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**Via email to Post2017BCP@wapa.gov
Original by U.S. mail**

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

Re: Comments on Proposed Marketing Criteria for Boulder Canyon Project, Post-2017
Resource Pool

Dear Mr. Moe:

This law firm represents Electrical Districts Nos. 2, 3, 4, and 5 of Pinal County, Arizona ("the Districts"). This letter constitutes written comments by the Districts on the Western Area Power Administration's ("Western") proposed marketing criteria for the Boulder Canyon Project Act post-2017 resource pool. Those proposed marketing criteria were set forth in an October 30, 2012 *Federal Register* notice, 77 Fed. Reg. 65681. The Districts attended the public information forum held on the proposed criteria in Phoenix on November 28, 2012 and the public comment session held on December 20, 2012. The Districts appreciate the opportunity to submit these written comments prior to Western's final decision on whether to adopt the marketing criteria as proposed.

Electrical District No. 2

ED2 is an existing recipient of Hoover power as a customer of the Arizona Power Authority ("APA"). Formed in 1923, ED2 has a service area in Pinal County, Arizona, that covers approximately 120,000 acres. Although some urbanization has occurred in the area in recent years, ED2's service area remains primarily agricultural. ED2 serves electricity to approximately 355 irrigation wells, and the 2011 annual usage of those wells was in excess of 95,000,000 kilowatt-hours. ED2 also currently serves twelve dairy operations, two cotton gins, the wastewater reclamation plant for the City of Casa Grande, the Pinal County Fairgrounds, and numerous other farm and non-farm users.

In addition to Hoover power, ED2 also receives an allocation of Colorado River Storage Project ("CRSP") power. At present, federal hydropower accounts for approximately thirty-six percent of the resources ED2 uses to meet the needs of its customers. Hoover and CRSP hydropower continue to be important resources for ED2, as they have been for many decades.

Most of the farmers to whom ED2 supplies power are also landowners within the Hohokam Irrigation and Drainage District. Many of those farmers currently receive Central Arizona Project (“CAP”) water, which they use in conjunction with groundwater withdrawn from wells by pumps powered by ED2 electricity. As the availability of CAP water is curtailed starting in 2017 and completed in 2030, ED2 expects that many of those farmers will need to increase their pumping of groundwater, thereby further increasing the demand for ED2 electricity to operate those pumps and making ED2’s federal hydropower resources even more important.

Electrical District No. 3

ED3 is an existing recipient of Hoover power as an APA customer. Formed in 1926, ED3 has a service area in Pinal County, Arizona, that covers approximately 245,500 acres. Although considerable urbanization has occurred in the area in recent years, ED3’s service area remains primarily agricultural. ED3 owns, operates and maintains 1,050 miles of electric lines, 11 substations and serves approximately 23,000 meters. ED3 serves 156 irrigation wells, 8 dairy operations, 2 cotton gins, 2 feedlot operations, and multiple industrial and commercial accounts in the Town of Maricopa.

In addition to Hoover power, ED3 also receives an allocation of CRPS power and power from the Parker-Davis Project. Hoover, CRSP and Parker-Davis hydropower continue to be important resources for ED3, as they have been for many decades.

Most of the lands to which ED3 supplies power are within the Maricopa-Stanfield Irrigation & Drainage District. These lands currently receive CAP water, which they use in conjunction with groundwater withdrawn from wells by pumps powered by ED3 electricity. As the availability of CAP water is curtailed starting in 2017 and completed in 2030, ED3 expects that MSIDD will need to increase pumping of groundwater, thereby further increasing the demand for ED3 electricity to operate those pumps and making ED3’s federal hydropower resources even more important.

Electrical District No. 4

ED4 is an existing recipient of Hoover power as an APA customer. Formed in 1928, ED4 has a service area in Pinal County, Arizona, that covers approximately 110,000 acres. Although some urbanization has occurred in the area in recent years, ED4’s service area remains primarily agricultural. ED4 serves electricity to approximately 160 irrigation wells, and 84% of its load is agricultural. ED4 also currently serves one vegetable packing shed, one cotton gin, and numerous other farm and non-farm users.

In addition to Hoover power, ED4 also receives an allocation of CRSP power. At present, federal hydropower accounts for all of the resources ED4 uses to meet the needs of its customers. Hoover and CRSP hydropower continue to be important resources for ED4, as they have been for many decades.

Most of the landowners to whom ED4 supplies power are also landowners within the Central Arizona Irrigation and Drainage District (“CAIDD”). Many of those landowners currently receive CAP water, which they use in conjunction with groundwater withdrawn from wells by pumps

powered by ED4 electricity. As the availability of CAP water is curtailed starting in 2017 and completed in 2030, ED4 expects that CAIDD will need to increase its pumping of groundwater, thereby further increasing the demand for ED4 electricity to operate those pumps and making ED4's federal hydropower resources even more important.

Electrical District No. 5

ED5 is an existing recipient of Hoover power as an APA customer. Formed in 1946, ED5 has a service area in Pinal County, Arizona, that covers approximately 75,000 acres. Although some urbanization has occurred in the area in recent years, ED5's service area remains primarily agricultural. ED5 serves electricity to approximately 145 irrigation wells, and 95% of its load is agricultural. ED5 also currently serves one dairy operation, one feedlot, one vegetable packing shed, and numerous other farm and non-farm users.

In addition to Hoover power, ED5 also receives an allocation of CRSP power. At present, federal hydropower accounts for all of the resources ED5 uses to meet the needs of its customers. Hoover and CRSP hydropower continue to be important resources for ED5, as they have been for many decades.

Most of the landowners to whom ED5 supplies power are also landowners within CAIDD. Many of those landowners currently receive CAP water, which they use in conjunction with groundwater withdrawn from wells by pumps powered by ED5 electricity. As the availability of CAP water is curtailed starting in 2017 and completed in 2030, ED5 expects that CAIDD will need to increase its pumping of groundwater, thereby further increasing the demand for ED5 electricity to operate those pumps and making ED5's federal hydropower resources even more important.

Comments on the Proposed Post-2017 Marketing Criteria

Because they are existing APA customers, the Districts anticipate applying for and hope to receive renewed allocations of post-2017 Hoover A and B power through the APA. To the extent that they receive renewed allocations of Hoover A and B power through the APA, the Districts do not currently intend to be applicants for post-2017 Hoover "D-1" power through Western. There is a limited supply of all forms of BCPA power, however, and all indications are that the overall demand for post-2017 allocations will be well in excess of the available supply. For that reason, the Districts and other existing APA customers remain interested in the marketing criteria that Western uses to make the D-1 allocations.

The Districts' primary concern with the proposed marketing criteria is the super-preference that would be given to Native American tribes. Section E(1) of the proposed criteria would give first priority consideration to "federally recognized Native American tribes." *See* 77 Fed. Reg. at 65681. Although the underlying legislation for some forms of federal hydropower provides for such a tribal preference, nothing in the Hoover Power Allocation Act of 2011 (Pub. L. 112-72, "HPAA") or any of the prior federal legislation relating to Hoover requires or authorizes such a preference. Congress certainly knows how to create a statutory preference for tribes because it did that in other contexts, but it chose not to provide for such a preference in the post-2017 Hoover allocations.

In addition to the tribal super-preference set forth in Section E(1), the proposed marketing criteria also provide additional special provisions and exceptions for tribes, such as in Section B (“[e]ligible applicants, except Native American tribes, must be ready, willing, and able to receive and distribute or use power from Western”); Sections G and H (where the proposed criteria would purport to allow for Western to use estimated load values for Native American tribes but not for other applicants); and Section L (“If unanticipated obstacles to the delivery of electric service to a Native American tribe arise, Western retains the right to provide the economic benefit of the resource directly to the tribe.”).

At the November 28 public information forum, Western staff acknowledged that no statutory or regulatory basis exists for the tribal preferences set forth in the proposed marketing criteria. In its Power Point presentation for that meeting, Western characterized its role with regard to the post-2017 allocations as “[c]arry[ing] forward directives as provided in the legislation” and “[c]onform[ing] its marketing process to the legislation.” *See* Boulder Canyon Project Post-2017 Marketing, Proposed Marketing Criteria, Public Information Forums, at 5 (November 27-29, 2012). Adopting the proposed tribal super-preference would not carry forward any legislative directives because no such directives exist, in the HPAA or elsewhere. For the same reason, adopting such a preference would not conform the marketing process to the legislation.

The Districts agree with comments made by APA and the Irrigation and Electrical Districts Association of Arizona at the December 20 public comment session in opposition to the tribal super-preference. No statutory or regulatory authority exists for such a preference. Western has no inherent discretion to apply such a preference. To the extent that they have “electric utility status” by April 1, 2014, tribal entities should be treated on the same basis as “municipal corporations and political subdivisions including irrigation and other districts, municipalities, and other governmental organizations.” *See* 77 Fed. Reg. at 65681-82.

Thank you again for the opportunity to submit these comments. If you need any additional information, please contact me.

Very truly yours,

Salmon, Lewis & Weldon, P.L.C.

By



Paul R. Orme

Mark A. McGinnis

General Counsel for ED2, ED3, ED4, and ED5

MAM:ff

cc: District Managers
APA Commissioner
Doug Fant, APA Counsel