



Fort McDowell Yavapai Nation

P.O. Box 17779, Fountain Hills, AZ 85269

OFFICE OF GOVERNMENT RELATIONS
Phone (480) 789-7161 Fax (480) 789-7420

January 9, 2013

Via Email and Post mail

Mr. Darrick Moe
Regional Manager
Western Area Power Administration
Desert Southwest Region
615 S. 43rd Ave.
P.O. Box 6457
Phoenix, AZ 85005-6457

**Re: October 30, 2012 Notice of Proposed Marketing Criteria
Boulder Canyon Project – Post 2017 Resource Pool**

Dear Mr. Moe:

This letter is in regard to Western Area Power Administration (Western) proposed marketing criteria for allocating Federal power from the Boulder Canyon Project (BCP). As mentioned on numerous occasions to Western officials, Fort McDowell Yavapai Nation (Nation) does not believe the proposed power allocation is fair, just, rational, or within the spirit of letter of the Federal laws including, but not limited to, the Hoover Power Allocation Act of 2011 (Pub. L. 112-72) (Act), which re-regulates Federal power allocations.

In regard to the proposed post-2017 Resource Pool Marketing Criteria for portions of Schedule D power to be allocated by Western to Tribes, the Nation has the following major concerns and disagreements as to the proposed allocations. The concerns delineated below are not a complete list, rather a starting point with which we propose Tribal Consultations with appropriate officials at upper levels of both Western and Department of Energy (DC office).

Under Section A. Allocations of power will be made in amounts determined solely by Western in exercise of its discretion under Reclamation Law, including the HPA.

We are unsure what specific laws this Section pertains to and where Tribal entities are included under existing Reclamation Laws pertaining to power allocations, including those laws that were developed in the early years of Reclamation (that did not address Tribal interests). We wish for you to review those laws and how they specifically apply to Tribes in current BCP allocations. (please also see below)

Under Section E. In determining allocations, Western will give priority consideration in the following order to entities satisfying these marketing criteria:

1. Federally recognized Native American tribes.

It appears that Western's proposal is to assign Tribes as a first priority in the allocation sequence as an effort to redress the historic lack of Tribal access to project benefits. It is also meant to extend the benefits of electricity to Tribal Nation's using publicly and cooperatively owned power systems. We applaud these efforts. As mentioned in the Inter Tribal Council of Arizona's letter of January 11, express delineation of Tribes by Western is consistent with relevant, documented Congressional intent such as that evidenced in the House of Representatives Report referencing tribes as "contracting directly with Western" and "develop[ing] allocation criteria in direct consultation with Western." No other interest group is so referenced therein. See House Report 112-159(I) dated July 20, 2011.

Western's action is also directly consistent with the documented legislative intent behind the 2011 Hoover Power Act as Congress there directed Western to "fairly and equitably determine allocations from the new power pool." See July 20, 2011 House Report.

However, despite the first priority status, under the next several sections, Western fails to consider Tribal interests fairly which may diminish this first priority standing when allocating power.

Under Section F. In determining allocations, Western will consider existing Federal power resource allocations of the applicants.

1. As proposed, because the Nation has another source of Federal power, we will effectively receive a reduced BCP power allocation - creating and regulating us to a

second Tribal tier/class status. Additionally, Western's does not consider or give deference to Tribal entities that currently have a Federal allocation but may potentially lose that allocation when their contract period is over. Congress never expressed in legislation the creation of two classes of Tribal interests. Moreover, if the Nation is to receive a reduced BCP allocation because of their prior Federal allocation, we are subject to a double jeopardy of sorts if we lose any portion of our current Federal allocation when that contract period is ended. Meaning, we may lose or have a reduced allocation in our current Federal power source (sometime in the future) should reallocation be subject to this very same dictum – i.e., if you have another federal power source you will be reduced in allocation. This is rather a circuitous way of continually reducing Tribal presence while at the same time not subjecting other states/customers to the same reductions. There are no provisions in legislation, in Western's proposed marketing plan of operations, proposed marketing criteria for allocating BCP to circumvent this potential circuitous allocation loss to Tribal entities. We ask- what is Western prepared to do under this scenario?

2. The Congressional intent behind the aforementioned and below mentioned governing legislation, including the Energy Policy Act of 1992, requires that Western adhere to "federal preference standards." We submit that "preference clauses" have existed throughout the history of federal power legislation and have been directed to a variety of customers and regions of the nation, including Tribal entities in later years. However, Western has interpreted this clause in a way that is unfair to Tribal entities.

Congress has mandated preference in the sale of electricity by federal agencies in a number of power-marketing and land reclamation statutes. The Reclamation Act of 1906 is generally considered the federal government's entry into the electric power field. The Act grants preference in the disposition of surplus² hydroelectric power from federal irrigation projects for "municipal purposes," such as street lighting. When Congress enacted the Rural Electrification Act of 1936 to encourage cooperatives and others to extend their electric systems into nearby rural areas, it also enacted other statutes that affect how federally generated electricity is sold, especially to cooperatives. These Acts excluded Tribal interests located in this area. Preference for public entities and cooperatives is also found in the Reclamation Project Act of 1939 and the Flood Control Act of 1944. The Reclamation Project Act of 1939, which provides guidance for projects operated by the Bureau of Reclamation, gives preference to municipalities, other public corporations or agencies, and cooperatives and other nonprofit organizations. Again, no mention of Tribal interests located in this area.

The use of the "preference clause" *as part of the restructuring* of Hoover Power was not intend to alter allocations to Tribal interests such that any Tribe who currently received a Federal Power allocation should be penalized under future Hoover allocations. As Tribal entities in this area were never a part of the aforementioned early and enabling legislation, it is unclear how Western can establish such unfair

policies in administering new Hoover allocations (reallocations). The administration and Congress had the opportunity, yet they declined to incorporate such provisions in any bill to date regarding restructuring of the industry (when pertaining to Tribes who receive other Federal power). In fact, it has been the administrations long-held belief that federal restructuring legislation should be designed to ensure that consumers in all states benefit and that those in certain parts of the nation not be 'adversely affected'. Specifically, in this case, Tribal interests who were left out of other federal power allocations for decades should not be penalized when they are only beginning to realize the benefits of power that should have been allocated to them long ago.

3. As mentioned in the aforementioned ITCA letter regarding Western's withdraw of its proposed application of EPAMP (Federal Register Notice on December 28, 2011), if Western interprets the Federal "preference clause" as encompassing deductions to new allottees on the basis of other hydro resources available for their use and/or benefit, in this instance, existing customers are receiving renewed contracts with a 5% share reduction. No consideration of their other federal resource availability has been made by statute or proposed by Western. As they state, Western should, in this instance only impose a maximum equivalent 5% reduction on new tribal customers receiving the benefit of other federal hydro resources. Such an approach would provide consistency by Western across its management of Hoover power output and harmonizes Western's action on this point with Congressional directives as well as Western's own withdrawal of EPAMP application in this instance.
4. Although Tribes are discounted and penalized for prior allocations, the proposed criteria are silent as to how Western will treat customers eligible for/receiving Hoover allocations through the States of Nevada or Arizona. As ITCA points out, unless Western undergoes a supplemental public process encompassing this issue prior to the allocation process, the matter must be addressed in the scope of the establishment of these allocation criteria. To ignore this issue as outside the scope of Western's authority or role would be inconsistent with Congressional intent behind the 2011 Hoover Act, in particular the directive that Western "fairly and equitably" allocate the resource. See aforementioned July 2011 House Report.

Under Section G. Western will base allocations to Native American tribes on actual loads experienced in the most recent calendar year. Western may use estimated load values if actual load data is not available. Western will evaluate and may adjust inconsistent estimates during the allocation process. Western is available to assist tribes in developing load estimates.

Since mid-2008, a number of Tribes have scaled back development plans and have conserved their electric usage in order to cost contain. The Nation is not an exception. We have had to roll-back plans of development of an electrical substation, reduced direct electric demand at our detriment, included the use of Solar Power as a long-term cost conserving measure, and have implemented other actions in an effort to reduce costs. Using only one year's of data in a depressed economy does not provide an accurate measure of need or demand and penalizes us for these cost saving measures.

Under Section I. The minimum allocation will be 1,000 kW. Applicants will be allowed to aggregate their loads to meet minimum requirements provided Western is able to schedule power deliveries in quantities of 1,000 kW or greater to the aggregated group. Western will consider making allocations under the 1,000 kW minimum conditioned upon an applicant's ability to aggregate to 1,000 kW or greater for scheduling purposes prior to final allocation determinations.

And

Under Section J. Applicants seeking an allocation as an aggregated group must demonstrate to Western's satisfaction the existence of a contractual aggregation arrangement prior to final allocation determinations. Each member of an aggregated group must meet all eligibility requirements.

1. It is the Nation assertion that and as earlier agreed to by Western, less than 1 MW allocation without an 'Aggregation Arrangement' is appropriate for Tribes, particularly for smaller Tribes such as Fort McDowell. Western does not have nor has provided standing, either legal or other regulatory justification, for developing a new customer group based solely on allocation size. Western has not provided fair or just arguments to this 'new' burdensome requirement other than it provides for Western's own conveniences, which, by itself, is not a justification. Furthermore, as proposed, this requirement only penalizes the smallest of new customer groups which overwhelmingly consists of small Tribes in this service area. Thus, this proposed hurdle is clearly biased against Tribal entities, partially smaller Tribes, and not what Congress prescribed to or intended.
2. Western should reference Tribal aggregation only with respect to how it has been historically permitted - on a voluntary basis - in terms of arranging for allocation scheduling and/or delivery. Currently, nearly all Tribal customers have a benefit arrangement rather than direct delivery. For example, the Nation has such an arrangement with Salt River Project. In the current proposed allocation, clear and concise aggregation arrangement provisions are lacking and potentially subject to

unknown additional guidelines by Western. Have provisions as to how Western will redress Tribal interests on this matter been established or congressionally allocated through the budget process? Westerns has also not provided guidance to Tribes should they disagree or have difficulties with how Western will handle this issue.

3. As articulated in ITCA's letter, Western can appropriately address its asserted allocation "rounding" concerns solely through operating protocols. The BCP power is contingent capacity and associated energy. This means that if an allocation is made for 1 MW, operationally based upon water conditions the customer will most likely receive something less than 1 MW. Western deals with this issue of reductions in allocations on a routine basis through operational protocols. Thus, this issue appears irrelevant and Western has created a burdensome process and hindrances to the very people who need this power the most – Tribal interests.
4. Overall, the aggregation concept is vague or poorly defined and can be interpreted in several ways because provisions have not been made clear or can be accounted for. As an example, there are no specifications of Western's treatment of any customer who loses their 'aggregation arrangement' before the end of the contract term, what happened to that entity or the electrical allocation?

Western has stated that it will review all comments and issue final marketing criteria, but Western's procedure to address the allocation of the Schedule D resource is not just vague, but inconsistent. Western's response to issues and concerns being raised by Tribal interests with respect to matters omitted from the criteria proposed (as mentioned above) will accordingly constitute a 'New Agency Action'. As a result of such a new action, Western must provide a supplemental opportunity to address any new criteria created as part of this public comment process and through Tribal Consultations (as required by law, administrative procedures and guidelines, Executive Orders, etc.) prior to making any allocations. A failure by Western to clarify its proposal and provide additional public comment and Tribal input and consultation opportunities will contravene established principles of administrative law and also defy relevant legislative intent for an "open, thorough and transparent assessment" in making new customer allocations. See House Report, July 20, 2011.

Thus, in closing, we are unable to explore all the options that can be made available and fully determine how this allocation can best serve the Nation. The Nation looks forward to working with Western and DOE on developing and implementing these options. However, to date, the Nation does not believe that agency officials at the Arizona level have either heard or heeded the Nation's or the other Tribal concerns. Thus, this letter hereby serves as the Nation's request for formal consultation with appropriate level Western and DOE officials (DC level) who have the authority to act upon our letter and concerns.

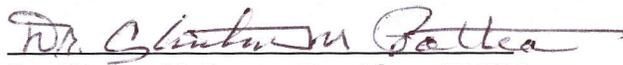
The Nation appreciates your time and attention to this matter. Please feel free to contact me at any time. I can be reached at cklopatek@ftmcdowell.org (best option) or by phone at 480.789.7161.

Respectfully,



Dr. Carole Coe Klopatek

In Concurrence:



Dr. Clinton M. Pattea, President, FMYN

cc: Fort McDowell Yavapai Nation Tribal Council
Mr. Philip Dorchester, General Manager, FMYN
Mr. Thomas Moriarty, General Council, FMYN
Mr. Alfonso Rodriguez, CEDD Director, FMYN

By Email:

Mr. John Lewis, Executive Director, ITCA
Mr. Mike Simonton, Project Manager, WAPA
Ms. Tracey LeBeau - Director, Office of Indian Energy Policy and Programs, DOE
Pilar Thomas, Deputy Director, , Office of Indian Energy Policy and Programs, DOE

ALSO Submitted electronically to Post2017BCP@wapa.gov