

Charles W. Murphy
Chairman

**TRIBAL COUNCIL
(DISTRICTS)**

**TRIBAL COUNCIL
(AT LARGE)**

Jesse "Jay" Taken Alive
Ronald C. Brownotter
Avis Little Eagle
Dave Archambault II
Joseph McNeil Jr.
Jesse McLaughlin

Mike Faith
Vice Chairman



Adele M. White
Secretary

Sharon Two Bears
Cannonball District
Henry Harrison
Long Soldier District
Duane Claymore
Wakpala District
Kerby St. John
Kenel District
Errol D. Crow Ghost
Bear Soldier District
Milton Brown Otter
Rock Creek District
Frank Jamerson Jr.
Running Antelope District
Samuel B. Harrison
Porcupine District

May 4, 2011

VIA ELECTRONIC MAIL

Robert J. Harris, General Manager
Western Area Power Administration
Upper Great Plains Region
2900 4th Avenue North
Billings, Montana 59101-1266
E-mail: UGP2021@wapa.gov

RE: Comments – 2021 Power Marketing Initiative Proposal
76 Fed. Reg. 12104-12106 (March 4, 2011)

Dear Mr. Harris:

I write to provide comments on behalf of the Standing Rock Sioux Tribe, on Western's 2021 Power Marketing Initiative. (76 Fed. Reg. 12104-12106).

Our Tribe has worked extensively with the Western Area Power Administration on the firm power allocation and contracts. We have held numerous meetings with Western, and worked extensively on the issue of utility status, the methodologies for distributing power amongst the Tribes, and the development of the reserve and benefits contracts. Accordingly, we are very interested in the 2021 Power Marketing Initiative.

My comments on the 2021 Power Marketing Initiative Proposal focus on four areas:

- (1) our objection to potential reductions in Standing Rock's current allocation of power;
- (2) the need for Western to explore alternatives to the bill credit mechanism in the current contracts, in order to maximize the economic benefit of our power allocation;

(3) the need for Western to recognize the Pick-Sloan Program's devastating and disproportionate impacts on Standing Rock, and to comply with Executive Order 12896 on Environmental Justice by increasing our Tribal allocation; and

(4) the need for Western to respect Tribal sovereignty in the post-2021 Power Marketing Initiative.

I address these items in order, below.

1. The Proposed Reductions in the Resource Pool Should Not Affect Standing Rock's Allocation

Western proposes that the allocation "to existing long-term firm power customers (be) reduced by up to 1 percent for each new resource pool in 2021, 2031, and 2041." (76 Fed. Reg. 12104). Western has imposed similar reductions in the current contracts.

The allocation for Standing Rock (and the other Tribes) should be exempted from any reductions in the resource pool, during the current contract period and in the post 2021 contracts. Current economic and demographic statistics indicate that our population, economy and housing stocks will continue to grow at more rapid rates than the off-Reservation communities in the Eastern Division marketing area. Consequently, our power usage will increase at a faster rate, as well. Any reductions in our allocation will impede badly-needed economic development on the Standing Rock Reservation.

Although we are making significant progress, our Reservation economy remains under-developed, in comparison to our neighboring communities and the nation as a whole. Our future rate of growth, along with our power usage, will exceed the rates of growth in off-Reservation communities whose economies are more developed.

The 2010 U.S. Census reveals that the unemployment rate at Standing Rock is 25.3 percent, as compared with unemployment rates of 3.6 percent for North Dakota and 4.5 percent for South Dakota. (U.S. Census, American Community Survey, 2005-2009). The Census may understate our unemployment rate, due to the difficulty of obtaining information in our rural, impoverished communities. The Bureau of Indian Affairs recently estimated our unemployment rate to be approximately 70 percent. (American Indian Population and Labor Force Report, 2005).

In any event, using the conservative estimates of the Census, our unemployment rate is 7 times higher than our neighboring communities. This reflects the severe economic distress on the Standing Rock Indian Reservation. The poverty rate is 42 percent, as compared with 12 percent in North Dakota, and 14 percent in South Dakota, and nationwide. (U.S. Census). Thus, our poverty rate is at least three times the state and national average.

Our elders are the most affected by poverty. This is especially injurious, because in our Lakota and Dakota culture, we are taught to honor our elders, and respect their wisdom. At Standing Rock, 22 percent of our population over 65 years-of-age suffer from poverty. That is twice the percentage of elderly poverty in North and South Dakota,

and nationwide. (U.S. Census). Of course, our elders survive on fixed incomes, and are most affected by high utility rates.

The median household income at Standing Rock is \$29,864, as compared to approximately \$45,000 in the Dakotas generally, and \$51,425 nationwide. Thus, our neighboring communities have one-third more disposable income. (U.S. Census).

Our housing stock is severely under-developed. The Census reveals that the average household size on our Reservation is 3.2 persons. That may be significantly underestimated. Nevertheless, that is 33 percent higher than in North Dakota, and 25 percent higher than South Dakota. (U.S. Census). There remains a severe shortage of housing on our Reservation. As we address the shortage of housing through new-home construction, the per capita usage of electricity will increase proportionately.

Meanwhile, our population grows at a faster rate than off-Reservation. The American Indian population nationwide is growing three-times the rate of the non-Indian population. (U.S. Census). This is also the case in the Pick-Sloan marketing area's Eastern Division.

Ultimately, our under-developed economy will grow at a more rapid pace than in our neighboring communities. As we address our housing shortage, our electricity usage on a per capita basis will increase significantly. Our overall population continues to grow at faster rates than off-Reservation.

Consequently, the proposed 1 percent reductions in the resource pool will disproportionately harm our Tribe. There should be no reduction in the allocation to Standing Rock and other Indian Tribes.

The equities strongly favor exempting the Tribes from any reductions in our allocation. The economic distress facing Indian Country clearly justifies the agency's exempting the Tribes from any reductions in our allocation.

Executive Order 13175 provides,

Each agency shall... consider... a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level....

(65 Fed. Reg. 67251).

Clearly, federal law encourages agencies such as Western to utilize a flexible, common-sense approach to the implementation of programs that include Indian Tribes. This applies to the 2021 Power Marketing Initiative. Western should not reduce the allocation of power to Standing Rock, as part of a general reserve of a portion of the resource pool for new customers, or for any other reason.

2. Western Should Explore Alternatives to Bill-Crediting to Enhance the Economic Benefit of the Tribal Allocation

The Department of Energy addressed the need to include Standing Rock and other Tribes in the post-2000 power allocation, before the House of Representatives Committee on Natural Resources, on June 16, 2004. (U.S. House of Representatives, 103rd Cong., 2d Sess., Committee on Natural Resources, *Oversight Hearing, WAPA Allocation of Hydroelectric Power*, Comm. Print 103-95, June 16, 1994). The Committee on Natural Resources received testimony that electrical rates on the region's Indian Reservations were among the highest in the region. (Comm. Print at 193-194). One Tribal leader testified, "We are trying to be self sufficient, and this is holding us back." (Comm. Print at 257). Thus, the economic distress facing the Tribes was a predominant consideration in the decision to revise the eligibility criteria in the post-2000 firm power allocation.

The Committee Report indicates that DOE decided to include the Tribes in the post-2000 allocation, to avoid legislation that would have required this. (Comm. Print at 257, Appendix). It was Congress' intent to ensure that the Tribes received a firm power allocation, in order to address the high cost of electricity on the Reservations, to foster economic development.

Nevertheless, the bill credit methodology of delivering the firm power allocation to the Tribes dilutes the economic benefit of the allocation. The blending of our current firm power allocation with the existing mix of low-cost federal hydropower and higher cost electricity purchased from Basin Electric, results in a very small comparative economic benefit. This is inconsistent with the intent of Congress in prompting administrative action by DOE, to revise the eligibility requirements and include the Tribes in post-2000 power allocation.

The 2021 Power Marketing Initiative presents Western with the opportunity to remedy this. Western should explore new contractual mechanisms with Standing Rock and the other Tribes, in order to enhance the economic benefit of our power allocation. Western should not automatically renew the existing benefits contracts, and present them to the Tribes on a take-it-or-leave-it basis. Instead, the agency should work cooperatively with the Tribes to explore options to enhance the economic benefit of the allocation to end user.

My office stands prepared to work with Western, to develop creative strategies for new contractual models. Perhaps a grant or demonstration program for Tribes would be appropriate as part of the 2021 Power Market Initiative. In any event, Western should work with the Tribes to enhance the benefit of the Tribal power allocation, above and beyond the current bill credit contracts.

3. Western Must Recognize the Pick-Sloan Program's Severe and Disproportionate Impact on Standing Rock, and Comply with Executive Order 12896 by Increasing the Tribal Allocation

Western should forever be mindful of the devastating, long-lasting impact that the Pick-Sloan Missouri Basin Program has had on the Standing Rock Sioux Tribe and other Tribes along the Missouri River.

The Pick-Sloan Missouri Basin Program (hereinafter “Pick-Sloan Program”), authorized the Act of December 22, 1944 (commonly known as the “Flood Control Act of 1944”) (58 Stat. 891), was approved to promote the general economic development of the United States. The Flood Control Act approved the general comprehensive plan for the conservation, control and use of water resources in the entire Missouri River Basin. The intended beneficial uses of these water resources include: flood control; aids to navigation; irrigation; supplemental water supply; power generation; municipal and industrial water supplies; stream-pollution abatement; sediment control; preservation and enhancement of fish and wildlife; and creation of recreation opportunities.

The non-Indian communities outside of the Missouri Basin’s Indian Reservations enjoy practically 100 percent of these benefits. The Standing Rock Sioux Tribe and other Missouri Basin Tribes suffered severe and disproportionate harm from the Pick-Sloan Program, and have generally not participated in the program’s benefits.

Executive Order 12896 on Environmental Justice requires agencies such as Western to take remedial action when programs and projects disproportionately impact minority communities. (59 Fed. Reg. 7629). Consequently, in the Post-2021 Program Marketing Initiative, Western should increase the Tribal allocation in order to mitigate the severe and disproportionate impacts suffered by Standing Rock and other Missouri Basin Tribes.

The Pick-Sloan Program destroyed more Indian land than any other public works project in United States history. Although providing great benefit to region and to the nation, the construction of the Oahe Dam has had a negative and lasting effect on the Standing Rock Sioux Tribe and its members. The Oahe Reservoir submerged the river bottoms of the Standing Rock Indian Reservation. Approximately 55,993 acres of land on the Standing Rock Reservation were inundated by the Oahe Reservoir. This included some of the Standing Rock Reservation’s most valuable rangeland, most of the Reservation’s gardens and cultivated farm tracts, and nearly all of the Reservation’s timber, wild fruit, and wildlife resources.

The inundation of choice grazing land decimated the pastoral economy at Standing Rock. Sixty percent of the ranchers on the Standing Rock Reservation lost their livelihood. Four Tribal communities were relocated in the early 1960’s, resulting in the loss of economic infrastructure and causing severe social dislocation, the impacts of which linger to this day. Thus, history shows that the members of the Standing Rock Sioux Tribe suffered irreparable damages and sacrificed much of their way of life for the greater progress of the United States.

Executive Order 12896 prescribes mitigation requirements for these impacts. In order to comply with E.O. 12896, in the post-2021 PMI, Western should increase the allocation of firm power to Standing Rock and other Missouri Basin Tribes.

In fact, when the House of Representatives Committee on Natural Resources worked with DOE on the Tribal allocation, the Committee cited the Pick-Sloan Program’s impacts on the Tribes as an important factor justifying the allocation. (Comm. Print at 208-216). Additionally, the Committee recognized that existing Western

customers would be impacted by a meaningful power allocation to the Tribes. (Comm. Print at 240-241). Consequently, an increase in the power allocation to Standing Rock and other Tribes in the post-2021 Power Marketing Initiative is consistent with the intent of Congress, and is mandated by E.O. 12896. Standing Rock's firm power allocation should be increased, accordingly.

4. Western Must Respect Tribal Sovereignty in the Post 2021 PMI

The Standing Rock Sioux Tribe is an Indian Nation, whose rights and privileges are codified in the Treaty of Fort Laramie of April 29, 1868 (15 Stat. 635), and the Treaty of Fort Laramie of September 17, 1851 (11 Stat. 749). We are not a mere stakeholder or customer of Western, but a sovereign Tribal nation. Consequently, Western, as an administrative instrumentality of the United States, possesses Treaty and trust responsibilities to our Tribe which do not apply to other beneficiaries of the Pick-Sloan hydropower program.

Agencies such as Western are obligated to "establish regular and meaningful consultation and collaboration with tribal leaders in the development of federal policies that have tribal implications." (Executive Order 13175, 65 Fed. Reg. 67249). Under section 2(b) of the Executive Order, "The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self government, tribal trust resources and Indian tribal treaty and other rights."

Too often, agencies such as Western have treated the Tribes as an inconvenience, or an afterthought, while striving to serve the needs of the cooperatives and other agency stakeholders. I believe that Western, like all agencies of the United States, possesses an over-riding responsibility to serve the needs of the Tribes. I will continue to remind Western of this, throughout the post-2021 Power Marketing Initiative.

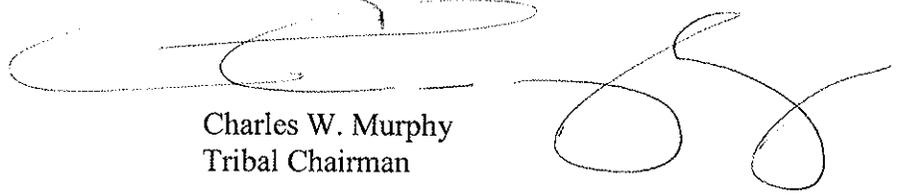
5. Conclusion

In sum, the Standing Rock Sioux Tribe is interested in working cooperatively with Western, in the development of new firm power contracts beginning in 2021. Any reductions in the resource pool to accommodate new customers should not affect the power allocation to our Tribe, however. Our under-developed economy, rate of population growth and improvements in our housing stocks demonstrate that our future electricity needs will outpace our neighboring communities. Moreover, the current economic distress that we face dictates that steps be taken to enhance the economic benefits of our allocation. Alternatives to the bill credit mechanism should be explored, as part of the Power Marketing Initiative.

Due to Pick-Sloan's devastating and disproportionate impacts on our Reservation, compliance with Executive Order 12896 is also required. This should entail an increase in our allocation of firm power at Standing Rock. Moreover, respect for Tribal sovereignty and our government-to-government relationship should be part-and-parcel of the post 2021 PMI.

Thank you for considering and acting upon these comments. I appreciate Western's efforts in working with Standing Rock and the other Tribes in the Pick-Sloan marketing area. I look forward to continuing our positive working relationship, for the betterment of the enrolled members of the Standing Rock Sioux Tribe.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles W. Murphy', with a large, stylized flourish extending to the right.

Charles W. Murphy
Tribal Chairman