

**IRRIGATION & ELECTRICAL DISTRICTS  
ASSOCIATION OF ARIZONA**

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September 1, 2011

Mr. Darrick Moe  
Western Area Power Administration  
Desert Southwest Regional Manager  
P.O. Box 6457  
Phoenix, Arizona 85005-6457

Re: Post-2017 Hoover Contracts and Allocations; Western's April 27, 2011 Federal Register Notice, 76 Fed.Reg. 23583-6

Dear Mr. Moe:

In its April 27, 2011 Federal Register notice<sup>1</sup> ("FRN"), the Western Area Power Administration ("Western") stated that it will apply the Energy Planning and Management Program ("Program") Power Marketing Initiative ("PMI") to the Boulder Canyon Project ("BCP"). In addition, Western's FRN announced four (4) proposals as they relate to the BCP post-2017 remarketing effort.

These comments are intended to respond to those decisions and proposals. These responses and analyses of the situation follow and expand on our oral comments made at Western's Public Comment Forum on August 17, 2011.

**(I) WESTERN'S APPLICATION OF THE PMI TO THE BCP**

The Irrigation & Electrical Districts Association of Arizona ("IEDA") objects to Western's decision to apply the PMI to the BCP and we incorporate by reference our prior January 29, 2010 written comments herein ("Attachment 1"). Western's decision to apply the PMI, effective December 31, 2011<sup>2</sup>, is an apparent attempt to circumvent pending

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<sup>1</sup> 76 Fed.Reg. 23583-6

<sup>2</sup> The effective date was extended from May 27, 2011, to December 31, 2011, by Western's May 24, 2011 FRN. 76 Fed.Reg. 30147.

legislation in the House of Representatives<sup>3</sup> and the Senate<sup>4</sup>. The terms of the PMI vary significantly from the terms of the pending legislation, which was negotiated by Hoover contractors and customers who have invested millions of dollars into the BCP and other related projects.

As we stated in our previous comments, there is no legal authority that allows Western to apply the PMI to the BCP.<sup>5</sup> Western's decisions not only violate state sovereignty, but also ignore the various laws and agreements comprising the BCP that prohibit this very action.<sup>6</sup> Such blatant disregard for the law will inevitably lead to litigation and, ultimately, unnecessary expenses and delays.

Western has also decided to extend existing contracts for a 30-year term. We believe that a 50-year term is more appropriate and is justified by the contractors' past, present and future funding of Hoover Dam. A 50-year term contract is justified because of the 50-year term during which Hoover contractors have agreed to contribute to funding the MSCP. Forty (40) years of that program will remain when new Hoover contracts go into effect. Moreover, MSCP will likely be an ongoing program beyond its current contract life.

Finally, Hoover contractors and customers strongly oppose a December 31, 2011 PMI effective date. IEDA urges Western to further postpone this date in order to allow time for the pending legislation, which has passed full committees in both the House and the Senate, to become law.<sup>7</sup> This will allow all interested parties to avoid further burden and expense, and allow time for Congress to direct the post-2017 allocations.

## **(II) WESTERN'S APRIL 27, 2011 PROPOSALS**

Western seeks comments on the proposals submitted in its April 27, 2011 FRN. The deadline for submitting written comments on these proposals is September 1, 2011.<sup>8</sup> It should be noted at the outset that several parties requested an extension of this deadline at the Public Comment Forum ("PCF") on August 17, 2011. That same day, IEDA requested an extension of the deadline via email to Darrick Moe and Timothy Meeks. Western has denied all such requests and has reserved its right to refuse written comments received after September 1, 2011.

IEDA hereby renews its request that the September 1<sup>st</sup> deadline be extended until at least October 31, 2011, for two reasons: First, the answers to questions presented at and the transcript of proceedings for the July 13, 2011 Public Information Forum ("PIF") only became available to customers and other interested parties via email at or about 3:00 p.m. (MST-Arizona) on July 16, 2011—the eve of the PCF. Clearly this was not enough time for

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<sup>3</sup> H.R. 470

<sup>4</sup> S. 519

<sup>5</sup> Written Comments of Robert S. Lynch, Irrigation & Electrical Districts Association of Arizona, pp. 1-5, (January 29, 2010).

<sup>6</sup> Ibid.

<sup>7</sup> See fns. 4,5.

<sup>8</sup> The deadline was extended from June 16, 2011 to September 1, 2011. 76 Fed.Reg. 30147-8.

interested parties to analyze and absorb those responses and respond accordingly at the PCF and/or with written comments.

Second, the above-mentioned legislation, which is pending in both chambers of Congress, has been approved by their respective committees and is headed towards floor action. That legislation defines a different process than the process Western is undertaking and would require Western to scrap the current process and move forward in a different direction if passed. In our view, it is a waste of time and resources to pursue this course of action pending congressional approval or disapproval. In other words, Western should not take any action at this time unless, of course, Western adopts the terms and conditions as they are presented in the pending legislation. Any other course of action is likely an exercise in futility.

Notwithstanding the foregoing, IEDA hereby submits its comments on Western's proposals, and reserves its right to supplement these written comments should Western wisely grant an extension.

**(1) Western's proposals deviate from the terms of pending legislation.**

Western makes several broad proposals, the substance of which (unlike the Hoover legislation) was never discussed with Hoover contractors or customers prior to the April 27, 2011 FRN. To the extent that the terms and conditions of Western's proposals deviate from the terms and conditions in the pending legislation, we object to Western's four proposals (i.e. allocation of Schedules A, B, C, and D, respectively). We urge Western to adjust their proposed allocations of contingent capacity and firm energy to reflect the corresponding allocations in the pending legislation. Moreover, we urge Western to adopt an excess energy provision similar to the corresponding provision in the Hoover Bill.

The Hoover legislation is a result of countless hours of extensive negotiation among Hoover contractors and state agency customers. The terms and conditions of the Hoover Bills represent an accurate consensus as to how Hoover power should be allocated. All parties were given a chance to voice their opinions and the texts of the Bills reflect the various interests thereto. As a result, the Hoover Bill is the most comprehensive set of guidelines detailing how to allocate Hoover power post-2017.

Moreover, significant doubt has already been raised as to the Constitutional and legal basis (or lack thereof) supporting Western's decisions and proposals. No such issues are presented in the pending legislation. The APA and other parties have already stated their intention to proceed with litigation should Western move forward with its plan. Therefore, Western should reassess its process, as awaiting congressional approval may offer the swiftest resolve.

**(2) Western's proposals could significantly alter the role of state agencies.**

We are also concerned that the process contemplated by Western for allocating power could fundamentally change the role of agencies like the Arizona Power Authority

and Colorado River Commission (“APA” and “CRC”). Western was questioned about this issue at the PIF. Unfortunately, Western failed to provide any guarantees that this will not occur. Therefore, we object to this proposal to the extent that Western cannot guarantee that allocations of Hoover power will not fundamentally change the role of these agencies.

**(3) Western’s proposals fail to delineate exactly who or how power from the “retained pool” shall be allocated.**

Western’s third proposal would result in a retained pool for allocation of new entrants. Western, however, fails to state whether or not the new entrant pool for Arizona and Nevada will be allocated by their respective state agencies. Western has refused to answer inquiries regarding this issue, stating “this is beyond the scope of this proceeding.”

Section 5 of the Boulder Canyon Project Act of 1928 declares a first “preference” in contracting specifically in favor of the states of Arizona, California and Nevada.<sup>9</sup> The Hoover Power Plant Act of 1984 confirmed the preference of Arizona and Nevada in the Hoover resource.<sup>10</sup> Notably, neither the 1928 Act nor the 1984 Act put any strings on how the two states were to redistribute Hoover power within their respective states. Arizona and Nevada, acting in their sovereign capacities to take their congressionally-mandated preference, are left to reallocate that power in that sovereign capacity. Until Congress says otherwise, Western cannot override this power granted to the states. For these reasons, we urge Western to recognize this sovereignty and acknowledge that all Hoover power allocated to Arizona and Nevada will be allocated to their respective agencies.

**(4) Western proposes to retain 30 Megawatts of power for itself.**

Western should allocate the full amount of Hoover power rather than holding back 30 megawatts for its own purposes. There is no legal authorization which allows for Western to withhold this power. Western has stated that their reasoning for withholding such power is its use for regulations purposes. Contractors have historically avoided scheduling load simultaneously from Hoover. As a result, co-incident peak demand is a non-factor, thus undercutting Western’s need to withhold this power.

**(III) CONCLUSION**

Western’s proposals, unlike the current legislation, are not a product of intense negotiations among the interested parties. It is apparent from Western’s insistence in moving forward that Western seems intent on implementing these “proposals” without adjusting to the substantive responses and comments it is receiving. By deviating significantly from the pending legislation, Western risks having to repeat this agency process and is unnecessarily wasting time and resources. For these reasons, we ask that Western either: (a) take no action on, or delay their proposals; and/or (b) alter their proposals to conform to the Federal legislation.

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<sup>9</sup> 43 U.S.C. § 617d

<sup>10</sup> 43 U.S.C. § 619

Finally, we suggest that Western address all inquiries submitted at the July 13, 2011 PIF.<sup>11</sup> To this date, Western has either declined to answer questions, stating that they are “beyond the scope of this proceeding,” or have neglected to answer the questions at all. Arbitrarily hiding behind this cloak of silence raises concerns among customers and other interested parties only fostering the perception that Western is operating without the authority of law.

We hope that Western will continue to work with us in a receptive and transparent manner so that we may resolve post-2017 allocations in a timely fashion. Thank you for the opportunity to comment on this important undertaking.

Sincerely,

/s/

Robert S. Lynch  
Counsel and Assistant Secretary/Treasurer

RSL

cc: w/ enclosure  
Tim Meeks, Administrator, Western Area Power Administration  
Joe Mulholland, Executive Director, Arizona Power Authority  
Hoover Customer Representatives  
IEDA Members

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<sup>11</sup> Western has not answered whether or not it will require new entrants to participate in the MSCP. Also, it not stated its authority for applying the PMI given the BCPA designation of states as first allottees in their sovereign capacities. BCP Questions and Responses from July 13, 2011 Public Information Forum, pp. 1-3, available at [http://www.wapa.gov/dsw/pwrmkt/BCP\\_Remarketing/Files/BCP%20PIF%207-13-11%20Q%20and%20A.pdf](http://www.wapa.gov/dsw/pwrmkt/BCP_Remarketing/Files/BCP%20PIF%207-13-11%20Q%20and%20A.pdf).

# **ATTACHMENT 1**

IRRIGATION & ELECTRICAL DISTRICTS  
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January 29, 2010

Mr. Darrick Moe  
Western Area Power Administration  
Desert Southwest Regional Manager  
P.O. Box 6457  
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Re: Written Comments of Robert S. Lynch, Counsel and Assistant Secretary/Treasurer, Irrigation & Electrical Districts Association of Arizona concerning Western's proposal to apply the Power Marketing Initiative of the Energy Planning and Management Program and to make other decisions concerning reallocation of Boulder Canyon Project Power Post-2017

Dear Darrick:

In its November 20, 2009 Federal Register notice<sup>1</sup>, the Western Area Power Administration (Western) asked a series of questions. These comments are intended to respond to those questions and important related subjects. These responses and analyses of the situation follow and expand on our filed and oral comments submitted and made at the Phoenix Public Comment Forum on January 20, 2010.

Applicability of the PMI to the BCP

The first question Western posed was whether the Power Marketing Initiative (PMI)<sup>2</sup> of the Energy Planning and Management Program (EPAMP)<sup>3</sup> applies or may be applied to the reallocation of power pursuant to the Boulder Canyon Project Act<sup>4</sup>. In short, it can't.

The PMI, by definition, reserves a portion of a resource allocated under it for "new entrants". 10 C.F.R. 905.32. Section 5 of the Boulder Canyon Project Act (43 U.S.C. § 617d) provides a renewal right to existing contractors, which Congress preserved in the Hoover Power Plant Act of 1984. 43 USC § 619, *et seq.* There is no mention in the 1928 Act of providing for new entrants in a renewal of contracts, whether by extension or reallocation. In the 1984 Act, Congress specifically provided both existing Hoover (Hoover A) and power from uprating the Hoover Power Plant (Hoover B) to the states of Arizona and Nevada and provided for six specific new Hoover B entrants in California.

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<sup>1</sup> 74 Fed.Reg. 60256-7.

<sup>2</sup> 10 C.F.R. 905.30-905.37.

<sup>3</sup> 10 C.F.R. Part 905, 60 Fed.Reg. 54151, *et seq.* (October 20, 1995)

<sup>4</sup> 43 U.S.C. § 617, *et seq.* In the 1995 establishment of EPAMP, Western postponed consideration of the applicability of the PMI to the Boulder Canyon Project. 60 Fed.Reg. at 54157.

43 U.S.C. § 619a. By doing so, Congress reaffirmed its original offer in the 1928 Act that the first preference for Hoover power would go to states in their sovereign capacity if they chose to take it. Both Arizona and Nevada made that choice and Congress in 1984 reaffirmed that state primacy as a continuing policy of Congress. Congress also specifically provided that the Hoover Power Plant Act of 1984 in no way diminished the renewal rights of contractors under the 1928 Act. 43 U.S.C. § 619a(b). These principles, state primacy and the right to renew, are inconsistent with the constructs in the PMI portion of EPAMP. Thus, PMI does not apply and the reserve pool contemplated in the Federal Register notice has no legal foundation.

There is yet a second reason that the PMI program cannot apply. The 1983 marketing criteria established ongoing principles for marketing power from the Boulder Canyon Project (BCP). 48 Fed. Reg. 20871, 20872. The 1984 Conformed Criteria, adjusting the rules as required by the 1984 Act, are likewise still applicable to the Boulder Canyon Project. 49 Fed.Reg. 50582, 50583 (December 28, 1984). Western has acknowledged that fact by referencing the marketing area articulated in the 1984 Conformed Criteria in its November 20, 2009 notice announcing the remarketing process for contracts post-2017. The Conformed Criteria were a decision collectively made under the Administrative Procedure Act and authorities relevant to the resource. Western cannot selectively continue to apply one aspect of the Conformed Criteria, marketing area, and not apply the remainder of the applicable portions of those criteria. Those criteria repeat and confirm the Congressional finding that Hoover power would continue to be offered to the states of Arizona and Nevada. 49 Fed.Reg. at 50583. Thus, a reserve pool, at least as it applies to the states of Arizona and Nevada, is not authorized. The existing authorities under which Western must act are inconsistent with the PMI program and are controlling.

#### Quantity of Resources to be Extended to Existing Contractors

Because the 1984 Conformed Criteria are still in effect, Western has no choice but to reallocate the capacity and energy to the existing contractors as allocated in 1984, and in 1985 as to uprating power. Even if it modifies or replaces those criteria, Western is, in our view, bound by its prior interpretations of the law as to preference and renewal.

It is common knowledge that Western left at least 75 megawatts on the table during that allocation process. More is available now. We think that the 1984 Conformed Criteria need to be modified to provide that the maximum capacity and energy available under optimum water conditions should be allocated. After all, the contractors are paying for that capability, whether it can be fully utilized under current water conditions or not.

We recognize that the fully allocated capacity and energy of the power plant will not initially be available to allottees. What will be available are the bills to allottees to pay for the whole plant. Since we are paying for the plant, we should get its output. If and when the lake fills, we who have paid for the previously unavailable power are entitled to get it. That is only fair.

### The Size of the Resource Pool

Because existing law and regulation do not allow Western to reserve a resource pool for new entrants, we will not comment on the size of the pool proposed in the Federal Register notice. We do, however, wish to repeat our comments about new customers. Section 5 of the Boulder Canyon Project Act gives first preference to states (subsection 5(c)) and second preference to municipalities, if those municipalities are within a state that does not exercise its first priority, by virtue of the incorporation of the policies of the 1920 Federal Water Power Act. 50 Fed.Reg. at 47832; 53 I.D. 1, 13 (1930). The latter state obviously is California and the former obviously are Arizona and Nevada. This preference is accompanied by a right to renew “under then existing law and regulation.” Subsection 5(b). That these provisions of the 1928 Act remain applicable law is confirmed by the savings clause of the 1984 Hoover Power Plant Act. 43 U.S.C. § 619a(b). The 1984 Conformed Criteria and 1985 allocation action confirm Western’s then interpretation of the applicable law. 49 Fed.Reg. at 50583; 50 Fed.Reg. at 47833, 47834. The resource pool as envisioned in the Federal Register notice is contrary to law.

### Excess Energy Provisions

Western’s Federal Register notice does not discuss the current distinction between Hoover A and Hoover B and only tangentially discusses Hoover C (excess energy) by asking a question about it. We believe that the resource should be reallocated using the same distinctions made in the Hoover Power Plant Act of 1984 and in the 1984-1985 allocation actions. Lumping Hoover A and Hoover B together effectively penalizes Hoover A contractors as to load factor. The contract renewal provision of the 1928 Act conflicts with that outcome. The wisest course of action would be to propose to maintain the distinctions among Hoover A, Hoover B and Hoover C as articulated in the 1984 and 1985 Western allocation decisions.

### Term of Contract

Western proposes a 30-year contract term. The PMI regulations apply a 20-year contract term to other resources but not the BCP, proposing to face that decision at a future time. That time is now. We believe that Western would have no choice but to offer a 30-year contract under the existing Conformed Criteria. We believe the Conformed Criteria should be amended to offer a 50-year contract. Western acknowledges that the current BCP Implementation Agreement requires any new contractors or contractors who receive an increased allocation to reimburse existing BCP contractors for replacement capital advances. Western also needs to require any new contractors to obligate themselves to participate in the power revenue support program for the Multi-Species Conservation Program (MSCP). All Hoover power allottees need to participate in this program. Their participation, tied to the time line of MSCP, militates toward a longer contract term. A 50-year term would be consistent with the initial contract term offered to Hoover allottees and would ensure that the 50-year MSCP program burden would be matched by an equivalent benefit to the power contractors who have shouldered that burden.

### The Role of the APA and the CRC in Western's Allocation Process

The final question that Western proposes in its Federal Register notice relates to the role of the two state agencies in the allocation process. It is preceded in the notice by an acknowledgement that the two state agencies have been designated agents of their respective states for acquiring and remarketing BCP power. By doing so, Western acknowledges that the two states have accepted the offer Congress made to receive the allocation for power to be utilized in their respective states and that each agency is acting in the sovereign capacity of its state. See 50 Fed.Reg. at 47832. The notice fails to mention that Congress, in passing the 1984 Act, recognized that this had happened in the original allocation process and not only acknowledged that the states had acquired the resource in their respective sovereign capacities but that the agencies in question were acting as the agents of the states in that regard. The states, having accepted the offer in the 1928 Act, and Congress, having confirmed the arrangement in 1984, Western is without authority to deal in Arizona and Nevada with anyone but the respective state agencies. That requirement is also acknowledged in the Conformed Criteria, 49 Fed.Reg. at 50583, 50588, and in the 1985 allocations, 50 Fed.Reg. at 47832.

### Timing and Process

While Western did not ask for comments on these subjects, we believe it is necessary to offer them in any event.

As to timing, we believe that Western should postpone moving forward with any action designed to implement a process affecting post-2017 Hoover power until the end of this Congressional session. As Western knows, bills have been introduced that would have Congress reallocate Hoover power, just as Congress stepped in to do in 1984. Those bills address the issue of broadening the potential beneficiaries of Hoover power.

We believe it would be prudent for Western to stay its hand until it sees whether the current Congress is willing to follow the same path as Congress did in 1984 and make this a Congressional decision. If Congress does, it will give Western further direction. If it does, it will likely give Western additional authority we believe it cannot exercise under existing law. Indeed, that was a prime motivating factor for introducing the legislation. Moreover, to the extent that Congressional direction varies from the course Western's notice suggests, both time and money will be saved by waiting.

Whatever timeframe Western adopts, we believe that the process should be split in two. Western has put forward in its Federal Register notice a proposal to use the PMI program. That is the main thrust of the Federal Register notice. We believe that a decision concerning the PMI program should be made in advance of any other decisions. We firmly believe that the PMI program is not applicable here and others appear to agree. In any event, it is a threshold matter that must be resolved before anything else is done. If there are substantial disagreements, those need to be resolved at the outset. If for some reason there is no legislation and the administrative process goes forward, the timeline is such that it would be helpful, if not totally necessary, to avoid litigation

during the process. Sorting out the nature of the process and its essential elements is, in our view, critical in attempting to achieve that result.

The Legal Effect of Past Actions

Finally, we suggest that Western must, as a preliminary matter, address the question of whether, and to what extent, its prior interpretations of existing law affecting Hoover power allocations, made some quarter century ago, bind it to the course of action we suggest. Alternatively, Western must evaluate the risk to its decision making process that attempting to change course here represents. The prior interpretations with regard to preference and renewal, published in final actions in the Federal Register, carry the force of law and are thus entitled to what is known as Chevron deference. Conversely, an agency may change course, but “an agency changing course must supply a reasoned analysis.”<sup>5</sup> Here, Western, in our view, must evaluate these principles as they apply to its proposal to reallocate post-2017 Hoover power. This analysis marries with that of the applicability of the PMI and, in our view, defines the near-term actions which Western must undertake.

Thank you for the opportunity to comment on this important undertaking.

Sincerely,

/s/

Robert S. Lynch  
Counsel and Assistant Secretary/Treasurer

RSL:psr

cc: Tim Meeks, Administrator, Western  
Joe Mulholland, Executive Director, Arizona Power Authority  
IEDA Members

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<sup>5</sup> Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). See also River Runners for Wilderness v. Martin, 574 F.3d 723, 737 (9<sup>th</sup> Cir. 2009); Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687-88 (9<sup>th</sup> Cir. 2007); Grand Canyon Trust v. Bureau of Reclamation, 623 F. Supp. 2d 1015, 1034 (D. Ariz. 2009).