14 occurred. . . Reclamation strictly followed the Section 106 regulations. We  
15 therefore were disappointed when several concessions of good will (i.e., the  
16 voluntary removal of 2,186 acres of the most sensitive land, regular  
17 communications via government-to-government consultations and  
18 information meetings, and additional inventories) failed to resolve  
19 differences with certain tribes. Project delays resulted in major cost  
20 overruns. After five years of consultation and with no end in sight,  
21 Reclamation’s management was forced to move ahead.

22 Letter from Jim Cherry, Area Manager, BOR, to Reid Nelson, Assistant Director, Federal  
23 Property Management Section, Office of Federal Agency Programs, ACHP (Aug. 7,  
24 2007) (Exhibit B).

25 None of the lands affected by the NHPA have been transferred and any  
26 disagreements with ACHP regarding “segmentation” have been adequately documented.  
In other words, BOR complied with 36 C.F.R. § 800.7(c)(4) (2006) (requiring  
documentation of any disagreement with ACHP).

**d. Area of Potential Effects**

The Tribe claims BOR should have had a wider “area of potential effects.” First  
Amended Complaint, ¶¶ 165 – 169. The Tribe does not state what the “area of potential

1 effects” *should have been*, but only that the area selected was “too narrow.” The Tribe  
2 ignores the fact that BOR’s “area of potential effects” included not only the *original*  
3 57,000 acres proposed for transfer (as opposed to the 47,538 acres currently being  
4 considered), but also a 2.5 mile buffer zone around those properties. FEIS at 3-36. In  
5 light of the fact that BOR considered *all* of the Transfer Lands, *plus* a 2.5 mile buffer  
6 zone, indicates that the Tribe’s claims are baseless.

7 **e. Districts and TCPs**

8 The Tribe’s final NHPA objections concern the failure of BOR to designate  
9 “districts” or “traditional cultural properties” (“TCPs”). First Amended Complaint, ¶¶  
10 170 – 178. The objections are not based on the premise that BOR failed to “stop, look  
11 and listen,” as the law requires, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d  
12 at 805, but that BOR should have “stopped, looked and listened” in a manner dictated by  
13 the Tribe. The Tribe does not have the authority under the NHPA to exercise such  
14 control over a project. *See Save Our Heritage*, 269 F.3d at 62 (“[T]he choice whether to  
15 approve the undertaking ultimately remains with the agency”). BOR, the agency,  
16 entrusted by Congress to apply NHPA, is entitled to considerable deference in carrying  
17 out those responsibilities. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837,  
18 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As with all other objections regarding  
19 BOR’s compliance with NHPA, the Tribe’s claims simply have no basis.

20 **B. ACF**

21 ACF has purchased 3.07% of the total Transfer Lands involved in this suit (1,460  
22 of 47,626 acres). ACF paid \$14,681,100.00 for that those lands. Exhibit A, ¶ 12. Those  
23 lands have long been disturbed by decades of farming. *Id.*, ¶ 13. Those are the lands  
24 least likely to contain anything of historical concern to the Tribe, and, in fact, the Tribe  
25 has never suggested there are any Traditional Cultural Properties on ACF’s land. ACF  
26 plans to use the property to build the first petroleum refinery in the United States to be  
constructed in the last 30 years, and the first facility in the western United States

1 specifically for the production of newer clean fuels. *Id.*, ¶ 3. Regardless, the Tribe asks  
2 the Court to direct ACF to place its multi-billion dollar project on hold while perceived  
3 technical procedural errors on the part of BOR are revisited. The Court should decline  
4 the Tribe's invitation.

5 The Tribe has failed to state a claim against ACF, and, in light of the Court's  
6 earlier rulings, the Tribe will fail in its claims against BOR. However, should the Court  
7 find there is some merit in the Tribe's contentions, the Court should still invoke its  
8 equitable powers and dismiss ACF from the case.

9 In deciding the appropriate remedy:

10 The district court must weigh "the competing claims of injury and the effect  
11 on each party of the granting or withholding of the requested relief."

12 *Espy*, 45 F.3d at 1343, citing *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531,  
13 542, 107 S.Ct. 1396, 94 L.Ed. 2d 542 (1987). Any weighing of the equitable factors in  
14 this case tips the scales decidedly in ACF's favor.

15 ACF's land has been previously disturbed, and it is highly unlikely any cultural  
16 resources remain on the property. See FEIS § 3.7; ROD at 10 ("All undisturbed lands  
17 have been surveyed"). However, if, during the course of construction, human remains or  
18 funerary objects are discovered, construction will stop and appropriate disposition made  
19 of the discovery – *under State law*. See A.R.S. § 41-865 (directing certain actions when  
20 human remains and/or funerary objects are discovered during development of private  
21 lands).

22 In short, it is not alleged ACF has done anything wrong; no claim has been stated  
23 against ACF; ACF properly relied on the presumption that the United States had properly  
24 performed its duties; and ACF paid good and valuable consideration for the property.  
25 This is a case in which all legal and equitable considerations align and counsel the  
26 dismissal of ACF from this lawsuit.

### C. The Transfer Act and APA





1 CERTIFICATE OF SERVICE

2 I hereby certify that on October 15<sup>th</sup>, 2007, I electronically transmitted the attached  
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
4 Notice of Electronic Filing to the following EM/ECF registrants:

5 Frank R. Jozwiak, Esq.  
6 Thane D. Somerville, Esq.  
7 MORISSET, SCHLOSSER,  
8 JOZWIAK & McGAW  
9 801 Second Avenue, Ste 1115  
10 Seattle, WA 98104  
11 Attorneys for Plaintiff  
12 Email: f.jozwiak@msaj.com  
13 t.somerville@msaj.com

14 Norman D. James, Esq.  
15 Todd Wiley, Esq.  
16 FENNEMORE CRAIG, P.C.  
17 3003 North Central Avenue, Ste. 2600  
18 Phoenix, AZ 85012  
19 Attorneys for Defendant Wellton-  
20 Mohawk Irrigation and Drainage Dist.  
21 Email: njames@fclaw.com  
22 twiley@fclaw.com

23 Richard G. Patrick, Esq.  
24 Assistant U.S. Attorney  
25 UNITES STATES ATTORNEY  
26 Two North Renaissance Square  
40 North Central Ave., Ste. 1200  
Phoenix, AZ 85004  
Attorney for Federal Defendants  
Email: richard.patrick@usdoj.gov

27 I hereby certify that on October 15<sup>th</sup>, 2007, I served the attached document by U.S.  
28 Mail on the following, who are not registered participants of the CM/ECF system:

29 The Honorable James A. Teilborg  
30 United States District Court  
31 401 W. Washington  
32 Phoenix, Arizona 85003

33 s/ J.K. Powell

# **Exhibit A**

## **DECLARATION OF GLENN McGINNIS**

I, Glenn McGinnis, state and declare as follows:

1. My name is Glenn McGinnis. I am over 18 years of age and the information contained in this Declaration is based upon my own personal knowledge.

2. I am employed as the Chief Executive Officer of Arizona Clean Fuels Yuma, LLC (“ACF”). My duties include managing the daily operations of ACF, obtaining any required permits and approvals, managing ACF’s property and obtaining financing for ACF.

3. ACF intends to construct and operate a petroleum refinery in Yuma County, Arizona. If constructed, the project would represent the first new petroleum refinery constructed in the United States in more than 30 years, and the first facility in the western United States to be built specifically for the production of newer clean fuels.

### **Air Quality Permit**

4. ACF began the process of applying for an Air Quality Class I Permit to operate the refinery in late 1999. All of the information required by the Arizona Department of Environmental Quality (“ADEQ”) to process the application was submitted in mid-2002. The application was deemed to be administratively complete on September 4, 2002.

5. A draft permit was issued by ADEQ in 2004. A public notice for the draft permit, including the dates and times for three public meetings and three public hearings, was published in the *Arizona Republic* on September 14, 2004, and on September 21, 2004. Additional notices were also published in the *Yuma Daily Sun* and the *Bajo El Sol* (Yuma) newspapers on September 17, 2004, and September 24, 2004. Public meetings were held in Wellton, Phoenix, and Yuma

on October 5, 6, and 7, 2004, respectively. Public hearings were held in Wellton on November 9, 2004, in Phoenix on November 10, 2004, and in Yuma on November 16, 2004. During the public comment period, a request was made for an extension of the comment period. In response to this request, ADEQ published a notice in the *Arizona Republic* on December 10, 2004 and December 17, 2004, and in the *Yuma Daily Sun* and *Bajo El Sol* on December 10, 2004 and December 17, 2004, stating that the written comment period would be extended, and that all comments were to be post-marked or received no later than January 10, 2005.

6. The Quechan Tribe of the Fort Yuma Indian Reservation (the “Tribe”) did not participate in the Air Quality Permit process.

7. The final Air Quality Class I Permit was issued by ADEQ on April 14, 2005. The Permit itself consists of 499 pages, while the supporting “Technical Support Document and Statement of Basis for Construction of Arizona Clean Fuels Yuma, LLC Petroleum Refinery,” dated February 3, 2005, consists of an additional 449 pages of detailed analysis of the project and its impacts on human health and the environment.

8. The Air Quality Permit originally required construction of the refinery to commence by September 13, 2007. That date has now been extended to April 20, 2008.

### **Yuma County Comprehensive Plan**

9. During the same time period that ACF was working on securing the Air Quality Permit, the Yuma County Board of Supervisors considered changes to its comprehensive plan. In December of 2004, pursuant to a public process that had begun months earlier, the Yuma County Board of Supervisors approved a comprehensive plan amendment. The amendment changed the land use designation for approximately 3,300 acres of the land to be transferred to the Wellton-Mohawk Irrigation and Drainage District (the “District”) from the United

States Bureau of Reclamation (“BOR”) (the “Transfer Lands”). The land use designation was changed from agricultural to heavy industrial. The public process and resulting comprehensive plan amendment were targeted directly at allowing the oil refinery to proceed on the lands to be transferred.

10. The Tribe did not participate in the comprehensive plan amendment process.

#### **ACF’s Purchase of Transfer Land**

11. ACF originally considered two sites in eastern Yuma County for the refinery. The first site was located on private land. The second, preferred site, is located on the Transfer Lands, approximately 40 miles east of Yuma, near the community of Tacna.

12. On March 26, 2007, BOR issued its *Record of Decision of the Lower Colorado Region for the Wellton-Mohawk Title Transfer, Yuma County* (the “ROD”). After the ROD had been issued, BOR conveyed 39,142.21 acres of the Transfer Lands to the District. ACF then purchased 1,460 acres of the Transfer Lands from the District for \$14,681,100.00.

13. The 1,460 acres of Transfer Lands purchased from the District by ACF consist of disturbed lands which had been used for farming for decades.

#### **Photographs**

14. In November of 2003, ACF commissioned a plane to fly over the 1,460 acres of Transfer Lands ACF intended to purchase. The photographs attached as Attachment 1 through Attachment 6 to this Declaration are some of the aerial photographs taken.

15. I am personally familiar with the location and appearance of the 1,460 acres, since I have either walked or driven on all parts of the property. I am also familiar with all roads, canals and railroads that surround the ACF property.

16. The aerial photographs attached as Attachment 1 through Attachment 6 to this Declaration fairly and accurately represent ACF's 1,460 acres, as well as the surrounding roads, canals, and railroads at the time the aerial photographs were taken.

17. To the best of my knowledge, there have been no alterations or changes to ACF's 1,460 acres since the aerial photographs attached as Attachment 1 through Attachment 6 to this Declaration were taken which would render the aerial photographs inaccurate.

18. In May of 2007, I personally took several photographs of the surface of ACF's 1,460 acres. Some of the photographs I took are attached as Attachment 7 through Attachment 13 to this Declaration.

19. The photographs attached as Attachment 7 through Attachment 13 to this Declaration fairly and accurately represent the surface of various sections of ACF's 1,460 acres.

20. To the best of my knowledge, there have been no alterations or changes to the surface of ACF's 1,460 acres since the photographs attached as Attachment 7 through Attachment 13 were taken which would render the photographs inaccurate.

I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of October, 2007.



R. Glenn McGinnis



↑  
South

Mohaw

Ave 44 E

Co 5th

Co 4th

Gila River

Co 3rd

Snyder Ranch Floodway

Ave 45 E

Mohawk Site

Mohawk Canal

Gila River

Railroad Hwy 80

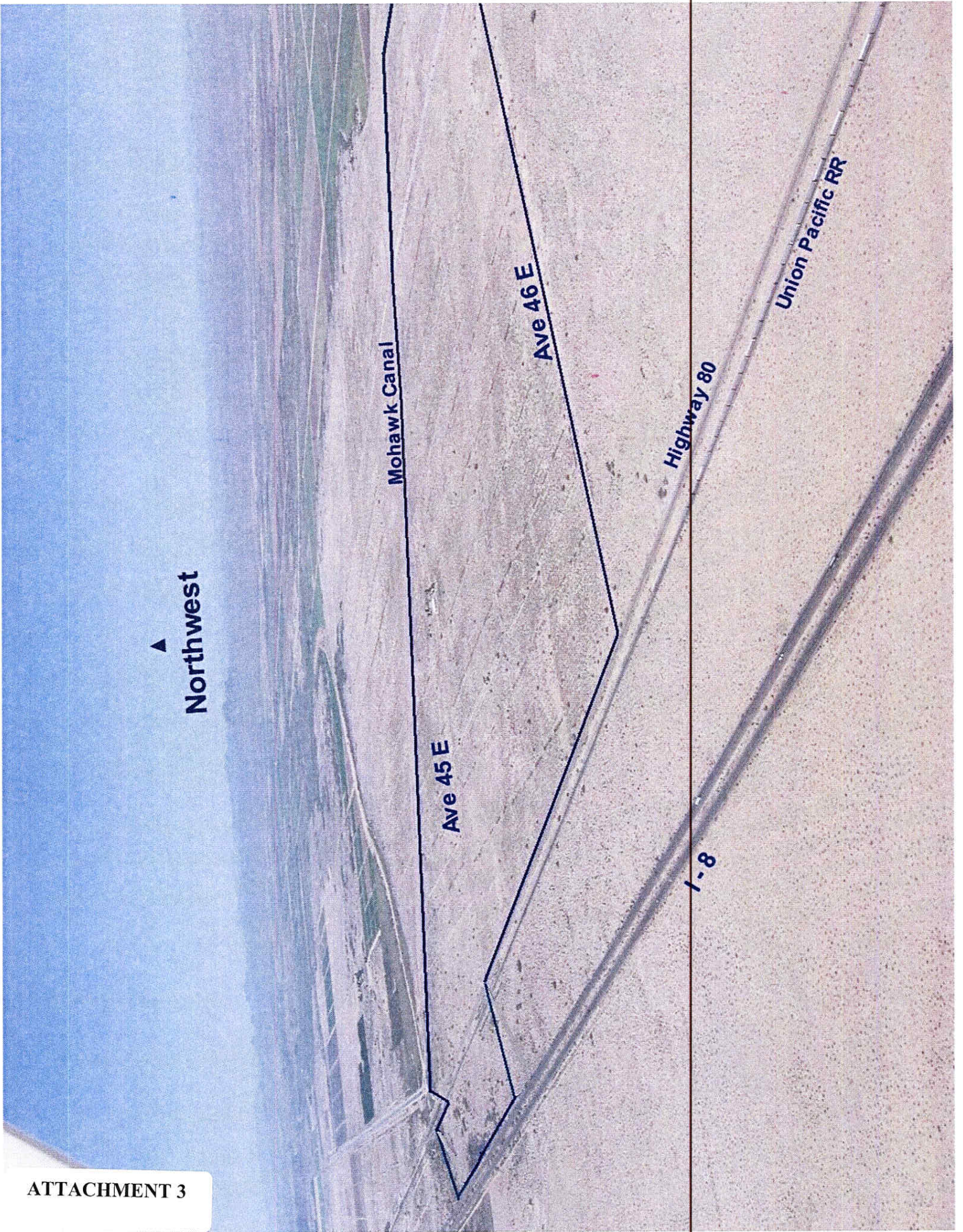
Ave 46 E

ATTACHMENT 1

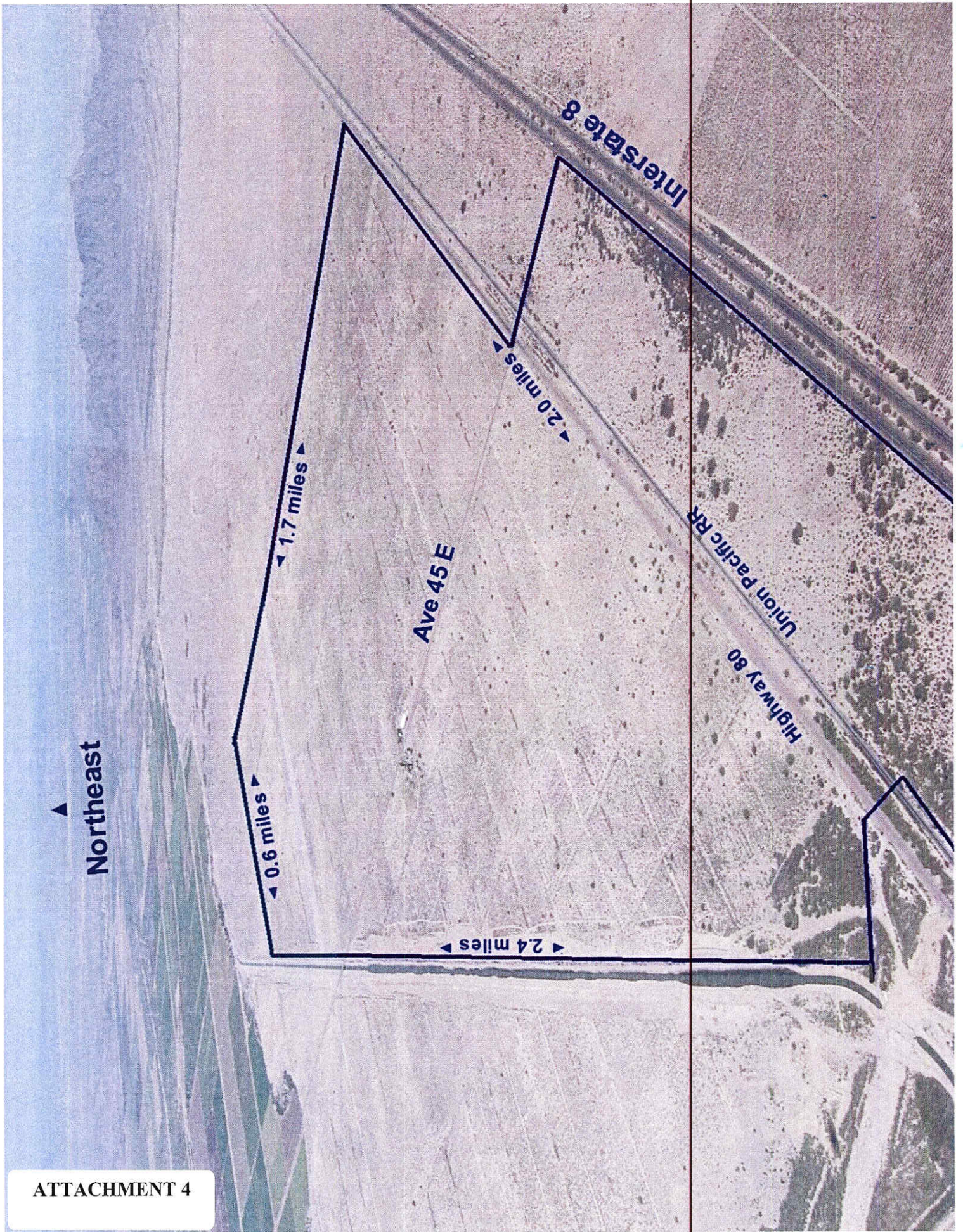




**ATTACHMENT 2**



ATTACHMENT 3



▲  
Northeast

Ave 45 E

Interstate 8

Union Pacific RR

Highway 80

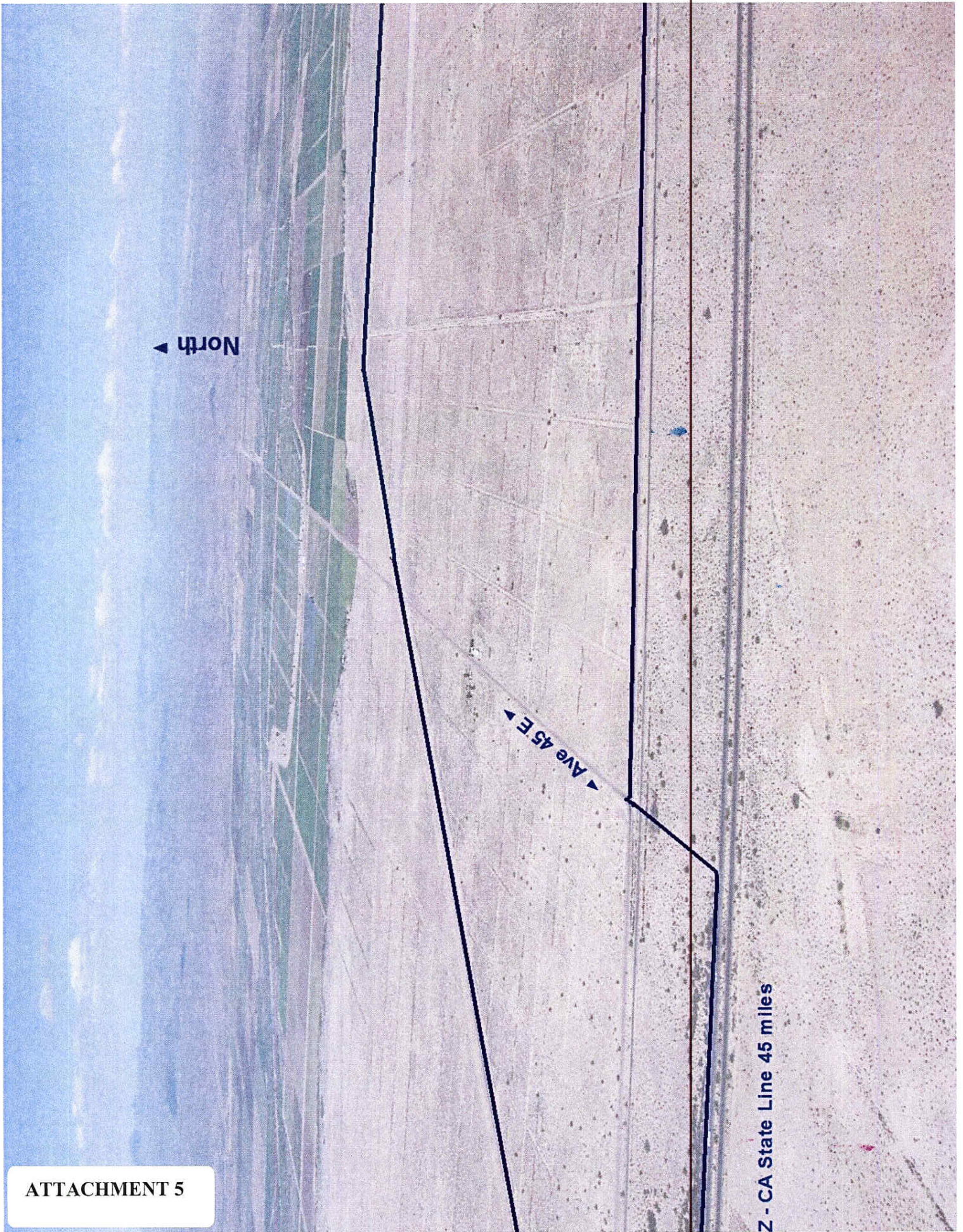
▲ 1.7 miles ▲

▲ 2.0 miles ▲

▲ 0.6 miles ▲

▲ 2.4 miles ▲

ATTACHMENT 4



North ◀

▶ Ave 45 E ▶

Z - CA State Line 45 miles

ATTACHMENT 5



ATTACHMENT 6