Tohono O'odham Nation Office of the
Chairman & Vice Chairwoman

COMPASSION FAITH TRADITION RESPECT
T-I:BDAG 'AMJED S-WOHOCUDA HIMDAG PI:K 'ELID

Ned Norris, Jr.
Chairman

Wavalene M. Romero
Vice Chairwoman

Via electronic mail (to Post2017BCP@wapa.gov)

January 11, 2013

Mr. Darrick Moe, Southwestern Regional Manager
Western Area Power Administration
United States Department of Energy
P.O. Box 6457
Phoenix, Arizona 80005-6457

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

Dear Mr. Moe:

Attached, please find the Tohono O'odham Nation's comments on the Western Area Power Administration's proposed marketing criteria for the Boulder Canyon Project – Post-2017 Resource Pool. Thank you for this opportunity to submit these comments. Should you have any questions, please contact Assistant Attorney General Samuel Daughety at 520-383-3410.

Respectfully,

Dr. Ned Norris, Jr.
Chairman

Cc: Samuel F. Daughety, Assistant Attorney General
Mike Bethurem, General Manager, Tohono O'odham Utility Authority

P.O. Box 837, Sells, AZ 85634. (520)383-2028 . Fax (520)383-3379

Comments of the Tohono O'odham Nation on Boulder Canyon Project – Post-2017 Resource Pool: Notice of Proposed Marketing Criteria

FR Doc 2012-26685

January 11, 2013

The Tohono O'odham Nation ("Nation") hereby submits the below comments on the Proposed Post-2017 Resource Pool Marketing Criteria as published in Federal Register on October 30, 2012 (FR Doc 2012-26685). As a federally recognized Indian tribe with the second largest reservation in the United States and an established tribal utility authority, the Nation has a significant interest in the marketing of Boulder Canyon Project power.

BACKGROUND

The Tohono O'odham Nation and its energy needs

The Tohono O'odham Nation is a federally recognized Indian tribe of approximately 32,000 members organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476.[1] The Nation's trust and reservation land consist generally of four non-contiguous areas within southern and central Arizona - the Main or "Sells" Reservation, the San Xavier Reservation, Florence Village, and San Lucy Village. About half of the members live on reservation or trust land. The Nation operates under a three-branch system of government served by over 1,100 employees, both members and non-members. In addition, the Nation has chartered tribal entities and enterprises providing employment and services to the Nation and its people. Among these entities is the Tohono O'odham Utility Authority ("TOUA") established in 1970 and formerly known as the Papago Tribal Utility Authority.

TOUA provides electric, water/wastewater, telephone, cellular, propane, and internet services to governmental and residential customers and employers on the Nation's Main and San Xavier reservations. TOUA operates and maintains an electric system consisting of 58 miles of transmission lines, one transmission substation, three distribution substations and 670 miles of distribution lines providing electric service to approximately 3,800 customers. Florence Village and San Lucy Village receive electric service from other public and private sources.

The Nation has devoted significant resources to on-reservation economic development and public services, including the construction and operation of a nationally-recognized nursing care home, Head Start facilities, five recreation centers, a museum and cultural center, and a forty-seat dialysis center. The Nation has also put a priority on public safety and justice; in recent years the Nation created its first fire department, tripled the size of its police force, and constructed and staffed the five-courtroom Tohono O'odham Justice Center. Despite these efforts, the Nation continues to lag far behind both non-Indian populations and other Arizona tribes in terms of income, life expectancy, education, quality housing, and stable family households.

For the Nation's government and enterprises, inexpensive, reliable energy secures basic infrastructure needs and makes possible the kind of capital improvement projects that, in decades to come, will assist the Nation in meeting its goals of self-sufficiency and prosperity. For the

[1] The Tohono O'odham Nation was known as the Papago Tribe until 1986.

Nation's members, inexpensive, reliable energy means one more step toward a standard of living that most Americans take for granted.

The Hoover Power Allocation Act of 2011 and Western's draft Schedule D marketing criteria

In 1928, Congress enacted the Boulder Canyon Project Act which authorized construction of Hoover Dam and a power plant to generate electricity from the dam. Act of December 21, 1928, 45 Stat. 1057, codified at 43 U.S.C. § 617 *et seq*. Congress authorized the allocation of this federal hydropower to partnering state and municipal entities in Arizona, Nevada and California (now known as Schedule A contractors) under fifty-year contracts extending from 1937 to 1987. H. R. Rep. 112-159(I) (July 20, 2011) at 1. In 1984, Congress authorized installation of upgrades at the power plant that increased its power production capacity, allocated power from the dam again to many of the same state and municipal entities (known as Schedule B contractors) over and above their contract entitlements, created a new Schedule C to govern excess power generated in unusually high water years, and directed that Schedule A and B contracts run for another thirty years, until 2017. *Id.*, at 2.

In 2011, Congress enacted the Hoover Power Allocation Act, Pub. L. 112-72, 125 Stat. 777, codified at 43 U.S.C. § 619a *et seq*. ("HPAA") with the explicit purpose to "further allocate and expand the availability of hydroelectric power generated at Hoover Dam." H.R. Rep. 112-1159(I) at 1. HPAA reallocates five percent of Schedule A and B contingent capacity and firm energy for delivery October 1, 2017 under a new Schedule D to "new allottees," defined as "entities not receiving contingent capacity and firm energy" under Schedules A and B. 43 U.S.C. § 619a(2)(B).

Congress authorized federally recognized Indian tribes to access Hoover Dam hydropower via Schedule D, *id.*, at § 619a(2)(C)(i), and to "develop allocation criteria" for Schedule D power "in direct consultation with Western." H. R. Rep. 112-159(I) at 3. On October 30, 2012, following initial tribal consultation and a public process, Western published draft criteria in the Federal Register (the "Draft Criteria") and invited comment by January 11, 2013. 77 Fed. Reg. 65681.

COMMENTS ON SPECIFIC CRITERIA

Section E – Priority consideration for determining allocations of Schedule D energy is consistent with the federal trust responsibility, congressional intent, and administrative discretion.

The Nation supports Section E of the Draft Criteria, establishing priority consideration to federally recognized Indian tribes in the allocation of Schedule D energy. This priority consideration is consistent with Western's trust responsibility to tribes in administering HPAA, Congress' intent in enacting the HPAA, and Western's administrative discretion as provided in reclamation law.

(1) The establishment of a tribal priority for the allocation of Schedule D energy in the Draft Criteria is consistent with Western's trust responsibility to Indian tribes and Congress' intent in enacting HPAA.

A bedrock principle of the relationship between the federal government and Indian tribes, the federal trust responsibility evolved from early treaties with tribes into a modern recognition that the government's dealings with tribes takes place "[u]nder a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of [the Supreme Court]," and wherein the government "has charged itself with the moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). As an agency of the federal government, the Department of Energy, via Western, is subject to the United States' trust responsibility to Indian tribes. *See Covelo Indian Community v. F.E.R.C.*, 895 F.2d 581, 586 (9th Cir. 1990); *see also U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy* (January, 2006) at 2 ("the DOE will be diligent in fulfilling its federal trust obligations to American Indian and Alaska Native governments in policy implementation and program management activities").

The HPAA clearly implicates this trust responsibility and advances the federal policy of promoting tribal economic self-determination. Unlike other Schedule D new allottees, Congress has instructed Western to *contract directly with tribes* for Schedule D power. 43 U.S.C. § 619a(a)(2)(C)(ii). In undertaking these responsibilities, Western is "something more than a mere contracting party." *Seminole Nation*, 316 U.S. at 296. Rather, the government's conduct in such circumstances is judged "by the most exacting fiduciary standards." *Id.*, at 297. These standards include an obligation to "always act in the interests" of tribes as beneficiaries. *Covelo Indian Community*, 895 F.2d at 586; *see also Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256 (D.C. Cir. 1973) (federal agency "was obliged to formulate a closely developed regulation that would preserve water for the Tribe," and was further obligated to assert its "statutory and contractual authority to the fullest extent possible to accomplish this result"). Accordingly, Congress authorized tribes to "develop allocation criteria" for Schedule D power "in direct consultation with Western." H.R. Rep. 112-159(I) at 3. In establishing a tribal priority for Schedule D power, the Draft Criteria advance Western's trust responsibility in administering the HPAA.

Finally, during the course of the administrative process it was contended by some that section 5 of the Boulder Canyon Project Act exclusively governs the question of what entities qualify as eligible allottees of Hoover power. This claim is directly contrary to the clear and unequivocal language of the HPAA at 43 U.S.C. § 619a(a)(2)(C)(i)(II), specifically listing "federally recognized Indian Tribes" as eligible new allottees entitled to receive schedule D power.

(2) The establishment of a tribal priority for the allocation of Schedule D energy in the Draft Criteria is consistent with Western's administrative discretion in implementing the HPAA

To the extent that it is consistent with Western's trust responsibility to Indian tribes and Congress' clear intent to provide tribes access to Hoover power, Western also possesses broad administrative discretion to implement the HPAA. *See City of Santa Clara v, Andrus*, 572 F.2d

660, 667 (9th Cir. 1978) (reclamation laws provide Secretary of the Interior[2] with authority to discriminate against some preference entities in favor of others, or even to allocate "all available…power to a single public entity"). Other than the imposition of federal trust obligations in marketing power to tribes, the HPAA does not restrict Western's ability to determine, establish, and apply administrative priorities for allocating Schedule D power among new allottees. Indeed, the House Report accompanying the HPAA indicates that Congress intended that Western make these priority determinations consistent with federal preference standards. *See* H.R. Rep. 112-159(I) at 3. The Draft Criteria, which establishes priority first to tribes and then to other public entities, is fully consistent with Western's administrative discretion under reclamation law.

Sections I and J – Implementing aggregation to satisfy 1,000 kW minimum allocation threshold must not undermine the Schedule D tribal priority.

The Nation supports the establishment of allocation criteria that provides tribes with maximum flexibility to access Schedule D power. While the Nation will not need to "aggregate" to meet the minimum threshold Western has proposed, Schedule D power that is initially allocated as part of an aggregation arrangement should not be lost to Schedule A and B contractors. Given that the HPAA provides (at 42 U.S.C. § 619a(a)(2)(F)) for the return to Schedule A and B contractors of Schedule D power not allocated and placed under contract by October 1, 2017, Western must implement the tribal priority to ensure that allocations to willing and eligible Schedule D allottees are satisfied to the maximum extent feasible prior to the returning any Schedule D power to Schedule A and B contractors. For example, Western must ensure that the implementation of an aggregation mechanism does not result in a loss of Schedule D power due to a given allottee's inability to meet Western's aggregation standards. In such circumstances, Western should allocate the remaining Schedule D power to other willing and eligible Schedule D recipients, again giving priority to tribal allottees. Fundamentally, Western must not allow the allocation standards that it establishes to result in the reversion of Schedule D power to Schedules A and B while Schedule D applicants' needs remain unfilled.[3]

OTHER COMMENTS

"New Allottees" who are eligible for Schedule D power do not include existing Schedule A and B recipients.

The Nation agrees with the plain language of the HPAA defining "new allottees" as "entities not receiving contingent capacity and firm energy" under Schedules A and B, 43 U.S.C. § 619a(2)(B), and the clear intent of Congress to "further allocate and expand the availability of hydroelectric power generated at Hoover Dam," H.R. Rep. 112-159(I) at 1. To put it simply: "new allottee" means "new allottee." Schedule A and B recipients have had access to inexpensive federal hydropower via the Hoover Dam for a considerably longer period than many Indians in Arizona have had access to electricity in their homes. Congress has permitted

[2] The functions of the Department of the Interior relating to electric power were transferred to the Department of Energy in 1977. *See* 42 U.S.C. § 7152(a).

[3] Western's responsibility to preserve Schedule D power for tribes is another extension of the federal trust responsibility. *Cf. Pyramid Lake Paiute Tribe*, 354 F.Supp. at 256 ("in order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the [non-Indian irrigation district] goes to Pyramid Lake").

Schedule A and B recipients to once again extend their contracts. In return, Congress has allocated a mere five percent of Schedule A and B power to those that have not previously had access to this power.

Accordingly, the Nation supports Western's position that "the intent of the HPAA legislation is that existing customers of APA and CRC who have a sub-allocation of Schedules A and B through the [Arizona Power Authority] or [the Colorado River Commission of Nevada] will not be eligible applicants for Schedule D from Western." *Boulder Canyon Project Post-2017 Proposed Marketing Criteria Public Information Forums Questions and Responses* (November 27-29, 2012), at 5. Schedule A and B contractors are not entitled to an allocation of Schedule D power, from Western or any other source. Western should not allocate Schedule D power directly or indirectly to existing Schedule A and B contractors, whether via a newly-established or recombined cooperative or other shell entity. The Nation has not had access to Hoover hydropower for the last eight decades and we are more than willing to use all the hydropower that is available to the Nation now.